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## Juror Misconduct in The Twenty-First Century: The Prevalence of The Internet and Its Effect on American Courtrooms

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# JUROR MISCONDUCT IN THE TWENTY-FIRST CENTURY: THE PREVALENCE OF THE INTERNET AND ITS EFFECT ON AMERICAN COURTROOMS

## I. INTRODUCTION

"sittin in court about 2 exercise my right as a juror"... "the testimony of the last witness doesn't add up"... "closing arguments r finally underway, then deliberations. the def is so guilty."<sup>1</sup> Though these statements are seemingly harmless, they each have the power to deprive the criminal defendant of a constitutional right, trigger a mistrial, and essentially derail the American justice system—all in just 140 characters or less.

Over the last few decades, technology has progressed at an increasingly alarming rate. Information can now be found at our fingertips, as people are turning to their iPhones<sup>2</sup> and Blackberrys<sup>3</sup> to constantly remain up to date with the latest news, sports, and weather forecasts. Cellular telephones and other handheld devices are also being used to keep in touch with friends and co-workers through e-mail and social networking sites such as Twitter<sup>4</sup> or Facebook.<sup>5</sup> However, the advancement of technology and the instantaneous access to the Internet is now creating

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1. These statements were created by the author and meant for illustration purposes only.

2. See generally iPhone, <http://www.apple.com/iphone/> (last visited Nov. 8, 2009) (illustrating the features and applications available on an iPhone).

3. See generally Blackberry, <http://na.blackberry.com/eng/> (last visited Nov. 8, 2009) (illustrating the features and services available on a Blackberry).

4. Twitter is a social networking website that encourages users to constantly inform their friends, in 140 characters or less, about what they are doing. See Twitter, <http://twitter.com> (last visited Oct. 1, 2009). Twitter is also used to follow the behaviors and "tweets" of others in order to stay up to date on what is happening around the world. *Id.*; accord Steven C. Bennett, *Look Who's Talking: Legal Implications of Twitter Social Networking Technology*, NYSBA JOURNAL, May 2009, at 11 (noting that "[t]he essential purpose of Twitter... is to keep connected to friends").

5. Facebook is a social utility that connects people to others who live, study, and work around them. Facebook, <http://www.facebook.com> (last visited Oct. 1, 2009).

some dire consequences for courthouses nationwide.<sup>6</sup> Increasingly, jurors have engaged in Internet activity to conduct outside research regarding the cases they sit on, including the applicable laws and the parties involved.<sup>7</sup> Through Facebook and Twitter, jurors are even posting messages, blogs, and “tweets”<sup>8</sup> to the online community about what is occurring in the courtroom and during jury deliberations.<sup>9</sup> As modern jurors engage in such Internet-related misconduct, courts nationwide are forced to declare mistrials, wasting both time and taxpayer money.<sup>10</sup> However, while judges and attorneys struggle to define the boundaries of juror misconduct on the web, they must also recognize that the general concept of juror misconduct is not a novel one. Although instantaneous accessibility to the Internet may allow the misconduct to come about through more novel means, such behavior should continue to be analyzed in accordance with the traditional rules and standards governing general juror misconduct. Rather than classifying this phenomenon as a brand new issue, it should be treated simply as a more advanced form of the traditional instances of misconduct that have occurred in the past.

This Comment describes the effect of instantaneous accessibility via the Internet on jurors in criminal trials. Part II provides a background on juror misconduct and the standards courts use to determine when a mistrial is warranted. Part III discusses the use of technology as a more modern form of juror misconduct and suggests the proper standard to use in determining when a new trial should be granted as a result of Internet-related misconduct. Finally, Part IV suggests potential solutions to this modern phenomenon in order to at least reduce the amount of juror misconduct resulting from technological advancement.

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6. See discussion *infra* Part III.A.1.

7. See discussion *infra* Part III.A.1.

8. “Tweets” are short updates—consisting of 140 characters or less—sent via Twitter which are searchable, posted to one’s profile and sent to his or her followers. Twitter Support: Frequently Asked Questions, <http://help.twitter.com/forums/10711/entries/13920> (last visited Jan. 23, 2010).

9. See John Schwartz, *As Jurors Turn to Google and Twitter, Mistrials Are Popping Up*, N.Y. TIMES, Mar. 18, 2009, at A1 (reporting the problems caused by jurors’ posts on Twitter and Facebook during trials).

10. See, e.g., Deirdra Funcheon, *Jurors and Prosecutors Sink a Federal Case Against Internet Pharmacies*, BROWARD-PALM BEACH NEW TIMES, Apr. 23, 2009, <http://www.browardpalmbeach.com/2009-04-23/news/jurors-and-prosecutors-sink-a-federal-case-against-internet-pharmacies> (reporting that after seven weeks of trial, a Florida federal judge “had no option but to declare a mistrial” upon discovering that eight of the twelve jurors had been doing outside research on the Internet). As a result of the mistrial, the defendants had to start all over with a second trial and a brand new jury. *Id.*

## II. BACKGROUND ON JUROR MISCONDUCT

### *A. The Criminal Defendant's Constitutional Right to a Fair and Impartial Jury*

Each and every defendant in a criminal proceeding is granted the explicit right to receive a fair, unbiased trial.<sup>11</sup> The Sixth Amendment to the United States Constitution and the basic principles of due process guarantee a criminal defendant “the right to a speedy and public trial, by an impartial jury of the State.”<sup>12</sup> An impartial, indifferent jury is one “capable and willing to decide the case solely on the evidence before it”<sup>13</sup> without resorting to outside sources or influences.

There are important reasons why a jury is not presented with all available facts and evidence in a given case.<sup>14</sup> The current rules of evidence have evolved over centuries and are specifically designed to ensure that the facts heard by a jury undergo examination and challenge by each side.<sup>15</sup> If a juror uncovers extraneous facts about the parties or issues in a criminal proceeding—facts that were specifically excluded from trial for evidentiary purposes—the mere knowledge about those outside facts might have a prejudicial effect on the defendant.<sup>16</sup> Because jurors tend to be more susceptible to passion, sympathy, and prejudice than an experienced and neutral magistrate, such extrinsic evidence obtained throughout the course of a trial may keep the jury from impartially weighing the evidence presented during the proceedings.<sup>17</sup> It is therefore critical that jurors do not know what information is excluded from the case or the reasons for its exclusion.<sup>18</sup> If just one juror is unduly biased, prejudiced, or improperly influenced by anything other than what is presented in court, the trial is deemed to be unfair as if all jurors were so influenced.<sup>19</sup> The failure to provide an accused with a fair hearing essentially strips him of his constitutional right and “violates even the

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11. See U.S. CONST. amend. VI.

12. *Id.*

13. *Smith v. Phillips*, 455 U.S. 209, 217 (1982).

14. See generally DAVID P. LEONARD & VICTOR J. GOLD, EVIDENCE: A STRUCTURED APPROACH 94–96 (2nd ed. 2008) (explaining the purpose for excluding certain types of relevant evidence from a jury).

