#JurorMisconduct, but #SameOldPretrialPublicity: A Proposal for the Use of Supreme Court Pretrial Publicity Precedent in Shaping Jurisprudence Involving Juror Use of Social Media

A Thesis
SUBMITTED TO THE FACULTY OF
UNIVERSITY OF MINNESOTA
BY

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IN PARTIAL FULFILLMENT OF THE REQUIREMENTS
FOR THE DEGREE OF
MASTER OF ARTS

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May 2013

Dedication

This thesis is dedicated to my family and friends and the supportive faculty who have helped me to be the first student complete the JD/MA dual degree program through the Law School and the School of Journalism and Mass Communication.

Abstract

Active Internet users in the United States spend 23 percent of the time they are online on social networking sites and blogs. Facebook, the most popular social networking site in the United States, currently boasts more one billion users. Twitter, another social networking site that has recently seen a surge in users, surpassed 500 million registered users by 2012. Further, 88 percent of American adults own cell phones, 46 percent of which are smart phones, capable of accessing the Internet and social media sites anytime, anywhere. Easy access to the Internet and social media websites does not end with receipt of a jury summons. Although juror misconduct has always been a concern within the judicial system, the prevalence of technology available to jurors has increased the ease with which jurors can improperly communicate with each other and with other trial participants, publish information regarding the trial, and conduct outside research on the case.

This thesis begins with a discussion a historical look at juries, the media, and pretrial publicity and its relationship with the idea of an impartial jury. Next, an overview is given of the judicial remedies available to courts in combating the external influences of the media and the public on a jury. Then, this thesis turns to a discussion of what an impartial jury looks like in the age of "tweets" and "likes," highlighting how changes in technology have put external influences in the palms of most jurors today. The author then provides examples of recent cases involving juror misconduct stemming from social media posts or other online activity, followed by a summary of how this problem is currently being dealt with in jurisdictions across the country and scholarly critiques of those potential tools. This thesis next turns to an exploration of whether online juror speech has First Amendment value and whether it is deserving of robust First Amendment protection. Finally, the author proposes that in order to balance speech which has First Amendment value with a defendant's Sixth Amendment right to a fair trial, that courts evaluate online juror misconduct cases utilizing the framework set forth by the Supreme Court in its pretrial publicity jurisprudence.

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I. INTRODUCTION

"Just say he's guilty and lets [sic] get on with our lives!"[1]

"[N]ow I get to listen to the local riff-raff try and convince me of their innocence."[2]

"Serving on this case just goes to show how opinionated I am."[3]

"It's over."[4]

While impaneled on a jury in an ongoing criminal trial, jurors posted each of these quotations about the trial. Internet postings like these are no longer the exception, but are becoming an issue courts across the country must address while attempting to balance a defendant's Sixth Amendment right to a fair and impartial trial with the First Amendment rights of the public and the press.

Active Internet users in the United States, they spend 23 percent of the time they are online on social networking sites and blogs.[5] Facebook, the most popular social networking site in the United States, currently boasts more one billion users.[6] Twitter, another social networking site that has recently seen a surge in users, surpassed 500

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[1] Commonwealth v. Guisti, 747 N.E.2d 673, 680 (Mass. 2001).

[2] State v. Goupil, 908 A.2d 1256, 1262 (N.H. 2006).

[3] State v. Goehring, No. OT-06-023, 2007 WL3227386 *1, *5(Ohio App., 6th Dist. 2007).

[4] Dimas-Martinez v. State, 385 S.W.3d 238, 248 (Ark. 2011).

[5] Sarah Kessler, *Americans Spend 23% of Internet Time on Social Networks [STUDY]*, MASHABLE, Sept. 12, 2011, http://mashable.com/2011/09/12/23-percent-online/.

[6] Wall Street Journal Staff, *Facebook Hits 1 Billion Users, Mark Zuckerberg Does 'Today,'* SPEAKEASY BLOG (Oct. 4, 2012, 10:45 AM), http://blogs.wsj.com/speakeasy/2012/10/04/facebook-hits-1-billion-users-mark-zuckerberg-does-today/.

million registered users by 2012.[7] Further, 88 percent of American adults own cell phones, 46 percent of which are smart phones, capable of accessing the Internet and social media sites anytime, anywhere.[8] Easy access to the Internet and social media platforms does not end with receipt of a jury summons. Although juror misconduct has always been a concern within the judicial system, the prevalence of technology available to jurors has increased the ease with which jurors can improperly communicate with each other and with other trial participants, publish information regarding the trial, and conduct outside research on the case.

The Sixth Amendment guarantees defendants "the right to a speedy and public trial, by an impartial jury. . . ,"[9] which requires that jurors be prohibited from discussing the case they are deciding with anyone other than fellow jurors during deliberation.[10] But despite this long-standing rule, American courts are grappling with jurors who blog,[11] tweet,[12] and post their opinions and observations of trial gained during jury service.

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[7] Lauren Dugan, *Twitter To Surpass 500 Million Registered Users On Wednesday*, MediaBistro, AllTwitter, *available at* http://www.mediabistro.com/alltwitter/500-million-registered-users_b18842.

[8] Aaron Smith, *Nearly Half of American Adults Are Smartphone Owners*, Pew Internet & American Life Project. (Mar. 1, 2012) *available at* http://www.pewinternet.org/Reports/2012/Smartphone-Update-2012.aspx.

[9] U.S. CONST., AMEND. VI.

[10] *See*, United States v. Olano 507 U.S. 725, 738 (1993) (jurors must be "capable and willing to decide the case solely on the evidence" provided in court) (quoting Smith v. Phillips, 455 U.S. 209, 217 (1982)).

[11] *See, e.g.*, State v. Goupil, 908 A.2d 1256 (N.H. 2006) (holding that juror's posting to a blog about upcoming jury duty, calling defendant "the local riff raff" did not violate defendant's right to a fair and impartial jury).

[12] *See, e.g.*, *Dimas-Martinez*, 385 S.W.3d at 249 (finding appellant was not afforded a fair trial in part because a juror broke court rules by tweeting that the jury reached a verdict before it was announced to the court); U.S. v. Fumo, 655 F. 3d 288, 305-06 (3d. Cir. 2011) (refusing to find jury bias where a juror posted "'vague' and 'virtually meaningless'" statements about the pending case on Twitter and Facebook).

Perhaps more troubling are the jurors who use the Internet to do additional research about the case, possibly encountering information that has been excluded from trial.[13] Given the widespread use of smart phones, many instances of juror misconduct likely go undetected.

The Internet gives jurors the ability to instantly publish information about an ongoing trial to a large audience. Easy access to social media applications and Internet search engines via smartphones and other Internet-ready portable devices like iPads presents a concern for courts in deciding how to address and prevent jury misconduct. Although many courts have adopted jury instructions that specifically address the issue of social media use,[14] others have taken more extreme prevention efforts, including banning all use of electronic devices within the courtroom[15] or punishing jurors using fines and criminal contempt charges.[16]

Many members of the legal community, including judges and attorneys, assert that when a juror uses the Internet to communicate about the case on which he is serving, it

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[13] *See, e.g.*, People v. Wadle, 77 P.3d 764 (Colo. App. 2003) (granting defendant a new trial where juror conducted independent internet research about the anti-depressant drug at issue in the case).

[14] *See generally*, Eric P. Robinson, *Jury Instructions for the Modern Age: A 50-State Survey of Jury Instructions on Internet and Social Media*, 1 REYNOLDS CTS. & MEDIA L.J. 3, 307 (Summer 2011).

[15] NewsMax, *Courts Finally Catching up to Texting Jurors* (Mar. 6, 2010) *available at* http://www.newsmax.com/US/Texting-Jurors-courts-blogs/2010/03/06/id/351842.

[16] *See, e.g.*, U.S. v. Juror Number One, 2011 WL 6412039 (E.D. Pa. 2011) (upholding a $1000 fine as sentencing for juror's criminal contempt conviction where one juror emailed other jurors and asked for their opinions on the case); Martha Neil, *Oops. Juror Calls Defendant Guilty on Facebook Before Verdict*, A.B.A. J. (Sept. 2, 2010) *available at* http://www.abajournal.com/news/article/oops._juror_calls_defendant_guilty_on_facebook_though_verdict_isnt_in (stating that a court held a juror in contempt and required that the juror pay a 250 dollar fine and write a five-page essay on the importance of the Sixth Amendment for posting on Facebook that the defendant was guilty before the verdict was announced).

may contribute to public debate. But, it also increases the risk that the juror will form premature opinions of the case, be exposed to extraneous information, or improperly communicate with third parties.

The First Amendment[17] guarantees the public and the press the right of access to trials and pre-trial hearings.[18] Courts have viewed the press as an important representative for the public that reports on what transpires in the courtroom. However, there are limitations on how the press, the general public, and the jury can interact. For example, courts can restrict jurors from talking to the press until the trial proceedings have ended.[19] But the Internet continues to blur the definition of "the press," as the web allows all individuals to consume, critique, create, and disseminate media.[20] When jurors use social media to communicate about the case, they arguably serve the same watchdog function as the press — reporting about the case to an audience and serving as a check on government authority.[21] As with traditional media, [22] when a juror's use of social media serves First Amendment values such as contributing to the marketplace of ideas,

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[17] U.S. CONST., amend. I.

[18] Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572-73 (1980) ("[M]edia representatives enjoy the same right of access as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard.").

[19] *See*, In re Express-News Corp., 695 F.2d 807, 809 (5th Cir. 1982) (holding a law prohibiting the press from interviewing jurors after their service unconstitutional, and noting that "[a]bsent good cause for restraint, petit jurors are free to discuss their service if they choose to do so.").

[20] Adam Cohen, *The Media That Need Citizens: The First Amendment and The Fifth Estate*, 85 S. CAL. L. REV. 1, 5 (Nov. 2011).

[21] For a more in-depth discussion of watchdog theory, *see* Vince Blasi, *The Checking Value in First Amendment Theory*, 1977 AMERICAN BAR FOUNDATION RESEARCH JOURNAL 521-649 (1977).

[22] The term "traditional media" for the purposes of this thesis refers to newspapers, TV broadcast media, radio broadcast media, and online media tied to a traditional news organization like *The New York Times*.

oversight of government, and self-fulfillment,[23] a conflict arises between First Amendment guarantees and Sixth Amendment protections.

Juror communications and exposure to information related to a trial occur in various forms. The author separated potential juror activities into three categories: (1) jurors as creators; (2) jurors as consumers; and (3) jurors as discussants to provide clarity in discussing the issues addressed by this thesis. The first category — jurors as creators — includes juror activity that reflects his or her own thoughts and observations about the trial that do not result in any interactions with other members of the public. The second category — jurors as consumers — consists of juror activity in which the individual is merely researching concepts related to the trial or is reading information about the case. In the online context, for example, a juror may use a search engines to research an unfamiliar term used during witness testimony or following an opinion commentator on Twitter who is discussing the trial. Finally, category three — jurors as discussants — refers to juror activity that contains some interactive element between the juror's communications and the broader public. A juror who posts a status on Facebook about the trial that elicits comments from "friends," which the juror then responds to, would be illustrative of the type of conduct included in this category.

Although this thesis explores the problems and concerns being raised regarding impaneled jurors' increased use of social media and other online platforms occurring in all three of these categories, the author's primary focus is on activities that would fall under the first and third categories. Much of the juror conduct that falls within category

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[23] For an overview of these theories, *see* Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982).

two is beyond the scope of this thesis. To explore this topic, this thesis asks the following three research questions:

> R1: What level of First Amendment protection, if any, should a juror's speech about an ongoing trial on social media, blogs, and other online forums receive?
>
> R2: How can current institutional tools be used to limit juror use of social media, taking into account a defendant's Sixth Amendment rights and a juror's First Amendment rights?
>
> R3: When a juror's use of social media rises to the level of juror misconduct, what legal framework should courts use to determine whether a mistrial should be declared? What considerations, if any, need to be made when balancing a defendant's right to a fair trial and a juror's free speech rights?

This thesis begins with a historical look at juries, the media, and pretrial publicity and its relationship with the idea of an impartial jury. Next, it provides an overview of the judicial remedies available to courts in combatting the external influences of the media and the public on a jury. Then, this thesis turns to a discussion of what an impartial jury looks like in the age of "tweets" and "likes," highlighting how changes in technology have put external influences in the palms of most jurors today. The author then provides examples of recent cases involving juror misconduct stemming from social media posts or other online activity, followed by a summary of how this problem is currently being dealt with in jurisdictions across the country and scholarly critiques of those potential tools. This thesis next turns to an exploration of whether online juror speech has First Amendment value and whether it deserves robust First Amendment protection. Finally, the author proposes that in order to balance speech which has First Amendment value with a defendant's Sixth Amendment right to a fair trial, that courts evaluate online juror misconduct cases utilizing the framework set forth by the Supreme Court in its pretrial

publicity jurisprudence.

II. A HISTORICAL LOOK AT JURIES, THE MEDIA, AND PRETRIAL PUBLICITY

The Sixth Amendment to the U.S. Constitution entitles a criminal defendant the right to a fair and an impartial jury.[24] Equally, the Constitution also guarantees free speech and a free press through the First Amendment.[25] Accordingly, there is a long history of tension between these two rights because the framers of the Constitution did not rank these rights in order of importance. This section examines the conflict that exists between these two rights and specifically focuses on how the Court balanced these two rights in the context of pretrial publicity. This precedent evolved as technology allowed the media to provide more extensive coverage of trials and may prove relevant as courts grapple with new changes to the media landscape that allow not only the traditional media, but the general public to provide instant commentary on trial proceedings.

A. Early United States

In the initial years after the United States was formed, one of the earliest debates on access to judicial proceedings resulted from Aaron's Burr's treason trial.[26] The former United States Vice President was charged with treason after he planned to seize New Orleans and conquer Mexico despite a warning by President Thomas Jefferson not to

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[24] U.S. CONST. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed…"). Because all of the rights of the of Sixth Amendment have not been incorporated through the Due Process Clause of the Fourteenth Amendment, some state courts may have to rely on similar clauses within their own state constitutions in their analysis of these issues.

[25] U.S. CONST. amend. I. ("Congress shall make no law … abridging the freedom of speech, or of the press…").

[26] *See* Robert Hardaway & Douglas Tumminello, *Pretrial Publicity in Criminal Cases of National Notoriety: Constructing a Remedy for the Remediless Wrong*, 46 AM. U. L. REV. 39, 48 (1996) (citing United States v. Burr, 25 F. Cas. 2, 3 (C.C.D. Va. 1807) (No. 14,692a)).

engage in rebellion.[27] During this historic trial, concerns over jury contamination arose.[28] The political nature of the trial and the public's curiosity fueled large amounts of newspaper coverage leading up to the trial, causing many to wonder if a fair trial was possible.[29] As a result, the Circuit Court of Virginia considered the problem of pretrial publicity and juror disqualification.[30] Supreme Court Chief Justice John Marshall, who presided over the trial as a circuit court judge, concluded that even though a juror may be exposed to pretrial publicity, it was not determinative of his ability to be impartial.[31] Marshall ruled that a juror could only be disqualified if the juror's strong predisposition as to the defendant's innocence or guilt cannot be set aside.[32]

Although the Burr trial set the stage for the standard for pretrial publicity and juror bias, the U.S. Supreme Court would not announce its standard for reviewing a trial court's finding of jury prejudice until 70 years later in *Reynolds v. United States*.[33] In that case, the Court held that a finding of jury bias must be based on evidence that the juror formed an opinion warranting such a conclusion and that "[t]he finding of the trial court

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[27] *Id.* at 48 (citing JEFFREY ABRAMSON, WE THE JURY 28 (1994)).

[28] *Id.* (citing JEFFREY ABRAMSON, WE THE JURY 38-39 (1994)).

[29] *Id.*

[30] *See* Hardaway & Tumminello, *supra* note 26, at 48 (citing *Burr*, 25 F. Cas. at 49-50)).

[31] *Id.* (citing *Burr*, 25 F. Cas. at 51 (observing that disqualification of all jurors who formed opinions prior to trial would exclude many intelligent jurors capable of rendering impartial verdict)).

[32] *Id.*

[33] Reynolds v. United States, 98 U.S. 145, 155-56 (1878) (rejecting a motion to overturn a conviction for bigamy based partially on the trial judge having impaneled a juror who had formed an opinion which he had never expressed, and which he did not think would influence his verdict after hearing testimony).

… ought not to be set aside by a reviewing court, unless the error is manifest."[34]

As the power of the press grew, its potential effect on legal proceedings gained attention. The 1935 trial of Bruno Hauptmann, who was accused of kidnapping and murdering Charles Lindbergh's baby, proved to be a catalyst for a heated debate over trial publicity.[35] The case received a mass amount of media coverage, leading to the "media circus" the Supreme Court would later condemn.[36] Following the Hauptmann trial, the American Bar Association enacted Cannon 35 of the Code of Judicial Conduct, which was aimed at controlling media coverage of criminal trials.[37] The advancements of media technology in the 1930s, such as the increased use of radio to cover breaking news, increased media interest in newsworthy stories and led the legal community to become "more concerned with guiding trial procedures to comport with fairness and decorum."[38]

B. Modern Supreme Court Jurisprudence

Justice Oliver Wendell Holmes stated in *Patterson v. Colorado*, "The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or

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[34] *Id.* at 156.

[35] *See* Hardaway & Tumminello, *supra* note 26, at 49.

[36] *Id.*

[37] *See* 62 A.B.A. REP. 1123, 1134-35 (1937). The Canon read: Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto the mind of the public and should not be permitted.