15. Cassandra Jowett, “Google Mistrials” Derail Courts, NAT’L POST, Mar. 23, 2009.

16. See generally LEONARD & GOLD, *supra* note 14.

17. PAUL D. JORDAN, PARALEGAL STUDIES: AN INTRODUCTION 178 (2001).

18. Schwartz, *supra* note 9.

19. *Tillman v. United States*, 406 F.2d 930, 937 (5th Cir. 1969).

minimal standards of due process.”<sup>20</sup>

### *B. Traditional Standards of Juror Misconduct*

The defendant’s right to an impartial jury trial is so essential to the notion of a fair justice system that judges “must be assiduous in insuring that it has not been abridged.”<sup>21</sup> Because any external communications between jurors and third parties have the potential power to invalidate a verdict,<sup>22</sup> a trial court is given considerable discretion in determining whether an investigation into alleged juror misconduct is warranted and how the investigation will be conducted.<sup>23</sup> The court may not question a juror on a whim; rather, it must be presented with “substantial evidence” of juror misconduct in order to investigate any allegations regarding that misconduct.<sup>24</sup> Any necessary investigation into allegations of juror misconduct serves to ensure that the accused receives a fair trial.<sup>25</sup>

Upon discovering that a juror has engaged in external communications, the party who is attacking the verdict, typically the defendant, bears the initial burden of introducing evidence to show that the extrajudicial communication was something more than just “innocuous interventions.”<sup>26</sup> To determine whether an external communication is innocuous or harmful to the attacking party, the Court in *Remmer v. United States* established that “any 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 the court made during the trial, with full knowledge of the parties.”<sup>27</sup> This prejudicial presumption is not conclusive, as the burden then shifts to the prevailing party to prove that such outside contact resulted in no harm to the defendant<sup>28</sup> and that “there exists no ‘reasonable possibility that the

20. *Irvin v. Dowd*, 366 U.S. 717, 722 (1961).

21. *Aston v. Warden, Powhatan Corr. Ctr.*, 574 F.2d 1169, 1172 (4th Cir. 1978).

22. *Mattox v. United States*, 146 U.S. 140, 150 (1892).

23. *United States v. Greig*, 133 F. Supp. 2d 697, 701 (D.V.I. 2001).

24. Maxwell Kennerly, *Does the Fumo Juror’s Twittering Warrant a Mistrial?*, LITIG. & TRIAL, Mar. 16, 2009, <http://www.litigationandtrial.com/2009/03/articles/the-law-for-lawyers/does-the-fumo-jurors-twittering-warrant-a-mistrial>.

25. *See State v. McDonald*, 430 N.W.2d 282, 289 (Neb. 1988) (stating that once a court finds juror misconduct has occurred, it must determine whether the misconduct was prejudicial enough to actually deny the defendant his or her right to a fair trial).

26. *Haley v. Blue Ridge Transfer Co.*, 802 F.2d 1532, 1537 n.9 (4th Cir. 1986).

27. *Remmer v. United States*, 347 U.S. 227, 229 (1954).

28. *Id.* (citing *Mattox v. United States*, 146 U.S. 140, 148–50 (1892); *Wheaton v. United States*, 133 F.2d 522, 527 (8th Cir. 1943)).

jury's verdict was influenced by an improper communication.”<sup>29</sup> The court is required to “examine the ‘entire picture,’ including the factual circumstances” of the extraneous influence as well as the impact it had on the juror.<sup>30</sup> Depending upon the results of the investigation, one or more jurors could be removed from the panel and possibly replaced, or a mistrial can be declared.<sup>31</sup> Trial judges are given sound discretion in finding that a juror's misconduct, through extrajudicial communication, is prejudicial enough to warrant a new trial.<sup>32</sup> A court's response to a motion for a new trial must be guided by the seriousness of the allegations, and the probability of truth to the allegations, in order to determine if the juror exhibited actual bias against the defendant.<sup>33</sup>

Courts will rarely find an external communication which is “devoid of substantive content” to be prejudicial.<sup>34</sup> In other words, a juror's misconduct must somehow relate to the *substance* of the case in order to have enough of a prejudicial effect on the defendant to warrant a new trial. In the past, courts have granted mistrials based on juror misconduct involving the reading of newspaper articles injurious to the defendant<sup>35</sup> and unauthorized crime scene visits where the physical condition of the scene itself related to a material issue in the case.<sup>36</sup> On the contrary, courts have held that a juror's misconduct did *not* warrant the granting of a new trial when minimal contact was made with news media outlets throughout the penalty phase of a trial<sup>37</sup> or when a mere opinion was expressed to an outside party about the outcome of a case before the trial was concluded.<sup>38</sup> Because the extrajudicial communication neither related to the facts under deliberation nor resulted in prejudice toward the defendant, such conduct only constituted harmless error in the eyes of a court.<sup>39</sup> Although there is a strong presumption against setting aside jury verdicts based on allegations

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29. *United States v. Cheek*, 94 F.3d 136, 141 (4th Cir. 1996) (quoting *Stephens v. S. Atl. Cannery, Inc.*, 848 F.2d 484, 488–89 (4th Cir. 1988)).

30. *Id.* at 142 (citing *Remmer*, 350 U.S. at 379).

31. *Kennerly*, *supra* note 24.

32. *Tillman v. United States*, 406 F.2d 930, 937 (5th Cir. 1969).

33. *United States v. Jones*, 707 F.2d 1169, 1173 (10th Cir. 1983).

34. *United States v. Basham*, 561 F.3d 302, 321 (4th Cir. 2009) (quoting *United States v. Sampson*, 486 F.3d 13, 41 (1st Cir. 2007)).

35. *Mattox v. United States*, 146 U.S. 140, 150–51 (1892); *accord* *Irvin v. Dowd*, 366 U.S. 717, 725 (1961).

36. *Crawley v. Ill. Cent. R.R. Co.*, 248 So. 2d 774, 777 (Miss. 1971).

37. *Basham*, 561 F.3d at 320.

38. *Tillman v. United States*, 406 F.2d 930, 936 (5th Cir. 1969).

39. *See generally* *Basham*, 561 F.3d at 318–19; *see also* *Tillman*, 406 F.2d at 938.

of juror misconduct,<sup>40</sup> courts are nonetheless required to consider each allegation of misconduct on a case-by-case basis in order to properly uphold the defendant's right to a fair trial by an impartial jury.<sup>41</sup>

### C. *The Effects of a Mistrial*

To a typical juror, there are no real consequences resulting from violating jury instructions.<sup>42</sup> In fact, jurors seem to care deeply about both the relevant and irrelevant issues which are excluded from court proceedings, and nothing tends to perk a juror's interest more than an objection.<sup>43</sup> By engaging in outside research about matters specifically prohibited from being introduced into evidence, jurors have the ability to essentially overrule a judge's choice to exclude certain information.<sup>44</sup>

Thus, when a judge *does* find that a juror's behavior has had some sort of prejudicial effect on the defendant, it is within his or her power to declare a mistrial.<sup>45</sup> However, the cost of a mistrial to society as a result of juror misconduct is enormous.<sup>46</sup> Although our adversarial system involves huge transaction costs, the extremely high premium placed on the system's truth-finding properties causes society to tolerate these expenditures.<sup>47</sup> Regardless, if parties invest large amounts of resources into a trial and then the jury reaches its verdict based on extraneous evidence, all of these resources become completely wasted.<sup>48</sup> It costs thousands of dollars to run a criminal courtroom each day.<sup>49</sup> Thus, when a juror engages in

40. See *Tanner v. United States*, 483 U.S. 107, 120–21 (1987) (recognizing that “[a]llegations of juror misconduct, incompetency, or inattentiveness . . . seriously disrupt the finality of the process” and that “a barrage of postverdict scrutiny of juror conduct” may undermine the community’s trust in the jury system).

41. See *United States v. McKinney*, 434 F.2d 831, 833 (5th Cir. 1970) (stating that investigations into juror misconduct must be decided on their “own peculiar facts and circumstances”).

42. Ralph Losey, *Jurors Rebel, Defy Judges, and Google Their Own Truth*, E-DISCOVERY TEAM, Nov. 15, 2009, <http://e-discoveryteam.com/2009/11/15/jurors-rebel-defy-judges-and-google-their-own-truth>.

43. *Id.*

44. *Id.*

45. See *United States v. McIntosh*, 380 F.3d 548, 554 (1st Cir. 2004) (stating that a judge’s decision to declare a mistrial will only be reversed if an incorrect legal principle was applied or a meaningful error in judgment was made).

46. See Losey, *supra* note 42 (noting the large costs and woeful inefficiencies of our adversarial system).

47. *Id.*

48. *Id.*; see also Funcheon, *supra* note 10 (reporting that the government easily spent millions of dollars prosecuting a federal drug case which ended up resulting in a mistrial).

49. E-mail from the Office of Court Research, Administrative Office of the Courts in San Francisco, CA (Jan. 11, 2010) (on file with author) (estimating that the daily cost to run a state

misconduct prejudicial enough to warrant a new trial, it is the funds paid by *state taxpayers*, including those taxes paid by the jurors themselves, which are being squandered.

In addition to the monetary losses resulting from mistrials, the amount of energy spent by everyone involved in the litigation is wasted as well.<sup>50</sup> The time and effort expended by the parties, judge, and jury are just as important as the monetary funds spent on a courtroom's administration. Therefore, when one or more members of a jury rely on external information, this forces the parties, another judge, and a whole new panel of jury members to sit through a second presentation of a previously adjudicated case rather than concentrating their efforts on a brand new case awaiting trial. It is thus in the best interest of society for jurors to refrain from engaging in extrajudicial communications, as it will save both time and taxpayer money and ultimately increase the efficiency and expediency of the judicial system.

### III. TECHNOLOGY IN THE COURTROOM

Over the past decade, technological developments have taken place at an exponential rate.<sup>51</sup> Technology has completely changed the way people interact and communicate with one another, making it difficult to even imagine living in a world without cellular phones, e-mail, or the Internet. However, as lawyers and judges across the nation are now discovering, the progression of technology has also had some major implications on the American legal system.<sup>52</sup>

#### *A. The Effect of the Internet on Judicial Proceedings*

##### 1. The Internet and Juror Misconduct

The advancement of technology has recently allowed juror misconduct to evolve from such traditional instances of investigating the crime scene or talking about the case with one's spouse to more

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criminal courtroom is \$2,590.00).

50. See Funcheon, *supra* note 10 (reporting that after seven weeks of trial, counsel and defendants in a Florida federal drug case had to "start all over on a second trial with a fresh jury" after a mistrial was declared).

51. See Stewart Brand, *Is Technology Moving Too Fast?*, TIME, June 19, 2000, at 108 (discussing today's "constant technological revolution" and its effects on society).

52. See *infra* Part III.A.



sophisticated means of Internet-based misconduct.<sup>53</sup> At any given moment, jurors now have the ability to use their cellular telephones to browse the web for the names of attorneys or parties in a case, educate themselves through Wikipedia about the technology underlying a patent claim or medical condition, examine an intersection using Google Maps, or even blog and update their friends about the case through Facebook and Twitter.<sup>54</sup> *The New York Times* has coined the phrase “Google Mistrial” to refer to mistrials that result when jurors use their iPhones and Blackberrys to receive and transmit information about the cases they sit on.<sup>55</sup> This type of behavior has recently been “wreaking havoc on trials around the country, upending deliberations and infuriating judges.”<sup>56</sup>

For example, in March of 2009, a juror on a big Florida drug trial admitted to violating the court’s instructions by doing outside research about the case on the Internet.<sup>57</sup> When the judge questioned the juror about his research, he discovered that the information the juror had encountered had been specifically excluded from trial proceedings.<sup>58</sup> The judge, William J. Zloch, then questioned the rest of the jury as to whether they had conducted any outside research, only to find that eight other jurors had been doing the same thing.<sup>59</sup> Judge Zloch was forced to declare a mistrial, wasting eight weeks of work by prosecutors and defense lawyers.<sup>60</sup>

That same month, during a civil trial involving building products company, Stoam Holdings, an Arkansas juror, Jonathan Powell, used Twitter to send updates and messages throughout the proceedings.<sup>61</sup> Powell’s messages included, “oh and nobody buy Stoam. Its bad mojo and they’ll probably cease to Exist, now that their wallet is 12m lighter” and “so Johnathan, what did you do today? Oh nothing really, I just gave away TWELVE MILLION DOLLARS of somebody else’s money.”<sup>62</sup> Although Powell maintained that he had not posted any messages relating to the substance of the case,<sup>63</sup> counsel for Stoam Holdings nonetheless asked the court to overturn the multi-million dollar judgment, which the court

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53. See generally Vesna Jaksic, *A New Headache for Courts: Blogging Jurors*, LAW.COM, Mar. 19, 2007, <http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1174035813248>.

54. Schwartz, *supra* note 9.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. Schwartz, *supra* note 9.

61. *Id.*

62. *Id.*

63. *Id.*

denied.<sup>64</sup> Similarly, defense lawyers in the federal corruption trial of former Pennsylvania state senator, Vincent J. Fumo, plan to use a juror's Twitter and Facebook posts telling his readers that a "big announcement" was forthcoming as grounds for appealing the jury's guilty verdict.<sup>65</sup>

This phenomenon has even extended beyond American courthouses, affecting international judicial systems as well. In the United Kingdom (U.K.), a juror posted confidential trial details on Facebook about the child abduction and sexual assault trial she was serving on.<sup>66</sup> She then held an online poll where she invited her friends to help her decide whether the defendants were innocent or guilty.<sup>67</sup> After some users responded that the defendants should be found guilty, the court received an anonymous tip about the post, dismissed the juror from the case, and simply continued the trial with an eleven member jury.<sup>68</sup> Legal scholars posited that the juror's conduct could have subjected her to being charged with contempt of court or even caused a mistrial.<sup>69</sup> Occurrences such as these will undoubtedly continue to increase as the availability of technology and accessibility of the Internet expands.<sup>70</sup>

## 2. The Temptations of Technology

The rapid growth of technology has caused Americans to become so addicted to constant communication and information consumption that rehabilitation centers are now being established in an effort to help people cope with their technological dependence.<sup>71</sup> Increasingly more Americans never leave home without some sort of Internet-capable device such as an iPhone or Blackberry.<sup>72</sup> As a result, courts are now being forced to deal with "Blackberry-addicted jurors who [feel that] a simple trip to the

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64. Christopher Danzig, *Mobile Misdeeds: When Jurors Have the Web at Their Fingertips, Trials Can Quickly Unravel*, INSIDE COUNS., June 2009, at 38.

65. Schwartz, *supra* note 9.

66. Urme Khan, *Juror Dismissed From a Trial After Using Facebook to Help Make a Decision*, TELEGRAPH.CO.UK, Nov. 24, 2008, <http://www.telegraph.co.uk/news/newstopics/lawreports/3510926/Juror-dismissed-from-a-trial-after-using-Facebook-to-help-make-a-decision.html>.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. ChooseHelp.com, *Can't Get Off Facebook? America's First Technology Addiction Rehab Opens for Business*, <http://www.choosehelp.com/news/can2019t-get-off-facebook-america2019s-first-technology-addiction-rehab-opens-for-business.html> (last visited Nov. 20, 2009) (reporting that ReStart, a recovery program near Seattle, Washington, "offers internet addicts a chance to break free during a 45 day technology detox program" for \$14,500.00).