[38] FED. R. CRIM. P. 53 (stating that the media should not be allowed in courtrooms).

public print."[39] Although Holmes' sentiments were broadly held in 1907, and likely hold true now among the legal community, the Supreme Court's jurisprudence in the area of pretrial publicity has wavered between free press and fair trial rights, championing the one most threatened at the time.[40]

In Professor John Walton's analysis of the Court's precedent in the area of pretrial publicity he said that although the Court has recognized a need to balance the two rights, "it has at times appeared willing to risk potential jury bias in the interests of preserving a free press."[41] In 1952, the Court took on a more modern case involving pretrial publicity in *Stroble v. California*.[42] Stroble had confessed to murdering a six-year old girl three days after the murder occurred.[43] Between the time of the murder and the defendant's arrest, Los Angeles newspapers covered the manhunt for the accused.[44] On the day of Stroble's arrest, the media printed excerpts from his confession, which had been released by the district attorney's office.[45] Stories in the following days described Stroble as a "werewolf," a "fiend" and a "sex-mad killer."[46] The stories also included the district

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[39] Patterson v. Colorado, 205 U.S. 454, 462 (1907).

[40] *See generally* Hardaway & Tumminello, *supra* note 26, at 50-68; John A. Walton, *From O.J. to Tim McVeigh and Beyond: The Supreme Court's Totality of Circumstances Test as Ringmaster in the Expanding Media Circus*, 75 DENV. U. L. REV. 549 (1998).

[41] Walton, *supra* note 40, at 555.

[42] 343 U.S. 181 (1952)

[43] *Id.* at 185.

[44] *Id.* at 192.

[45] *Id.*

[46] *Id.*

attorney's rhetoric that the defendant was sane and guilty.[47]

The Court rejected the defendant's argument that the newspaper articles were so inflammatory that a fair trial in Los Angeles was impossible.[48] The Court said the defendant did not make an "affirmative showing" that the coverage actually prejudiced any juror.[49] The Court also noted that Stroble never moved for a change of venue or complained of the publicity until after he was convicted.[50]

The requirement the Court set out in *Stroble* that the defendant must prove actual juror prejudice before a conviction was challenged in a series of subsequent cases. In 1959 in *Marshall v. United States*, the Court reversed a federal district court conviction because the jury was exposed to newspaper accounts revealing the defendant's previous convictions.[51] Just two years later, in *Irvin v. Dowd*, the Court overturned a murder conviction based on the lack of an impartial jury.[52] In the 1961 case, the Court established a structural framework to evaluate potential juror prejudice.[53] The Court held that it is not required "that the jurors be totally ignorant of the facts and issues involved."[54] Further, the Court recognized that in an era of "widespread and diverse

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[47] *Id.*

[48] *Id.* at 193.

[49] *Stroble*, 343 U.S. at 195.

[50] *Id.* at 193-94.

[51] 360 U.S. 310, 313 (1959).

[52] 366 U.S. 717 (1961).

[53] *Id.*

[54] *Id.* at 722.

methods of communication," important cases would be highly publicized and would likely garner the interest of the community.[55] Therefore, many potentially qualified jurors would likely have an impression or have formed an opinion of the case before serving on a jury panel.[56] The Court said that for a juror to be disqualified, his opinion has to be so strong that it could not be overcome by the testimony and evidence introduced at trial.[57] In *Irvin*, the trial transcript indicated that eight out of the twelve jurors stated during *voir dire* that they believed the defendant was guilty.[58] In this case, the Court found this to be evidence of constitutionally impermissible bias.[59]

In 1963, the Court departed from its requirement that the defendant show actual prejudice before succeeding on a Sixth Amendment claim.[60] Instead, it adopted the implied rationale in *Marshall*, which allowed for reversal of conviction based on presumed prejudice.[61] The case, *Rideau v. Louisiana*, involved a defendant arrested for robbing a bank, kidnapping bank employees, and murdering one of them.[62] After the arrest, the sheriff filmed an interview with the accused in which he confessed.[63] During

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[55] *Id.*

[56] *Irvin*, 366 U.S. at 722-23.

[57] *Id.* at 722-23.

[58] *Id.* at 727.

[59] *Id.* at 728-29.

[60] *See* Rideau v. Louisiana, 373 U.S. 723 (1963).

[61] *Id.*

[62] *Id.* at 723-24.

[63] *Id.* at 724.

the following three days, local television stations broadcast the recorded interview, which was viewed by approximately 97,000 of the area's 150,000 residents.[64] The trial judge denied a motion for change of venue, and the jury convicted the defendant and sentenced him to death.[65] Instead of examining the *voir dire* transcript, as it had in the past, the Court held the possibility of jurors seeing the televised confession was enough to establish a presumption of juror bias because the trial judge did not grant the change of venue motion.[66] Courts relied on this reduced standard of presumed prejudice during the following decade.[67]

Two years later, the Court addressed pretrial publicity again in *Estes v. Texas*.[68] In a 5-4 decision, the Court held that the television broadcast of a defendant's pretrial and trial proceedings was sufficient grounds to warrant reversal of his conviction and stated such publicity violated the defendant's due process rights.[69] The majority explained that a due process violation does not require the showing of actual, identifiable prejudice, but rather, it can also be presumed from actions or procedures employed by the state during the judicial process. Additionally, the Court commented on the invention of television and its

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[64] *Id.*

[65] *Rideau*, 373 U.S. at 724-25.

[66] *Id.* at 727.

[67] *See, e.g.*, United States v. Macino, 468 F.2d 750, 752 (7th Cir. 1973) (stating that "prejudice … must, at some point, be presumed to result from an inordinate delay in bringing a defendant to trial"); United States v. DeTienne, 468 F.2d 151, 156 (7th Cir. 1972) (finding that a 19-month post-indictment delay in prosecution gave rise to certain amount of presumed prejudice); United States v. Canty, 469 F.2d 114, 125 (D.C. Cir. 1972) ("One significant form of prejudice is prolonged detention which can be imposed on a defendant…").

[68] 381 U.S. 532 (1965).

[69] *Id.* at 585-586.

rise in popularity in relation to the courtroom: "But the television camera, like other technological innovations, is not entitled to pervade the lives of everyone in disregard of constitutionally protected rights."[70] Although the Court recognized the right of the broadcast media to be in the courtroom observing, it was clear that cameras would disrupt the "hallowed sanctuary, where the lives, liberty, and property of people are in jeopardy."[71]

The presumed prejudice doctrine reached a pinnacle in the infamous *Sheppard v. Maxwell* case.[72] The 1966 case involved the brutal murder of Marilyn Sheppard, Dr. Sam Sheppard's pregnant wife, who was bludgeoned to death in their home.[73] From the beginning, the police's investigation focused on Dr. Sheppard as the main suspect.[74] The media intensely covered the story and demanded action be taken against Dr. Sheppard.[75] He maintained his innocence.[76] Headlines stated Dr. Sheppard refused to partake in a lie-detector test and stressed his lack of cooperation with the authorities.[77] After Sheppard was arrested, the publicity grew in intensity and the trial judge even encouraged the

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[70] *Id.* at 585.

[71] *Estes*, 381 U.S. 532 at 585-86.

[72] 384 U.S. 333 (1966).

[73] *Id.* at 335-36.

[74] *Id.* at 337.

[75] *Id.* at 340.

[76] *Id.*

[77] *Id.* at 338.

coverage, reserving most of the courtroom for the press.[78] The media continually broadcast and photographed throughout the trial.[79] Reporters eavesdropped on conversations between Dr. Sheppard and his attorney and would publish details in the newspaper, accessible to the jury.[80] The jury subsequently convicted Dr. Sheppard.

Sheppard v. Maxwell has become the quintessential example of a "media circus." In an 8-1 decision, the Court reversed Dr. Sheppard's conviction and remanded the case for new trial. In its decision, the Court listed nine instances of "flagrant" judicially encouraged press abuses.[81] The Court said "[l]egal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper."[82] The Court used the totality of the circumstances approach it established in *Estes* and *Rideau* to find presumption of a reasonable likelihood of prejudice resulting from pretrial publicity.[83] Actual evidence that prejudice existed within the jury was not required.[84] The Court emphasized the importance of courts taking steps through rules and regulations to protect the jury from outside influences.[85] When courts do not take these steps to insulate juries, the Court can and will presume that a jury was prejudiced against a defendant.

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[78] *Id.* at 343.

[79] *Id.*

[80] *Sheppard*, 384 U.S. at 344.

[81] *Id.* at 345-49.

[82] *Id.* at 350.

[83] *Id.* at 351-52.

[84] *Id.*

[85] *Id.* at 363.