72. Losey, *supra* note 42.

grocery store can compel an Internet update.”<sup>73</sup>

This ability to instantly access the Internet has caused Americans to become accustomed to quickly and easily looking up a question and receiving an immediate answer.<sup>74</sup> Although jurors are technically allowed to ask questions during the course of a trial, the feedback they receive will not be nearly as instantaneous as the feedback they could obtain through a Google search.<sup>75</sup> The formalities a jury must go through to ask the court a simple question—submitting the question to the sheriff in writing who then presents it to the judge—makes it rare for jurors to engage in such a process,<sup>76</sup> especially when they have the Internet, and the answers, at their fingertips. Jurors have become so accustomed to readily accessing information that the immediate need for that information sometimes causes them to go to great lengths to get it, even if it requires ignoring orders from the court.<sup>77</sup> A juror’s disobedience of the judge’s instructions, then, may be partly due to these addictions.<sup>78</sup> “We [have become] so hooked on . . . instantaneous communication . . . [that] we can’t seem to drop it even for a short period of time in order to discharge a civic duty.”<sup>79</sup> But is this type of behavior actually *intentional*? Perhaps because Americans are now so used to having the answers at their fingertips that their constant Google searches and Twitter updates have simply become an ingrained and uncontrollable habit.<sup>80</sup> These dependencies highlight the urgent need to develop solutions<sup>81</sup> to Internet-related misconduct if a defendant’s right to a fair and impartial jury trial is to be safeguarded.

### B. *A New Face on an Old Problem*

The seemingly sudden emergence of juror misconduct through the use of the Internet has courts and legal scholars in an uproar, as many believe that juror misconduct is actually becoming *more common* as a result of the

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73. Ahnalese Rushmann, *Courtroom Coverage in 140 Characters*, NEWS MEDIA & THE LAW, Spring 2009, at 28.

74. Losey, *supra* note 42.

75. Jowett, *supra* note 15.

76. *Id.*

77. Losey, *supra* note 42.

78. Jowett, *supra* note 15.

79. *Id.*

80. See *supra* note 71 and accompanying text. See also Danzig, *supra* note 64, at 41 (discussing DLA Piper Partner Jeffrey Rosenfeld’s belief that “[i]f you take somebody’s BlackBerry away for a day, they almost become suicidal”).

81. See *infra* Part IV.A–F.

now ubiquitous and instantaneous accessibility to the web.<sup>82</sup> Judges and attorneys are scrambling to rectify this latest issue, but seem to be at a loss as to how to proceed. According to New Hampshire defense attorney Mark Sisti, “[i]t’s the kind of stuff that scares you because you don’t know what’s going on.”<sup>83</sup> “You don’t know if the jurors are communicating via this type of media or device after they are released each day, you don’t know what they are picking up. It’s not TV or radio, this is a whole new medium.”<sup>84</sup> Similarly, upon encountering Internet-related juror misconduct during a trial, Miami defense lawyer Peter Raben said that in thirty years of practice, he had never seen such behavior before.<sup>85</sup>

But even though such misconduct is occurring through the use of a new medium, jury misconduct in general is not a new phenomenon.<sup>86</sup> Legal professionals have been struggling to limit jurors’ access to outside information since the very beginning of the American legal system.<sup>87</sup> Before newspapers and television, jurors could simply go home and discuss the trial with their spouses<sup>88</sup> or investigate the crime scene to learn more about an incident. Courts then had to adopt new rules and order jurors to avoid any media coverage about the cases they sat on.<sup>89</sup>

It therefore follows that all courts need to do now in order to adjust to Internet-related juror misconduct is exactly what they have done in the past to incorporate society’s ever changing character. While the basic framework for analyzing juror misconduct should remain the same, it merely needs to be reinterpreted and adapted to include instances of misconduct that take place through the use of the World Wide Web. Courts have engaged in this type of reinterpretation method for centuries.<sup>90</sup> For example, the Federal Rules of Civil Procedure—which have been recently altered to include e-discovery guidelines<sup>91</sup>—exemplify necessary

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82. See Jowett, *supra* note 15 (reporting York University professor Alan Young’s belief that society’s addition to instantaneous communication has caused jurors to disobey a court’s instructions more often than we think).

83. Jaksic, *supra* note 53.

84. *Id.*

85. Funcheon, *supra* note 10.

86. Jowett, *supra* note 15 (“[A]lthough the way jurors find or disseminate information today may be different than in the past, they’ve always had the desire and ability to do it.”).

87. Danzig, *supra* note 64.

88. *Id.*

89. Jaksic, *supra* note 53 (“[J]ury instructions . . . evolve as people communicate in new ways.”).

90. For instance, although the United States Constitution was adopted in 1787, it has been constantly reinterpreted and reworked to conform to the changing needs of society whilst keeping the basic structure, and therefore the intent of the Framers, the same.

91. Danzig, *supra* note 64.

adaptations that were made in order to accommodate the Internet's effect on our judicial system. Because courts have historically modified these basic frameworks to comply with modern technologies, it begs the question as to why Internet-related juror misconduct is treated as such a "new" issue.<sup>92</sup> As the continuing advancement of society gives rise to more technological innovations, the availability of the Internet in the palm of a juror's hand can therefore only be classified as the next logical link in the developing chain of juror misconduct. "There's nothing different here. Jurors for centuries have told their friends over the weekend, 'I think we've finally reached a verdict!' We just have more 'friends' these days."<sup>93</sup> Therefore, rather than regarding such behavior as a completely novel phenomenon, courts should recognize web-related misconduct for what it is: simply a more advanced form of the traditional instances of misconduct that they have encountered in the past.

Because misconduct through the use of the Internet cannot properly be classified as a particularly novel issue—although it may come about through novel means—courts must continue to use traditional standards of juror misconduct to evaluate whether or not a new trial is warranted when allegations of web misconduct become known. Courts, however, are struggling to develop a consistent standard to cope with juror misconduct resulting from researching, blogging, or sending messages on the Internet.<sup>94</sup> As there is no bright-line rule stating that Internet research automatically dooms a jury's verdict,<sup>95</sup> courts must continue to focus on the resulting prejudicial impact to the defendant<sup>96</sup> when declaring a mistrial. This approach is more appropriate than basing their decisions on less significant factors such as the mere *number* of jurors doing Internet research.<sup>97</sup>

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92. Jowett, *supra* note 15 (quoting criminal lawyer Yossi Schochet: "This is not a new phenomenon. Anyone who thinks it's unusual is living in a dreamland.").

93. Kennerly, *supra* note 24.

94. Danzig, *supra* note 64 ("[T]here is no universal electronics policy between courthouses, or even judges in the same building.").

95. Russo v. Takata Corp., 774 N.W.2d 441, 454 (S.D. 2009).

96. See *id.* at 443–44 (holding that a juror's Google search of a defendant seat belt manufacturer and his conversations about his findings with other jurors during deliberations prejudiced the jury's verdict against the plaintiffs and therefore warranted a mistrial); see also State v. Goupil, 908 A.2d 1256, 1262–63 (N.H. 2006) (holding that comments posted by a juror on a web blog that referenced his upcoming jury duty, in which he stated he would "get to listen to the local riff-raff try and convince [him] of their innocence," voiced his views on a United States Supreme Court decision ruling against death penalty for juveniles, and referenced an unrelated shooting incident in Atlanta, did not violate the defendant's right to a fair and impartial jury).

97. See Schwartz, *supra* note 9 (reporting that Judge Zloch was forced to declare a mistrial

Whether or not a specific activity results in prejudice will depend on a variety of different factors, such as the type of Internet activity engaged in by the juror.<sup>98</sup> Although “*particular tweets* (say, ‘he’s guilty as sin, ain’t nothin’ gonna change my mind’)” may provide “substantial evidence” of juror misconduct, it is unlikely that courts will consider twittering *in general* to rise to a level of actual misconduct.<sup>99</sup> Simple posts which broadly describe the jury duty experience and refrain from delving into the particularities of the case are generally harmless from a court’s perspective<sup>100</sup> because they are unlikely to have any prejudicial effect upon the defendant. A jury is only instructed to keep a trial’s *content* secret, and general tweets or blogs—which do not reveal such substantive information—will not likely rise to the level of “substantial evidence” required for courts to investigate allegations of misconduct.<sup>101</sup> This distinction between particular, substantive tweets and online posts, and those that are generally broader, is the type of distinction that courts have typically employed in analyzing juror misconduct in the past. For example, upon discovering that a juror had engaged in alleged misconduct by returning to the scene of a crime, a judge would not have just blanketly declared that such actions warranted a mistrial.<sup>102</sup> During a criminal trial, though an unauthorized view of the crime scene by a juror may ordinarily constitute misconduct *per se*, the trial court must nevertheless determine whether the defendant was actually prejudiced by the misconduct.<sup>103</sup> So while a simple view of the crime scene may not rise to a level of prejudicial error,<sup>104</sup> a showing that the misconduct actually influenced the verdict<sup>105</sup> likely would.

It makes sense then that this same determination should also apply to Internet misconduct. Like a juror’s investigation of a crime scene, a juror’s Internet activities have varying degrees of possible prejudice to the

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upon discovering that eight jurors had been doing research on the Internet).

98. See Kennerly, *supra* note 24 (“Twittering a couple lines about the status of the trial doesn’t come close to ‘refusing to apply the law.’”).

99. *Id.*

100. Rushmann, *supra* note 73.

101. Kennerly, *supra* note 24.

102. See *State v. Wells*, 437 N.W.2d 575, 580–81 (Iowa 1989) (discussing the three part test which must be met before a court can determine that a mistrial is warranted).

103. *Remmer v. United States*, 347 U.S. 227, 229–30 (1954) (“The trial court . . . should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial” in order to maintain the integrity of jury proceedings).

104. *Wells*, 437 N.W.2d at 581.

105. See *Pendleton v. State*, 734 P.2d 693, 696 (Nev. 1987) (holding that the lower court erred in denying a motion for new trial after a juror visited the accident scene and then subsequently rejected the defendant’s argument).

defendant. For example, each time a juror engages in external communication, the possibility arises that the communication could be two-way.<sup>106</sup> If the juror receives any potentially biased responses to his online posts, that may be sufficient grounds for a mistrial.<sup>107</sup> Similarly, when jurors blog, they tend to side with one party or another, subjecting the opposing party to prejudice.<sup>108</sup> Blogs may even expose problematic information about the jurors themselves, such that they prejudged the case or lied during *voir dire*, constituting sufficient grounds for a motion for new trial.<sup>109</sup>

The information that enters the jury box may be just as troublesome as the information that leaves.<sup>110</sup> When a juror discovers prejudicial evidence against a party on the Internet and then subsequently relays that information to other jury members, his actions create a risk that the remainder of the jury will become tainted as well.<sup>111</sup> Because a variety of factors come into play in determining the prejudicial effect of a juror's Internet misconduct, courts need to accord special attention to every allegation of Web-related juror misconduct, just as they would when dealing with more traditional allegations of misconduct. Such allegations must therefore continue to be adequately investigated on a case-by-case basis<sup>112</sup> in order to maintain the defendant's constitutional right to a fair and impartial jury trial.

#### IV. POSSIBLE SOLUTIONS TO THIS MODERN PHENOMENON

For our system to work, judges must be able to control jurors' access to information. The adversarial system works in large part as a result of cross-examination, and counsel has no way to challenge extrajudicial information a juror secretly obtains, since it is impossible to cross-examine what they cannot see or hear. Judges must therefore find some way to adapt the rules of our adversarial system in an effort to curb contemporary juror misconduct through the use of the Internet.

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106. Danzig, *supra* note 64.

107. Cf. Mike Ferro, *Juror's Twitter Use in Court May Cause Mistrial*, TECH. BLORGE, Mar. 16, 2009, <http://tech.blorge.com/Structure:%20/2009/03/16/jurors-twitter-use-in-court-may-cause-mistrial> ("Since tweeting is a one-way service, it is hard to argue that bias was externally introduced.").

108. Jana Lauren Harris, *Social Media in the Jury Room Can Sabotage Trials*, GARLAND, SAMUEL & LOEB, P.C., May 2009, <http://www.gslaw.com/CM/Custom/social-media-trial.asp>.

109. Jaksic, *supra* note 53.

110. See Schwartz, *supra* note 9.

111. Danzig, *supra* note 64.

112. See *supra* note 41 and accompanying text.

There has been a growing debate regarding the amount of change required to adjust to this recent phenomenon.<sup>113</sup> In an attempt to diminish Web-related juror misconduct, judges have already begun to inform jurors that prohibitions against seeking outside information during trials include Internet searches.<sup>114</sup> However, now that the Internet is as close as a juror's pocket, the risk for engaging in such misconduct has grown more immediate.<sup>115</sup> Courts must now begin tailoring their former established solutions to alleged misconduct to adequately accommodate the increasing prevalence of the Internet. The following solutions present reformed, particularized strategies that should be adopted by courts nationwide in order to sufficiently diminish modern instances of juror misconduct.

*A. The Confiscation of Cellular Telephones and Other Handheld Devices Prior to Courtroom Entry*

While some scholars believe that all Internet-ready handheld devices should be completely banned from courtrooms, others feel that such a change is simply too extreme.<sup>116</sup> On one hand, it is believed that “[t]he best practice is for trial courts to discourage, restrict, prohibit, or prevent access to mobile electronic communication devices by all persons . . . during all trial proceedings, and particularly by jurors during jury deliberation.”<sup>117</sup> As courts across the nation have already discovered, permitting jurors access to their cell phones and other Internet-capable devices is “fraught with significant potential problems impacting the fair administration of justice.”<sup>118</sup> State committees have already begun taking steps to ensure that these problems are reduced.<sup>119</sup> For example, the Indiana Judicial Conference's jury committee recently drafted a rule setting limitations on the use of electronic devices while a jury is deliberating.<sup>120</sup> Likewise, as of September 1, 2009, Michigan jurors are only permitted to use their cell phones and other such electronic devices during breaks while serving on a trial or deliberating.<sup>121</sup> New Jersey has adopted a similar

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113. Danzig, *supra* note 64.

114. Schwartz, *supra* note 9.

115. *Id.*

116. See Danzig, *supra* note 64 (discussing the debate over how extensive change needs to be in order to adequately cope with modern forms of juror misconduct).

117. Charles Wilson, *Texting, Tweeting Tempt Jurors, Frustrate Judges*, WSBT.COM, Aug. 1, 2009, <http://www.wsbt.com/news/national/52234872.html>.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*



rule.<sup>122</sup>

However, others argue that the solution to the problem should not be “simply to rage against the machine” and completely bar these devices from courtrooms.<sup>123</sup> In order to properly present their case, counsel must have stable access to laptops, cell phones, and other such technologies.<sup>124</sup> So rather than entirely eliminating Internet accessible devices, the best way to manage this problem may be to limit the use of these devices to only those counsel who are preauthorized to use them in the courtroom, and then mandate those who are not preauthorized—such as jurors and witnesses—to check their devices in the lobby.<sup>125</sup> A general preauthorization rule would not only “solve the constitution defense question, . . . [i]t would also address security concerns that the press or public could be surreptitiously recording court proceedings or photographing jurors or witnesses . . . [and] mitigate courtroom disturbances caused by the typical cacophony of cellphone ringers and the like.”<sup>126</sup> The Southern District of New York is currently evaluating such a rule in the interim.<sup>127</sup>

### *B. Modernizing Jury Instructions*

In addition to limiting the use of cellular phones and other handheld devices in the courtroom, courts must specifically tailor their jury instructions to make jurors aware that researching, blogging, tweeting, or posting messages about their case on the Internet constitutes misconduct.<sup>128</sup> Counsel should lobby their state legislatures in order to make them aware of this problem so that action may be taken to tailor the instructions as needed.<sup>129</sup> Such modifications are necessary because most curious jurors do not realize that researching a party on the Internet or viewing a crime scene on Google Maps violates court rules about seeking evidence independently<sup>130</sup> and should therefore be educated about the rules of juror misconduct. The only way to adequately educate jurors is to make

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122. *Id.*

123. Katherine A. Helm, *Courtrooms All Atwitter*, NAT'L L.J., Aug. 10, 2009, at 34.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. Danzig, *supra* note 64.