The Court's decisions in *Estes* and *Sheppard* demonstrated its willingness to reverse criminal convictions in cases where pretrial publicity led to a presumption of unfairness in the trial process. In 1975, the Court revisited pretrial publicity, and this time, was less willing to presume prejudice as it had in the past.[86] *Murphy v. Florida* involved defendant "Murph the Surf," an animated jewel thief, who first became known for his role in the theft of the Star of India sapphire from a New York museum.[87] The trial drew extensive media coverage.[88] *Voir dire* indicated that some of the jurors knew about the defendant's past criminal convictions from press coverage, and one juror stated he may be inclined to find the defendant guilty.[89] The jury convicted the defendant, and the Court upheld the conviction. Interpreting *Irvin*, *Rideau*, *Estes*, and *Sheppard*, the Court formulated a new two-part test. The Court held that jury prejudice would be presumed where there is an apparent departure from fundamental due process and decorum and there is an intrusion of external influences.[90] For example, in *Estes* and *Sheppard*, the Court allowed the media unprecedented access in nearly all areas of the courtroom.[91] In *Irvin* and *Rideau*, the press published the defendant's confessions, given to the media by people who were a part of the legal process.[92]

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[86] *See* Murphy v. Florida, 421 U.S. 794 (1975).

[87] *Id.* at 795.

[88] *Id.*

[89] *Id.* at 800-02.

[90] *Id.* at 799.

[91] *Id.*

[92] *Id.* at 798.

In *Murphy*, the Court found that the trial court's actions were not enough to presume juror impartiality — indicating they could have taken more control.[93] The Court then examined the case under the second prong of the test, which is whether there were "any indications in the totality of [the] circumstances that petitioner's trial was not fundamentally fair."[94] The Court said that this standard does not require that jurors be completely ignorant of facts and issues, but instead it focuses on whether a juror can put aside personal impression and opinions and render a verdict based on the evidence and testimony presented in court.[95] The Court focused on three main indicators: (1) the *voir dire* record, looking for juror hostility; (2) the atmosphere of the community at the time of the trial; and (3) the length to which the trial court had to go to select impartial jurors.[96] In its analysis, the Court found that even with some potential exposure to pretrial publicity, that the *Murphy* jury was sufficiently impartial.[97]

The Court reaffirmed its hesitance to reverse convictions potentially tainted by pretrial publicity in its 1984 decision in *Patton v. Yount*.[98] In this case, the Court relied on the *Irvin* premise that intense negative publicity could create a presumption of prejudice.[99] The Court, however, focused the majority of its analysis on the idea that a

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[93] *Id.* at 799.

[94] *Murphy*, 421 U.S. at 799.

[95] *Id.* at 800.

[96] *Id.* at 802-03.

[97] *Id.* at 803.

[98] 467 U.S. 1025 (1984).

[99] *Id.* at 1031, 1035.

trial court's finding of juror impartiality could be overturned only when there was manifest error.[100] This standard is much more difficult for a defendant to meet. The Pennsylvania Supreme Court had remanded the defendant's original conviction for a second trial after a finding that his confession has been secured improperly.[101] After a second conviction by a jury, the Pennsylvania Supreme Court found that the publicity between the first and second trials was less inflamed and softened community views about the case.[102] The Court therefore held that the passage of time between the trials rebutted any presumption of jury bias.[103] The Court also held that questions of whether jurors have disqualifying opinions about the case are a question of fact, and that the trial court's findings are afforded a presumption of correctness.[104]

The test articulated and applied in *Murphy* and *Patton* recognizes that publicity issues will be different in each case, and the two-prong test provides for the law to be decided on a case-by-case basis. It also gives the trial courts wide discretion in developing remedial measures. This pre-social media precedent provides important insight into how the Supreme Court has attempted to balance the First and Sixth Amendments in the context of the courtroom.

III. JUDICIAL REMEDIES AVAILABLE TO COURTS

As the Supreme Court noted in several of the cases discussed above, it expects trial

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[100] *Id.* at 1031.

[101] *See* Commonwealth v. Yount, 256 A.2d. 464, 466 (Pa. 1969).

[102] *See* Commonwealth v. Yount, 314 A.2d 242, 247-48 (Pa. 1974).

[103] *Patton*, 467 U.S. at 1031-32.

[104] *Id.* at 1036-37.

courts to utilize a variety of techniques to minimize the potential for juror impartiality. These judicial "tools" include change of venue, *voir dire*, judicial instructions, continuance and jury sequestration, among others.[105] The main problem with these options, however, is little consensus exists as to what it means to have an impartial jury, despite more than 100 years of Supreme Court decisions on the issue. Must the jury panel have no biases or opinions? Or is it more important that the individuals on the jury panel believe that they can put their biases and opinions aside and base their decision on the testimony and evidence presented at trial? Should a jury panel just comprise an equal number of jurors biased toward and against the defendant to even the playing field? What about keeping the jury impartial once the trial has begun?

The consideration of these questions plays a role in determining what techniques might ensure there is an "impartial" jury. Before the rise of social media and the smartphone, courts had previously considered how to employ these tools relevant to the prevalence of what were viewed as the new pervasive media technologies of the time.[106] The techniques available to judges are discussed below.

A. Change of Venue

Change of venue involves moving the trial out of the current jurisdiction to another

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[105] John S. Carroll, Norbet L. Kerr, James J. Alfini, Francis M. Weaver, Robert J. MacCoun, & Valerie Feldmen, *Free Press and Fair Trial: The Role of Behavioral Research,* 10 LAW & HUM. BEHAV. 187, 192 (1986) (noting that *voir dire*, jury instructions, sequestration, continuance, additional peremptory challenges, and gag orders on attorneys are all useful tools for dealing with jury bias) [hereinafter Carroll, et al.].

[106] For more on the history of media innovation and its relationship to the regulation of free speech, *see generally* TIM WU, THE MASTER SWITCH: THE RISE AND FALL OF INFORMATION EMPIRES (2011).

one.[107] Courts are generally cautious in granting motions for change of venue, especially if the motion is based solely on concerns surrounding pretrial publicity.[108] In the high profile trial of Jack Ruby for shooting Lee Harvey Oswald, the man who assassinated President John F. Kennedy, the judge refused to grant a motion for change of venue based upon concerns over pretrial publicity, even when it was likely most Dallas residents had seen the video clip of Ruby shooting Oswald.[109]

A change of venue can also create constitutional concerns, however, because the Sixth Amendment also provides that a defendant has a right to a trial before "a jury of the State and district wherein the crime shall have been committed."[110] However, because defendants often bring these motions, this often cures such concerns. But a change of venue may prove ineffective as a remedy to quell pretrial publicity, especially if the media coverage has not been limited to the area in which the crime was committed. Take for example the trial of Casey Anthony, the young mother prosecuted for killing her toddler daughter Caylee.[111] Although the alleged crime and the trial took place in Florida,

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[107] *See* 28 U.S.C. § 1404 (1988) (providing that judges may change the trial location "in the interest of justice" to a venue in which the case could have been brought); FED. R. CRIM. P. 21 (a) (stating a court "must transfer the proceeding against a defendant to another district if the court is satisfied that so great a prejudice against the defendant exists in the transferring district that the defendant cannot obtain a fair and impartial trial there"). Many states have similar statutes and court rules. For a comprehensive look at individual states, *see* Erwin S. Barbre, *Change of venue by state in criminal case*, 46 A.L.R.3d 295 (1972).

[108] *See* Newton Minow & Fred Cate, *Who is an Impartial Juror in an Age of Mass Media?*, 40 AM. U. L. Rev. 631, 647 (1991).

[109] Minow & Cate, *supra* note 108, at 647 (citing M. BELLI, MY LIFE ON TRIAL 260-61 (1976) (discussing the events of the Ruby trial)).

[110] U.S. CONST. amend. VI.

[111] *See generally*, Nicholas A. Battaglia, Comment, *The Casey Anthony Trial and Wrongful Exonerations: How "Trial By Media" Cases Diminish Public Confidence in the Criminal Justice System*, 75 Alb. L. Rev. 1579 (2012).

media coverage extended across the country and was delivered through a variety of media platforms.[112] A change of venue, although requested by Anthony,[113] would likely not have helped address pretrial publicity concerns in that case. The judge agreed and denied the motion. In addition, a change of venue burdens the prosecution, witnesses, and others who would have to travel to take part in the court proceedings.

B. Continuance

Granting a continuance involves delaying the trial.[114] Like change of venue, courts are also reluctant to grant these motions,[115] in part because of potential issues with records, burdens on witnesses, and potentially fading memories of witnesses.[116] Additionally, when continuances are granted they may implicate a defendant's Sixth Amendment right to a "speedy and public trial."[117] Continuance is one of the least studied remedies for curbing issues related to pretrial publicity, but the results of one study show that a 12-day continuance proved ineffective in reducing jury bias created by "emotional publicity," referring to publication of graphic crime scene photographs.[118] Courts

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[112] *Id.*

[113] Defendant's Motion for Change of Venue, State of Florida v. Casey Marie Anthony (May 4, 2009), *available at* http://i.cdn.turner.com/cnn/2009/images/05/04/casey.anthony.motion.pdf.

[114] Continuance involves the adjournment or postponement of a trial or other proceeding until a future date. BLACK'S LAW DICTIONARY (9th ed. 2009), continuance.

[115] ALFRED FRIENDLY & RONALD GOLDFARB, CRIME AND PUBLICITY: THE IMPACT OF NEWS ON THE ADMINISTRATION OF JUSTICE 99 (1967).

[116] Morris v. Slappy, 461 U.S. 1, 15 (1983) (discussing the problem with continued or repeated trials).