129. *Id.* at 41.

130. Wilson, *supra* note 117; accord Jon Gambrell, *Appeal Says Juror Sent “Tweets” During \$12.6M Case*, SFGATE.COM, Mar. 13, 2009, <http://www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2009/03/13/national/a090737D28.DTL> (reporting that juror Jonathan Powell thought it was “kind of crazy that [his tweets were being used] to get the case thrown out” since he “didn’t really do anything wrong”).

instructions *very precise* in explaining what they may and may not do while engaged in a trial.<sup>131</sup> Rather than just going through boilerplate orders, judges must give the jurors detailed instructions before the trial begins, prohibiting *all* device usage, and then repeat those instructions numerous times throughout the course of the trial.<sup>132</sup> An example of such an instruction may be:

You may not receive information about this case from any other source other than what you are presented in this Courtroom concerning the case. That means do not “google” any party or lawyer or court personnel in this case; do not conduct any research whatsoever on the Internet about this case or the parties or facts involved in it; you may not “blog” about the case or events surrounding the case or your jury service; you may not “tweet” about anything to do with the parties, events, or facts in this case or your jury service on this case. Do not send any email to anyone conveying your jury experience or information about this case. In the jury room, you are not to use your cell phone at recesses or lunch to call anyone to ask questions about issues in this case or to report facts about this case. You may not use Facebook, YouTube or any other “social” network on the Internet to discuss your jury service or issues in this case or people involved in this case, including the lawyers.<sup>133</sup>

By expressly drawing the line as to what constitutes misconduct in the eyes of the law, jurors will be less likely to engage in that type of behavior.<sup>134</sup>

### *C. Specific Questioning During Voir Dire Proceedings*

#### *1. Questions to Jurors About Their Internet Presence During Voir Dire*

Some scholars, such as Bob Kelley, an attorney in Fort Lauderdale, Florida, also believe that jurors should be specifically questioned about their Internet usage behaviors during *voir dire* proceedings.<sup>135</sup> Trial counsel are already given broad discretion when questioning potential

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131. Danzig, *supra* note 64.

132. *Id.*

133. Harris, *supra* note 108.

134. Losey, *supra* note 42 (“If a judge makes it very clear from the outset of the jury selection what is prohibited (i.e. any Internet search on the lawyers, evidence, ect. [sic]) than [sic] it is less likely that a juror will run afoul of the rules.”).

135. See generally Jaksic, *supra* note 53 (discussing the pertinence of asking prospective jurors about their Internet activity).

jurors during *voir dire* in order to expose their biases and potential prejudices.<sup>136</sup> If a juror's presence on the Internet has the similar potential to result in prejudice against the defendant, it seems obvious that a counsel's *voir dire* questioning should be expanded to include inquiries into online activity. Kelley, who routinely asks potential jurors such questions, asserts that "lawyers should know by now to check whether potential jurors have blogs" and that "[a]ny lawyer who does not inquire during jury selection about a juror's Internet presence—whether it be a Web site, a blog, an account on MySpace or an account on Match.com—hasn't done their job."<sup>137</sup> Such particular questioning serves as an additional safeguard for preventing the occurrence of a possible mistrial, as it gives lawyers the opportunity to be rid of the jurors who may potentially abuse the Internet throughout the proceedings.

## 2. Potential for Invading a Juror's Privacy Rights

The *voir dire* process, however, is a fragile mechanism and must be used carefully so as not to disrupt or invade the privacy rights of any potential juror.<sup>138</sup> While the main purpose of the *voir dire* examination is to provide information about which a juror may be prejudiced or unqualified,<sup>139</sup> it must nonetheless be conducted in such a way as to protect the interests of each prospective juror.<sup>140</sup> A citizen's obligation to serve on a jury in a criminal matter should not amount to a willing waiver of the expectation of privacy.<sup>141</sup> Courts therefore have wide discretion in the way a *voir dire* examination is conducted, and may limit *voir dire* examination of prospective jurors to only those questions which are relevant<sup>142</sup> or which might tend to affect the verdict.<sup>143</sup> A court may even bar questions which are only speculatively tied to potential prejudice.<sup>144</sup>

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136. 76 AM. JUR. *Trials* § 4 (2000).

137. Jaksic, *supra* note 53.

138. Michael R. Glover, *The Right to Privacy of Prospective Jurors During Voir Dire*, 70 CAL. L. REV. 708, 711 (1982) ("[P]rospective jurors should have a constitutional right to privacy protecting them from disclosure of personal information during *voir dire*.").

139. See *Morgan v. Illinois*, 504 U.S. 719, 719 (1992) (recognizing that "[p]art of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors").

140. See *State v. Patterson*, 645 A.2d 535, 539 (Conn. 1994) (recognizing that "[t]here are two sets of interests protected by the *voir dire*: (1) the interests of the parties, namely, the defendant and the state; and (2) the interests of the prospective jurors.").

141. Glover, *supra* note 138, at 711–12.

142. *Walker v. State*, 640 S.E.2d 274, 277 (Ga. 2007).

143. *McLain v. Routzong*, 608 So. 2d 722, 724 (Ala. 1992).

144. *United States v. Jones*, 722 F.2d 528, 529 (9th Cir. 1983).

The parties have no right to limitlessly and publicly delve deeply into matters concerning the jurors' private lives,<sup>145</sup> and the court may refuse to ask or allow questions which may unduly infringe on the juror's constitutional right to privacy.<sup>146</sup> Of course, whether or not *voir dire* questioning regarding a potential juror's Internet activity rises to a level sufficient to constitute an invasion of his or her privacy will depend on the specific type of Internet activity engaged in. It is unlikely, for example, that a court would find a juror's short, daily blog about his life experiences to be deemed an invasion of privacy.<sup>147</sup> On the other hand, other types of Internet activity which might tend to cause a potential juror disgrace or infamy would likely be considered too invasive and should therefore not be permitted.<sup>148</sup>

However, suppose a lawyer learns during *voir dire* that a certain juror is an active Twitter or Facebook user or that he or she maintains a blog on a personal website. If selected to serve on the jury, may a judge or attorney actively search Twitter, Facebook or other online websites during the trial to ensure that the juror is not engaging in web-related misconduct? Although past cases indicate that it is typically the jurors who come forward and admit to a judge that either they or another member of the jury have engaged in external Internet activity,<sup>149</sup> more and more lawyers are taking it upon themselves to discover whether jurors are using the Internet to engage in such misconduct.<sup>150</sup> "It is [now] common that counsel in a trial are on the Internet just looking for these juror blogs or 'tweets,'" <sup>151</sup>

145. See *Berry v. State*, 651 S.E.2d 1, 5 (Ga. 2007) (suggesting that jurors who believe that public questioning will result in embarrassment have the option to request a private hearing with the judge in camera and with counsel present).