[117] U.S. CONST. amend. VI.

[118] Geoffrey P. Kramer, Norbert L. Kerr & John S. Carroll, *Pretrial Publicity, Judicial Remedies, and Jury Bias*, 14 LAW & HUM. BEHAV. 409, 432 (1990).

infrequently employ continuances on the grounds of pretrial publicity, even though they are granted for a number of other reasons on a fairly regular basis.[119]

C. *Voir Dire*

Once the pretrial procedures have concluded and the beginning stages of the trial are under way, the next technique the court can utilize is the *voir dire* examination of prospective jurors. This procedure varies by jurisdiction, but generally both parties are permitted to question potential jurors in an effort to decide whether they can be impartial.[120] By questioning jurors, an attorney or the judge may be able to determine that a potential juror's exposure to pretrial publicity caused the juror to form an opinion or impression that cannot be overcome.[121] However, for the publicity to bias a potential juror, it must have been negative, or inaccurate and misleading as to the facts.[122] The right to challenge a juror for cause is available in all jurisdictions.[123] If a challenge for cause is overruled, the juror may also be challenged peremptorily.[124] Each jurisdiction allows some number of peremptory challenges, for which no cause is needed to have the

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[119] *See* FRIENDLY & GOLDFARB, *supra* note 115, at 99.

[120] FED. R. CIV. P. 47(a) (governing questioning of jurors in a civil trial setting); FED. R. CRIM. P. 24 (a) (governing the questioning of jurors in a criminal trial setting). The *voir dire* process in criminal cases is most relevant to this thesis. For a broad overview of *voir dire* in criminal trials, *see* Anne Payne & Christine Coe, *Jury Selection and Voir Dire in Criminal Cases*, 76 AM. JUR. TRIALS 127 (2000).

[121] Payne & Coe, *supra* note 120, at § 36.

[122] *Id.*

[123] *See generally*, id.

[124] *Id.*

juror dismissed.[125]

Voir dire has been found to be a popular tool among judges,[126] but it is unclear whether the process proves effective in uncovering jury bias. Some research suggests that *voir dire* is not adequate for this task.[127] For example, Phoebe Ellsworth, a professor of law and psychology at the University of Michigan, argued that the goal of *voir dire* is incorrectly set to find incompetent jurors, rather than focused on finding jurors with expertise or an education.[128] Other critics of the process have stated that *voir dire* fails to elicit honest or accurate responses from potential jurors.[129] Although a popular tool among the judiciary, *voir dire* is likely just an additional technique alongside the other tools that may help uncover jury bias. Alone, it may not be the end-all-be-all solution some in the legal community desire.

D. Sequestration

Once jurors have been selected and impaneled for a particular trial, there are still

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[125] *Id.* However, peremptory challenges are not allowed solely on the basis of discriminatory classifications. *See, e.g.*, Batson v. Kentucky, 476 U.S. 79 (1986) (ruling that a prosecutor's use of peremptory challenge may not be used to exclude jurors based solely on their race).

[126] Carroll, et al., *supra* note 105, at 192 (stating judges are strong believers in *voir dire*).

[127] *See, e.g.*, Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, 52 LAW & CONTEMP. PROBS. 205, 206-07 (1989) (suggesting the goal of *voir dire* is incorrectly set to find incompetent jurors, rather than finding jurors with expertise or more education); Dale W. Broeder, *The University of Chicago Jury Project*, 38 Neb. L. Rev. 744, 753 (1959) (indicating that *voir dire* is a tool to jurors' indoctrination to a particular view, rather the searching for qualified jurors).

[128] Ellsworth, *supra* note 127, at 206-07.

[129] *See, e.g.*, Susan E. Jones, *Judge Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 LAW & HUM. BEHAV. 131, 134 (1987) (implying the formal courtroom environment hinders self-disclosure of jurors); Neal Bush, *The Case for Expansive Voir Dire*, 2 Law & Psychology Rev. 9, 13 (1976) (stating potential jurors often lie in order to remain on a jury); Dale Broeder, *Voir Dire Examinations: An Empirical Study*, 38 S. CAL. L. REV. 503, 528 (1965) (concluding that jurors are likely to lie, either consciously or unconsciously, when questioned publically about their views).

remedies available to the bench to minimize the potential for judicial bias. One of those is jury sequestration, where the court will isolate the jury for the duration of the trial to prevent jury tampering or exposure to publicity.[130] The threat of juror exposure to continued media publicity during a trial has influenced many decisions to sequester juries. This has particularly held true in high-profile trials, including the trials of Charles Manson,[131] Patty Hearst,[132] and O.J. Simpson.[133] During a trial, there are three main concerns with exposure to media coverage: (1) discussion of evidence that is inadmissible in trial;[134] (2) opinion commentary on the evidence;[135] and (3) exposure to public sentiment that may be impassioned by the publicity that could inflame a juror.[136]

Three arguments emerge in support of using sequestration for this purpose.[137] First, jury exposure to publicity violates the defendant's right to an impartial jury.[138] Second,

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[130] BLACK'S LAW DICTIONARY (9th ed., 2009), sequestration). For a general overview of jury sequestration in criminal trials, *see* Allan E. Korpela, *Separation of jury in criminal case during trial-modern cases*, 72 A.L.R.3d 131 (1976).

[131] People v. Manson, 61 Cal. App. 3d 102, 185-91 (Cal. Ct. App. 1976).

[132] United States v. Hearst, 412 F. Supp. 873, 876 (N.D. Cal. 1976).

[133] *See* Defendant's Motion to Immediately Sequester the Jury, People v. Simpson, (Cal. Super. Doc. Dec. 28, 1994) (No. BA097211), *available in* 1994 WL 731499.

[134] *See, e.g.*, United States v. Thompson, 908 F.2d 648, 649-51 (10th Cir. 1990) (finding reversible error when the trial court failed to discover if jurors seen reading newspapers had read a highly prejudicial article concerning an inadmissible, withdrawn guilty plea by defendant).

[135] During the O.J. Simpson trial, the commentary on the trial itself became news; there was significant discussion of the role of commentators and their influence on the public. *See* Erwin Chemerinsky & Laurie Levenson, *The Legal Ethics of Being a Legal Commentator*, 69 S. CAL. L. REV. 1303 (1996).

[136] *See generally* FRIENDLY & GOLDFARB, *supra* note 115 (discussing ways in which media coverage may jeopardize the impartiality of a jury).

[137] *See* Marcy Strauss, *Sequestration*, 24 Am. J. Crim. L. 63, 78 (1996).

[138] *Id.*

no other viable alternatives to sequestration ensure that jurors are not exposed to such publicity.[139] And finally, jury sequestration is the most effective way to ensure that the jury only considers the evidence presented at trial. The effectiveness of sequestration is based upon a premise that all of the arguments are true and that pretrial publicity has a negative impact.[140] However, there is plenty of empirical research to contest the negative impact of pretrial publicity. One researcher explained:

> Survey studies on pretrial publicity reliably show pretrial publicity effects in the absence of a trial, but tell us nothing about whether or not this bias would persist through a trial. Many of the studies that demonstrate pretrial publicity effects do so with the presentation of little or no trial evidence.[141]

Another observation that calls into question the ability of sequestration to fully insulate judicial proceedings from publicity is that there is no such option to sequester the judge.[142] We trust that the trier of fact, even if exposed to outside publicity, will make rulings based upon the law and evidence, but we do not afford this same trust to juries.[143] This is likely in large part because judges make ruling based upon the law rather than facts and are bound by professional and ethical duties that jurors are not. But despite the critiques it receives, sequestration remains one option in fighting off juror exposure to external information about a trial.

E. Jury Instructions

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[139] *Id.*

[140] *Id.*

[141] *See* Amy L. Otto, Steven D. Penrod & Hedy R. Dexter, *The Biasing Impact of Pre-Trial Publicity on Juror Judgment*, 18 LAW & HUM. BEHAV. 453, 456 (1994).

[142] Strauss, *supra* note 137, at 82-83.

[143] *Id.*

While impaneling the jury, judges often issue jury instructions in the form of directions or guidelines concerning the case.[144] In the case of pretrial publicity, this often includes telling the jury to ignore information outside of the courtroom or to refrain from discussing the case or looking at outside information.[145] Social science research suggests these instructions are ineffective.[146] Judge Learned Hand called these types of instructions "placebo,"[147] requiring the jury to do a "mental gymnastic which is beyond, not only their powers, but anybody's else. [sic]"[148]

F. Jury Deliberation

Jury deliberations occur at the conclusion of trial,[149] and many researchers have cited them as an important tool to minimize the impact of bias on the verdict. However, other research has suggested that the group dynamics of deliberation may actually end up polarized and dominated by individual opinions.[150] One concern is that a small amount of bias on the part of one individual can be intensified during group deliberations. For example, a study by Professors Norbert Kerr and Robert MacCoun showed jury

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[144] BLACK'S LAW DICTIONARY (9th ed. 2009), jury instruction.

[145] *Id.*

[146] *See, e.g.*, Joel D. Liberman and Bruce D. Sales, *What Social Science Teaches Us About the Jury Instruction Process*, 3 PSYCH. PUB. POL. and L. 589 (1997).

[147] United States v. Delli Paoli, 229 F.2d 319, 321 (2d Cir. 1956) (noting that few people can disregard evidence or correct their thoughts because of an instruction telling them to do so).

[148] Nash v. United States, 54 F.2d 1006, 1007 (2d Cir. 1932) (stating that evidentiary rule can impede the search for truth).

[149] Jury deliberations involve jurors carefully considering issues and options before they make a decision or take an action. This is particularly important when the jury reaches a verdict by analyzing, discussing, and weighing the evidence presented at trial. BLACK'S LAW DICTIONARY (9th ed. 2009), deliberation.

[150] *See, e.g.*, Norbert L. Kerr, Robert J. MacCoun, and Geoffrey P. Kramer, *Bias in Judgment: Comparing Individuals and Groups*, 103 PYSCH. REV. 687 (1996).

deliberation tends to exaggerate the initial bias of individual jurors.[151] This indicates that jury deliberations cannot be relied upon to counter issues of jury bias.

IV. THE CONCEPT OF AN "IMPARTIAL" JURY IN THE AGE OF "TWEETS" AND "LIKES"

Much of the pretrial publicity case law and commentary on judicial remedies predates the social media phenomenon. Supreme Court precedent related to dealing with jury bias was decided long before the average American owned a smartphone, allowing them to readily access the Internet and real-time tools that allow for both public and private communication. The changes in technology and changes in the availability of media public consumption further complicate the discussion about what it means to have an "impartial" jury in the digital age?

A. The Rise of Social Media and Internet Misconduct

The Internet has provided individuals with access to vast amounts of information in seconds, and in more recent years, has provided users with services that allow them to instantly post their thoughts to millions while eliciting immediate responses through "social networking" or "social media" platforms.[152] Social media services enable users to connect and communicate with networks of friends. The most well-known of these

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[151] Norbert L. Kerr & Robert J. MacCoun, *The Effects of Jury Size and Polling Method on the Process and Product of Jury Deliberation*, J. of 48 Personality & Soc. Psych. 349 (1985).

[152] *See, e.g.*, Lisa Hoover, *How Social Media Has Changed Society*, PC WORLD, Apr. 7, 2009, http://www.pcworld.com/article/162719/social_networks.html; STATE OF THE MEDIA: THE SOCIAL MEDIA REPORT, THE NIELSEN CO. 1, 4 (2012) [hereinafter NIELSEN REPORT] (finding the popularity of social networks continues to grow with people spending 20% of their time on their computer and 30% of their time on their mobile phone on social networks).

services in the United States are Facebook and Twitter.[153] Facebook allows users to connect by "friending" each other, commenting on users' "walls," posting statuses and photos with the ability to "tag" friends, the ability to "like" friends' posts, and instantly chat with friends, among other features.[154] A user's profile and actions on Facebook are public unless the individual changes his privacy settings.[155] Founded in 2004, Facebook now claims it has more than 1 billion users.[156] Users can access the service on either an Internet-connected device or through the Facebook smartphone application or "app."[157]

Launched in 2006, Twitter is a social networking and microblogging service that allows users to send a "tweet," or a short post of 140 characters or less.[158] Users can send and receive tweets, and they may also re-tweet the posts of others.[159] A user's tweets are public unless the individual changes his privacy settings.[160] Twitter does not publish specific demographic information, but it is clear that the website has continued to grow in popularity.[161] By March 2011, Twitter announced it had 140 million users,[162] and users

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[153] *See* NIELSEN REPORT, *supra* note 152 at 2.

[154] *Timeline*, FACEBOOK, http://newsroom.fb.com/Timeline (last visited April 1, 2013).

[155] *Safety and Privacy*, FACEBOOK, http://newsroom.fb.com/Safety-and-Privacy (last visited April 1, 2013).

[156] *Key Facts*, FACEBOOK, http://newsroom.fb.com/Key-Facts (last visited April 1, 2013); Geoffrey A. Fowler, *Facebook: One Billion and Counting*, WALL ST. J., Oct. 4, 2012, http://online.wsj.com/article/SB10000872396390443635404578036164027386112.html.

[157] *Platform*, FACEBOOK, http://newsroom.fb.com/Platform (last visited April 1, 2013).

[158] *About Twitter*, TWITTER, https://twitter.com/about (last visited April 1, 2013).

[159] *Id.*

[160] *Twitter Privacy Policy*, TWITTER, https://twitter.com/privacy (last visited April 1, 2013).

[161] Chris Taylor, *Does Twitter Have Half a Billion Users?*, MASHABLE (July 30, 2012), http://mashable.com/2012/07/30/twitter-users-500-million/.

reportedly sent 350 billion tweets per day as of 2012.[163] Beyond these two social media giants, other "sharing" platforms, including Google Plus, Tumblr, Pinterest, LinkedIn, and now Facebook-owned Instagram, have also gained popularity in the United States.[164]

The judicial system was quickly exposed to social media. Modern lawyers are frequently using social media to prepare for cases. For example, lawyers often turn to social media to discover information about potential jurors, opposing counsel, and sometimes even the judge.[165] Journalists have also used platforms like Twitter to "live tweet" from the courtroom.[166] Even federal and state courts are beginning to develop their own social media presence.[167]

B. The Impartial Jury and Exposure to External Communications

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[162] *Id.*

[163] Charlie White, *Reaching 200 Million Accounts: Twitter's Explosive Growth*, MASHABLE, July 17, 2011, http://mashable.com/2011/07/16/twitter-accounts-200-million/.

[164] *See* NIELSEN REPORT, *supra* note 152 at 2, 10 (noting Pinterest had the greatest year-over-year audience growth). It is important to note that social media popularity is not just concentrated in the United States, but rather has strong audiences and participants worldwide. *Id.* The focus of this thesis is on the United States and its judicial system. For an article exploring the issue of social media and jurors in the United Kingdom, *see*, Nicola Haralambous, Educating jurors: technology, the Internet and the jury system, 19 Info. & Comm. Tech. L. 255 (2010).

[165] For a more in-depth discussion of how attorneys use social media to investigate jurors online, *see infra* Part VI, subsection 2.

[166] *See Live Blogging and Tweeting from Court*, DIGITAL MEDIA LAW PROJECT, (Feb. 8, 2010), http://www.dmlp.org/legal-guide/live-blogging-and-tweeting-from-court.

[167] *AOCs and High Courts Using New Media*, NATIONAL CENTER FOR STATE COURTS, KNOWLEDGE AND INFORMATION SERVICES DIVISION, http://www.ncsc.org/Topics/Media/Social-Media-and-the-Courts/~/media/Files/PDF/Information%20and%20Resources/State%20List%20May%2011%202012.ashx (last visited Apr. 19, 2013).

As discussed previously, the Sixth Amendment guarantees defendants "the right to a speedy and public trial, by an impartial jury."[168] Courts have interpreted this provision of the Constitution to mean that jurors may not communicate with anyone other than officers of the court and other jurors about the case in which they are impaneled. Jurors are typically prohibited from conducting outside research, discussing the case with other jurors outside of deliberations, reading or watching any news reports about the trial, or discussing the case with non-jury members at all before the proceedings are completed.[169] In *Remmer v. United States*,[170] the Supreme Court held 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.[171]

Recall also, Justice Holmes' declaration in *Patterson v. Colorado* that "the theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."[172]

The Third Circuit recognized that the opportunity for such "outside influence" to find its way into the minds of jurors has vastly increased since Justice Holmes'

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[168] U.S. CONST., amend. VI.

[169] *See, e.g.*, U.S. v. Fumo, 655 F. 3d 288, 331 (3d Cir. 2011) ("Jurors are not supposed to discuss the cases they hear outside the jury deliberation room.").

[170] 347 U.S. 227 (1954).

[171] *Id*. at 229

[172] Patterson v. Colorado, 205 U.S. 454, 462 (1907).

pronouncement more than 100 years ago. "Justice Holmes, of course, never encountered a juror who 'tweets' during the trial."[173] A juror's ability to instantly communicate with the masses, even from within the jury box, has resulted in widespread media coverage[174] and bar journal articles[175] concerned over the potential for a heightened risk of outside influences entering the courtroom.

According to a recent survey administered by the Federal Judicial Center, only six percent of district court judges said they have experienced jurors using social media to communicate during a trial or deliberation.[176] But some have questioned the reliability of the survey. Alison Frankel of ThompsonReuters' "On the Case" blog pointed out that most Americans can access the Internet from their cellphones, which a judge is unlikely to witness, so these survey results likely underestimated the extent to which jurors are engaging in Internet-related misconduct without getting caught.[177] With easy access and widespread use, "[t]he Internet and social networking sites . . . have simply made it

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[173] *Id*.