146. See *People v. James*, 710 N.E.2d 484, 490 (Ill. App. Ct. 1999) (holding that "the prosecutor's questions of potential jurors regarding their prior illegal drug use were improper in that such questions compelled potential jurors to be witnesses against themselves in violation of the fifth amendment").

147. See *Guest v. Leis*, 255 F.3d 325, 333 (6th Cir. 2001).

148. See *United States v. Padilla-Valenzuela*, 896 F. Supp. 968, 972 (D. Ariz. 1995) ("To be meaningful, the right to privacy must preclude the offending questions from being asked of any prospective jurors.").

149. See Schwartz, *supra* note 9 (reporting that "a juror in a big federal drug trial in Florida admitted to the judge that he had been doing research on the case on the Internet").

150. See Danzig, *supra* note 64 (reporting that an Arkansas juror's tweets were discovered after one of the defendant's friends ran a Google search on the company). See also Oliver Mackson, *Trials & Tribulations: Twitter While On a Jury, and You'll Pay For It*, TIMES-HERALD RECORD, June 12, 2009, <http://www.recordonline.com/apps/pbcs.dll/article?AID=/20090612/COMM/906120361/-1/NEWS67> (reporting that the "outraged lawyers" representing the defendant company in the same Arkansas case could easily track jurors' tweets by simply following them on Twitter).

151. Harris, *supra* note 108.

and some “[a]ttorneys have [even] begun to check the blogs and Web sites of prospective jurors.”<sup>152</sup> This has become an especially simple task since a “tweet” can be monitored by anyone who “follows” another on Twitter.<sup>153</sup> A juror’s Facebook profile or personal blog, if they exist, can be similarly accessed through a quick Google search of their name.

The amount of privacy that a juror expects to retain, however, likely diminishes as their web-related activity increases.<sup>154</sup> The explosion of computer technology and communications in recent years has increased the abundance of litigation regarding a person’s expectation of privacy on the Internet.<sup>155</sup> Courts have generally held that no reasonable expectation of privacy exists in e-mail communications or chat room dialogues.<sup>156</sup> Likewise, the operator of an Internet website has little reasonable expectation of privacy in any postings makes on that website.<sup>157</sup> In *J.S. v. Bethlehem Area School District*, for example, the court held that a middle school student’s right to privacy was not violated when school officials accessed the student’s website and found derogatory comments about his teachers and principal.<sup>158</sup> Noting that the website was not protected and that any user who happened upon the correct search terms could have accessed it, the court found that the creator of the site took the risk of other individuals encountering any postings he chose to display. Therefore, the student maintained no expectation of privacy in the site.<sup>159</sup>

Similarly, a court would likely find that a lawyer’s discovery of a juror’s tweets or blogs on the Internet would not violate his or her privacy rights.<sup>160</sup> Assuming that the juror had not taken special precautions to keep his or her posts private—either by allowing only certain viewers to access the site or simply adjusting the privacy settings so that the information displayed could not be viewed by the general public—a court could reasonably conclude that an active search for a juror’s Internet postings

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152. Schwartz, *supra* note 9 (emphasis added).

153. Mackson, *supra* note 150.

154. See generally *United States v. Charbonneau*, 979 F. Supp. 1177, 1184–85 (S.D. Ohio, 1997) (discussing the expectation of privacy one can expect to maintain depending upon the activity he or she engages in).

155. Mitchell Waldman, Annotation, *Expectations of Privacy in Internet Communications*, 92 A.L.R. 5TH 15 (2001).

156. See *Charbonneau*, 979 F. Supp. at 1184–85.

157. See *Commonwealth v. Proetto*, 771 A.2d. 823, 831 (Pa. 2001) (finding that the openness of electronic communications diminishes one’s expectation of privacy).

158. See *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 757 A.2d 412, 425 (Pa. Commw. Ct. 2000).

159. *Id.*

160. See *Guest v. Leis*, 255 F.3d 325, 333 (6th Cir. 2001) (“Users would logically lack a legitimate expectation of privacy in materials intended for publication or public posting.”).

would not constitute a violation of his or her privacy expectations.<sup>161</sup> Just like the student in *J.S. v. Bethlehem*, a juror's posting of information on the Internet creates the risk that the general public, including attorneys and judges, will encounter such information; consequently, these jurors cannot realistically expect as much privacy as one would normally receive during *voir dire*.<sup>162</sup> The threat to one's invasion of privacy as a result of questioning jurors about their Internet activity during *voir dire* proceedings therefore seems to be minimal, so this particular solution has the potential to curb Internet-related misconduct if used appropriately.

#### D. Holding Jurors in Contempt

Some courts have considered even going so far as to hold jurors in contempt for engaging in misconduct via the Internet.<sup>163</sup> In general, "contempt" refers to "[c]onduct that defies the authority or dignity of a court or legislature."<sup>164</sup> When a person's conduct tends to interfere with or prejudice parties or their witnesses, or impedes or obstructs the court in the discharge of its duties, he or she will be guilty of contempt.<sup>165</sup> In the past, courts have had to determine whether a juror's acquisition of or exposure to extrinsic information should constitute contempt. For example, while the consultation of information about the operation of breathalyzers was deemed sufficient to hold a juror in contempt,<sup>166</sup> a visit to the scene of the alleged crime for the purpose of becoming acquainted with the locality was typically not.<sup>167</sup>

The modern phenomenon of the Internet need not alter the court's analysis of contempt. The court's determination must continue to be based on whether or not the particular misconduct led to the obstruction of justice or prevented a fair trial, even though these contemptuous behaviors may come about by new means. Threats of contempt for Internet misconduct

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161. See *United States v. Maxwell*, 45 M.J. 406, 417–18 (C.A.A.F. 1996) (analogizing one's Internet activity to sending a letter and holding that "the more open the method of transmission, the less privacy one can reasonably expect").

162. See *Bethlehem Area Sch. Dist.*, 757 A.2d at 425 (holding that anyone can access information on the Internet once it has been posted and that the creator takes a risk that other individuals will so access the post, thereby lessening any expectation of privacy in it).

163. See 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>.

164. BLACK'S LAW DICTIONARY 140 (3d pocket ed. 2006).

165. *State v. Pierce*, 516 S.E.2d 916, 919 (N.C. Ct. App. 1999); see also 17 AM. JUR. 2D *Contempt* § 113 (2004).

166. *Pierce*, 516 S.E.2d at 918–19.

167. *People v. Oyer & Terminer*, 4 N.E. 259, 263–64 (N.Y. 1886).

have already started to make their way into courts.<sup>168</sup> In the midst of a gang murder trial in one California courtroom, a judge chastised the jury foreman for writing a blog that exposed the details of the trial, therefore failing to follow his instructions to refrain from discussing the case.<sup>169</sup> Had the case resulted in a mistrial, the juror could have been sentenced to five days in jail, subject to a \$1,000 fine, or both.<sup>170</sup> Perhaps this fear of incarceration or monetary fines may be necessary to dissuade jurors from engaging in Internet-related misconduct. Because a juror's extrajudicial communication has the potential to result in a prejudicial effect toward a defendant, it may also be fair to impose on a juror the costs of rehearing the case if the misconduct warrants a mistrial.<sup>171</sup> Though this punishment seems extreme, the threat of either fining jurors or holding them in contempt of court due to Internet misconduct may be necessary to convey a public message that such behavior will not be tolerated, thereby dissuading future jurors from researching or blogging about the case online.