[174] *See, e.g.*, Steve Eder, *Jurors' Tweets Upend Trials*, WALL ST. J. (March 5, 2012), http://online.wsj.com/article/SB10001424052970204571404577255532262181656.html; John Schwartz, *As Jurors Turn to Web, Mistrials Are Popping Up*, NY TIMES (Mar. 17, 2009), http://www.nytimes.com/2009/03/18/us/18juries.html?pagewanted=all.

[175] *See, e.g.*, Richard Raysman & Peter Brown, Social Media Use and Researching Jurors in the Courtroom, NY L. J. (Apr. 9, 2013), http://www.newyorklawjournal.com/PubArticleNY.jsp?id=1202595249917&Social_Media_Use_and_Researching_Jurors_in_the_Courtroom&slreturn=20130317205055.

[176] 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 (Federal Judicial Center, Nov. 22, 2011) [hereinafter "FJC STUDY"].

[177] Alison Frankel, *On The Case: Few Judges See Social-Media Problems With Juries*, THOMSON REUTERS NEWS & INSIGHT, Jan. 25 2012 (questioning the accuracy of a FJC study that found only six percent of Federal District Court judges had experienced jurors using social media during service) *available at* http://newsandinsight.thomsonreuters.com/Legal/News/2012/01_-_January/Few_judges_see_social-media_problems_with_juries/.

quicker and easier to engage more privately in juror misconduct, compromise the secrecy of [jury] deliberations, and abase the sanctity of the decision-making process."[178]

On the other hand, law professor Thaddeus Hoffmeister pointed out that, despite the anecdotal discussions and catchy names, such as "Twitter Effect," "Google Mistrials," and "Internet-Tainted Jurors," there is little academic research on the issue. Hoffmeister questions whether juror use of social media is actually a pervasive and growing problem that is truly different from past concerns over juror impartiality.[179] He explains this lack of research by noting that juror use of social media is an emerging issue and that juror misconduct in "historically an under-examined area of the law."[180]

These two viewpoints exemplify the disagreement among scholars as to whether this issue is truly a problem. Differing results in the current empirical research furthers divergent opinions as to how often this type of conduct is actually occurring. Regardless of how problematic one views juror conduct online, it is certain that when it occurs, it will make headlines. The newness, uncertainty, and public interest surrounding this issue make it ripe for further research.

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[178] *Id*. at 1332. *See also*, *id*. ("Not unlike a juror who speaks with friends or family members about a trial before the verdicts is returned, a juror who comments about a case on the internet or social media may engender responses that include extraneous information about the case, or attempts to exercise persuasion and influence, . . . the risk of such prejudicial communication may be greater when a juror comments on a blog or social media . . . given that the universe of individuals who are able to see and respond to a common on Facebook or a blog is significantly larger.").

[179] Thaddeus Hoffmeister, *Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age*, 83 U. COLO. L. REV. 409, 413-415 (2012).

[180] *Id*. at 414.

V. A MISTRIAL AT THEIR FINGERTIPS? CURRENT CASE LAW INVOLVING INSTANCES OF JUROR MISCONDUCT ONLINE

Internet-related juror misconduct comes in a variety of forms because of the wide range of services available online that allow individuals to share information. As discussed previously jurors may act as creators, consumers, or discussants. Jurors acting as creators may write a 140-character tweet on Twitter, craft a status update on Facebook, write a blog post, or comment on a website or blog. Jurors acting as consumers may use search engines like Google and Bing to conduct research or read a variety of online content about the trial for which they are a juror. Finally, jurors acting as discussants might engage in much of the conduct that a creator would, but in addition to creating and posting content using an online platform, the juror's actions would also include some kind of interactive element with the broader public like responding to comments from family and friends on Facebook. Across the country, jurors have used online platforms during trials in many of the ways discussed above, leading attorneys to assert that these jurors engaged in misconduct. With little consensus on how to deal with instances of juror misconduct online, courts have made ad-hoc decisions dependent on the facts of the individual situation.

A. Tweets and Posts

Juror misconduct challenges often occur when jurors use social media to share their sentiments about the case or jury duty in general. In *U.S. v. Fumo*,[181] the Third Circuit declined to overturn Pennsylvania State Senator Vincent Fumo's conviction for 137 counts of fraud, tax evasion and obstruction of justice where a juror had posted to his

[181] 655 F.3d 288 (3d Cir. 2011).

Facebook and Twitter pages about the trial.[182] The juror tweeted statements about his experience, stating he was "not sure about tomorrow," telling his followers to "[s]tay tuned for the big announcement . . . ." after the first week of deliberations, and before the jury announced its verdict, announcing, "[t]his is it . . . no looking back now!"[183] A local television news station discovered and reported the postings the night before the jury announced its verdict to the court.[184] The court in *Fumo* noted that not every post to a social media or Internet site results in exposure to extraneous information or juror partiality, and that the court must determine whether the post resulted in substantial prejudice toward the defendant.[185] The court denied Fumo's motion for a new trial. It held that the posts were "nothing more than harmless ramblings having no prejudicial effect" and therefore the defendant did not suffer substantial prejudice.[186]

The Supreme Court of Arkansas came to the opposite conclusion in *Dimas-Martinez v. State*.[187] The court in *Dimas-Martinez* reversed a capital murder conviction in part because one of the jury members tweeted about his jury duty experience during the trial and continued to post tweets after he was questioned and admonished for his

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[182] *Id*. at 298.

[183] *Id*.

[184] *Id*.

[185] *Id*. at 305.

[186] *Id*. at 306. *See also*, People v. McNeely, 2009 WL 428561,*7 (Ct. App. Cal. 2007) (refusing to find jury bias or misconduct where one juror published detailed posts about the trial and about the jury deliberations to a blog, holding that the juror's posts "do not raise a substantial likelihood that [the juror] was actually biased against [defendant].").

[187] 2011 Ark. 515 (Ark. 2011).

conduct.[188] Although the juror's tweets were similar to those of the juror in *Fumo* in that they were ambiguous and did not refer to specific facts of the case,[189] the court found that his tweets were "very much public discussions,"[190] and even if they did not elicit any response from third parties, they were inappropriate because "the possibility for prejudice is simply too high."[191] An important difference in this case, is that the court also based its decision in part on the fact that the juror admitted to the conduct and then deliberately ignored the court's specific and repeated instructions even after he was reprimanded.[192]

The Supreme Court of Massachusetts first addressed online juror misconduct in *Commonwealth v. Guisti*,[193] when it rejected a defendant's motion for a new trial where a juror sent an email to an 800-member listserv complaining about jury duty and stating, "Just say he's guilty and lets [sic] just get on with our lives!"[194] At least two people outside the jury responded to her emails.[195] The court held that the comment "reflect[ed] the juror's subjective view of the defendant's guilt at that time," and while the court

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[188] *Id*. at 14-15.

[189] The juror in *Dimas-Martinez* tweeted several times over the course of the trial. One of his tweets announced "Its [sic] over" exactly one hour before the jury announced it had reached a decision. *Id*.

[190] *Id*. at 15.

[191] *Id*. at 17 (noting that "[n]ot only can jurors access Facebook, Twitter, or other social media sites, but they can also access news sites that might have information about the case . . . [or] conduct research about many aspects of a case.").

[192] *Id*. at 16.

[193] 449 Mass. 1018 (Mass. 2007).

[194] Commonwealth v. Guisti, 434 Mass. 245, 249-250 (Mass. 2001).

[195] *Id*.

noted that the comment was improper, it declined to hold that the comment was sufficient to overturn the verdict.[196]

Five years after *Guisti*, a Massachusetts appellate court applied *Guisti* to a defendant's appeal from a denial of a motion for a new trial based on a two jurors' Facebook postings.[197] In *Commonwealth v. Werner*, both jurors made a series of postings related to their frustrations with juror duty and the length of the trial, which received comments from Facebook friends, including one juror's wife.[198] In using *Guisti* as a guide the court held that "the Facebook postings and juror testimony revealed no evidence of extraneous influences on the jury."[199] Further, the court found that because the postings were about jury service and nonspecific complaints that did not name the defendant or give trial details, they were less concerning.[200]

B. Communication Among Jurors

Another type of Internet-related juror misconduct involves one juror contacting other jurors or other parties to the litigation outside of deliberation. For example, in *Sluss v. Commonwealth*,[201] the Supreme Court of Kentucky held on a matter of first impression that the status of two jurors as "friends" of a victim's mother on Facebook was not, on its

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[196] *Id*. at 251-52. The court remanded the case for the trial court to conduct *voir dire* to discover whether the alleged responses could have influenced the juror. It found that the only responses were from attorneys cautioning the juror not to communicate about the case. The court concluded that the juror was not exposed to extraneous evidence. *Guisti*, 449 Mass. 1018, 1019.

[197] Commonwealth v. Werner, 967 N.E.2d 159 (2012).

[198] *Werner*, 967 N.E.2d 159 at 162.

[199] *Id.* at 166.

[200] *Id.* at 167.