#### *E. Jurors' Responsibilities for One Another*

Finally, aside from the above court-imposed solutions to web-related misconduct, a juror must also learn to take responsibility not only for his own actions, but for the actions of the remaining eleven jury members as well. Cases in which jurors informally monitor one another have already arisen in courthouses across the nation.<sup>172</sup> If a juror knows that another jury member has engaged in outside Internet research or participated in the blogosphere, especially if such actions have the potential to prejudice a party, the juror should immediately relay that information to the judge or bailiff. Enforcement of the court's rules, therefore, goes even beyond what the judge can do, and it is often left up to each juror to make sure that the others stay in line.<sup>173</sup> However, there is some indication that this may be easier said than done.<sup>174</sup> Last year, for example, while data support specialist Seth McDowell was serving on a jury, another juror admitted to him that she ran a Google search on the defendant.<sup>175</sup> Although McDowell considered telling the judge about the juror's actions, he eventually decided

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168. See Hernandez, *supra* note 163.

169. *Id.*

170. *Id.*

171. See *supra* Part II.C (discussing costs of a mistrial).

172. See Danzig, *supra* note 64 (stating that a juror might notify the judge or bailiff if he or she sees something inappropriate).

173. See Schwartz, *supra* note 9.

174. See *id.*

175. *Id.*

against it.<sup>176</sup>

So let's face it: When citizens are summoned to perform their civic duty as impartial judges of an accused, they tend to treat that responsibility as more of a chore than a privilege. "Rather then [sic] willingly fulfilling a public service, the person called for jury service typically succumbs begrudgingly to the jury summons."<sup>177</sup> Sacrificing one's time to serve on a jury is often met with irritation, frustration, and general feelings of annoyance, and most jurors typically hope that the trial goes by as quickly as possible. So then what motivation do jurors have to come forward with information regarding the misconduct of other panel members? McDowell's attitude seems to sum it up best: "If everybody did the right thing, [a] trial, which [may only take a few] days, [could go] on for another bazillion years."<sup>178</sup> Such feelings will essentially deter any incentive jurors may have to relay misconduct to the judge.<sup>179</sup>

As a result, judges may not be able to completely rely on jury members offering information of another's misconduct, and so there must be at least some action taken by the courts to curb this problem. It is important that jurors focus only on the evidence presented before them during the trial.<sup>180</sup> Of course, unless sequestered, one cannot know what jurors do after leaving the courthouse.<sup>181</sup> It has simply become too easy for jurors to go home at night, turn on the computer, and do a little research. In fact, some jurors "'feel [that] they can't serve justice if they don't find the answers to certain questions,'" and by doing additional research or blogging on the Internet, these jurors believe that they are actually helping, and not hurting, the case.<sup>182</sup> Confiscating cell phones, modernizing jury instructions, or threatening contempt may help to reduce the amount of Internet-related misconduct. Unfortunately, these propositions will not completely eliminate the effect of this phenomenon. If jurors really want to cheat, they are going to cheat, no matter what safeguards are in place.<sup>183</sup> Even just a cursory search on Twitter using the key words "court" and "jury duty" revealed the following two tweets: "Selected for jury duty. No

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176. *Id.*

177. Glover, *supra* note 138, at 722.

178. Schwartz, *supra* note 9.

179. *See id.* (inferring that jurors such as McDowell will hesitate to come forward with reports of juror misconduct if such information might potentially delay the trial).

180. Harris, *supra* note 108.

181. *Id.*

182. Schwartz, *supra* note 9.

183. Danzig, *supra* note 64.



tweeting from the box—court’s order. We solemnly swore not to tweet”<sup>184</sup> and “dudes I am twittering in court, THE FUTURE OF JURY DUTY.”<sup>185</sup> These examples, however, only further demonstrate the need to establish one or more of the above suggestions in order to curtail Internet-related misconduct in American courthouses.

### F. The Ideal Solution

Though each of the aforementioned proposals may be independently adequate to at least curtail contemporary occurrences of juror misconduct, the most effective resolution will be to employ a combination of them. At this point, however, the confiscation of a potential juror’s cellular phone prior to their entry into the courtroom is too extreme to implement into courthouses nationwide. Although some may argue that society has become perhaps *too* reliant on technology, the desire to remain connected to friends and current with the latest events should not be completely eliminated just because a person is called to perform a civic duty. Similarly, holding jurors in contempt should only be reserved for the most extreme instances of misconduct and need not necessarily be adopted on a national scale just yet.

Rather, the alteration and modernization of jury instructions is the most crucial change that must take place to curb this kind of misconduct, and should be immediately implemented in every courtroom across the nation. Updating jury instructions further puts each juror on notice that every time he or she tweets about a case, posts blogs on Facebook or My Space, or researches the parties on the Internet, he or she is also engaging in misconduct that may subject that juror to discipline. Although this remains the most pressing change to be made, attorneys and jurors can additionally use their roles in the judicial system to help prevent those instances of Internet-related misconduct that may occur regardless of any modernized instructions.<sup>186</sup> By questioning prospective jurors during *voir dire* about their Internet use, attorneys have the power to initially eliminate those panel members who have the potential to surrender to the temptations of the Internet and possibly pose a risk to the functioning of a fair trial. Similarly, jurors must learn to recognize when a fellow panel member is engaging or has engaged in any improper behaviors during the course of a

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184. N+1 (nplusonemag) on Twitter, <http://twitter.com/nplusonemag> (posted Sept. 23, 2009) (last visited Nov. 21, 2009).

185. Preston Guillot (prestonguillot) on Twitter, <http://twitter.com/prestonguillot> (posted Sept. 23, 2009) (last visited Nov. 21, 2009).

186. See *supra* Part IV.E.

trial and then immediately report such information to the appropriate authorities. When each of the system's players effectively work together like this to eliminate potential Internet misconduct, the possibility of such misconduct actually occurring will significantly diminish. Of course, the first step that must take place for these solutions to be effective is an immediate change to the jury instructions given in all courthouses nationwide. Once this occurs, the remaining reforms will follow as necessary, once again ensuring that the defendant's right to a fair and impartial trial is preserved.

## V. CONCLUSION

The advancement of society and its technological innovations have, at least in some respects, led to significant problems for the American judicial system. Now that the Internet can be easily accessed through cellular phones and other handheld devices, judges and attorneys nationwide are forced to cope with blogging and web-surfing jurors who impede a defendant's constitutionally protected right to a fair and impartial trial. While the notion of juror misconduct is not a novel concept, the use of the Internet to engage in such misconduct is clearly on the rise.<sup>187</sup> But as the law struggles to keep up with society's technological advancements, it must also realize that efforts to resist such change are futile<sup>188</sup> and learn to simply adapt to accommodate these impending changes. Society will only continue to advance, and with its advancement will come further technological progressions and innovations. Rather than completely restructuring the way juror misconduct is analyzed throughout the court system, the legal community need only incorporate such modern instances of misconduct into these already established and preexisting guidelines. Courts must therefore immediately take staunch measures to adapt to these revolutionary technological developments, such as by altering jury instructions to reflect the ways in which Internet usage can constitute juror misconduct. Doing so will not only allow the law to naturally evolve alongside society, but it will also effectively preserve the integrity of the

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187. See *supra* Part III.A.1; see also Wilson, *supra* note 117 (reporting that more problems are arising as jurors become increasingly wired).

188. Funcheon, *supra* note 10. J.D. Candidate, Loyola Law School, Los Angeles 2011; B.A., University of California, Santa Barbara 2007. The author would like to thank the editors and staff writers of *Loyola of Los Angeles Entertainment Law Review* for all of their hard work throughout the publication process of this article. Special thanks to Professor Kenneth Klein for all of his encouragement and guidance in helping to choose and develop the topic. Most importantly, a very special thank you to my parents, sister, and brother for their constant love and support.

justice system by maintaining the criminal defendant's constitutional right to a fair and impartial jury trial.

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