[201] Sluss v. Commonwealth, 381 S.W.3d 215 (Ky. 2012).

own, a ground for a new trial based on juror bias.[202] However, the court did find that the defendant, on trial for vehicular homicide, was entitled to a post-trial hearing to determine if the misconduct resulted in juror bias.[203] The court noted that the case had received a large amount of publicity and that the record indicated that members of the community had discussed the case on social media websites like Facebook.[204] In addition, the mother of the victim posted information about the death of her daughter.[205] But the court also hesitated to assume a Facebook friendship carries the same weight as a friendship within a physical community.[206] "The degree of relationship between Facebook 'friends' varies greatly, from passing acquaintanceships and distant relatives to close friends and family," the court wrote, also acknowledging people have thousands of Facebook friends.[207] The court rejected the idea that all social media activity conducted by a juror immediately results in a mistrial.[208]

A court in Pennsylvania reached a different conclusion in *United States v. Juror Number One*,[209] where a juror was charged with criminal contempt and fined $1,000 for misconduct. Juror Number One in this case was empanelled, dismissed, and then replaced

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[202] *Id*. at 223.

[203] *Sluss*, 381 S.W.3d at 229-30.

[204] *Id.* at 221.

[205] *Id.*

[206] *Id.* at 222.

[207] *Id.*

[208] *Id.* at 229-30.

[209] 2011 WL 6412039 (E.D. Pa. Dec. 21, 2011).

with an alternate for employment reasons. After being dismissed, the juror sent emails to two other jurors who remained on the panel, informing them of her opinions of the case, including that she "would have found [Defendant] guilty on all 4 counts based on the facts as I heard them."[210] The court held the juror was guilty of contempt beyond a reasonable doubt because she willfully disobeyed the judge's specific and repeated instructions not to speak to anyone else until after the trial. The court did not find that the juror's conduct actually influenced the proceedings. Instead, it noted that the juror's emails "could have damaged the trial process, prejudiced the defendant, and/or resulted in a mistrial."[211]

C. The Google Mistrial

Some jurors adhere to court instructions prohibiting communication, yet use the Internet to commit other types of misconduct.[212] This type of conduct is generally beyond the scope of this thesis, but this section is included to provide a general overview of a related area of misconduct that if often discussed in tandem with issues related to juror use of social media. What the *New York Times* has dubbed the "Google mistrial"[213] occurs when a juror uses the Internet to research information outside the evidence and

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[210] *Id*. at *2.

[211] *Id*. at *5.

[212] The idea of the "Google mistrial" is not the main focus of this thesis, but examples of such cases have been included because this is issue is often discussed along with cases involving juror misconduct on social media.

[213] John Schwartz, *As Jurors Turn to Web, Mistrials Are Popping Up*, THE NEW YORK TIMES (Mar. 17, 2009) *available at* http://www.nytimes.com/2009/03/18/us/18juries.html?pagewanted=all.

arguments presented in court. In *Wardlaw v. State*,[214] the Court of Appeals of Maryland granted a motion for mistrial on the basis of juror misconduct where a juror used the Internet to research an illness at issue in the case. The defendant was convicted of rape and incest, and his daughter testified during the trial about the incest. Following the defendant's daughter's testimony, a behavioral therapist testified that the daughter had been diagnosed with Oppositional Defiant Disorder, but the witness did not explain the disorder. The juror researched the illness online and found that it was a disorder commonly associated with lying.[215] The juror disclosed her research to the other jurors. The court found that the juror's research and disclosure was "egregious misconduct" that "improperly and irreparably influenced" the impartiality and deliberations of the jury.[216]

Recently in *State v. Abdi*, the Supreme Court of Vermont held that a juror's acquisition of information on the Internet concerning Somali culture and religion, a subject that had played an important role in the trial, had the ability to affect the jury's verdict.[217] Therefore, the court held that the jury's exposure to this type of extraneous information was not harmless and remanded the case for a new trial.[218]

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[214] 185 Md. App. 440 (Md. Ct. Special App. 2009).

[215] *Id*. at 444-45.

[216] *Id*. at 453. *See also*, People v. Wadle, 77 P.3d 764 (Col. App. 2003) (granting defendant a new trial where juror had researched the anti-depressant that the defendant had testified to using and read his findings to the other jurors during deliberations); Schwartz, *supra* note 32 (describing a Florida case in which the court declared a mistrial where juror admitted to researching information about type of prescription drug at issue in the case that the judge had specifically excluded).

[217] 46 A.3d 29 (Vt. 2012)

[218] *Id*. at 39.

VI. EFFORTS TO CURTAIL JUROR USE OF SOCIAL MEDIA DURING A TRIAL AND DURING DELIBERATIONS

Courts have utilized a variety of measures to educate jurors about the improper use of social media during both trial and deliberations. Judges have also developed strategies to deal with jurors who have been discovered using social media during the trial or deliberations. In addition, the California legislature enacted a criminal penalty for jurors who engage in misconduct related to social media use and Internet research.

A. Before Trial

1. Jury Instructions

Most courts have adopted some form of jury instructions that specifically address social media use and Internet research during a trial and jury deliberations.[219] A survey of federal district court judges conducted by the Federal Judicial Center (FJC) for the Committee on Court Administration and Case Management reported that 60% of the judges use model jury instructions to address use of social media.[220] The Judicial Conference Committee has created a set of model jury instructions for courts to give jurors before a trial begins and before deliberations begin. A portion of the model instructions to be given before the trial begins states:

> I know that many of you use cell phones, Blackberries, the [I]nternet and other tools of technology. You also must not talk to anyone at any time about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, including Facebook, Google+, My

[219] *See generally* Eric P. Robinson, *Jury Instructions for the Modern Age: A 50-State Survey of Jury Instructions on Internet and Social Media*, 1 REYNOLDS CTS. & MEDIA L.J. 3, 307(Summer 2011).

[220] *See* FJC STUDY *supra* note 176 at 6.

> Space, LinkedIn, or YouTube. You may not use any similar technology of social media, even if I have not specifically mentioned it here. I expect you will inform me as soon as you become aware of another juror's violation of these instructions.[221]

A reiteration of this portion is given at the close of the case before the jurors being to deliberate.[222] The most recent model instructions were released in June 2012[223] just two years after the federal courts released its original model instructions in January 2010.[224] The revised version includes an expanded and more explicit list of the types of activities jurors should avoid and tells jurors they are expected to inform the judge if they become aware of any juror's violation of the instructions.[225] The 2012 version of the instruction also extends what judges say to jurors at the close of the case.[226] According to a U.S. Judicial Conference press release, the revised instructions were based on the FJC study's finding that most federal judges reported becoming aware of juror use of social media during a trial from fellow empaneled jurors.[227] In addition to the instructions, trial judges

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[221] Judicial Conference Committee on Court Administration and Case Management, *Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research or Communicate About a Case* (June 2012) [hereinafter "Model Jury Instructions 2012"] *available at* http://www.uscourts.gov/uscourts/News/2012/jury-instructions.pdf.

[222] *Id.*

[223] *Id.*

[224] Judicial Conference Committee on Court Administration and Case Management, *Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research or Communicate About a Case* (December 2009, released January 2010) [hereinafter "Model Jury Instructions 2010"] *available at* http://www.uscourts.gov/uscourts/News/2010/docs/DIR10-018-Attachment.pdf.

[225] *Compare* Model Jury Instructions 2010 *supra* note 224 *with* 2012 *supra* note 224.

[226] *Compare*, Model Jury Instructions 2010 *supra* note 224 *with* 2012 *supra* notes 221, 224.

[227] Press Release, United States Courts, Revised Jury Instructions Hope to Deter Juror Use of Social Media During Trial (Aug. 21. 2012) *available at* http://news.uscourts.gov/revised-jury-instructions-hope-deter-juror-use-social-media-during-trial ("The overwhelming majority of judges take steps to warn jurors not to use social media during trial, but the judges surveyed said additional steps should be taken," said Judge

were also provided with a poster stressing the importance of jurors making decisions based on information presented only in the courtroom. These were to be posted in the jury deliberation room or other areas where jurors congregate.[228] State courts have also adopted various forms of the poster pictured below.

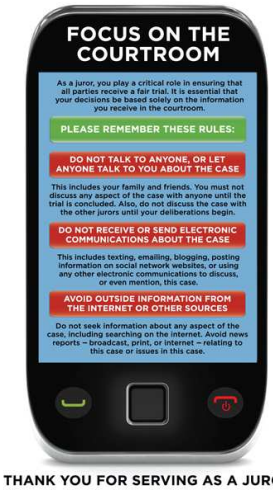

Figure 1

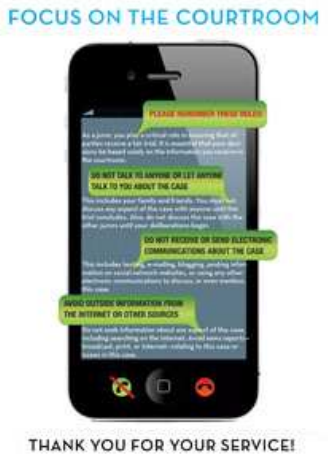

Figure 2

Eric P. Robinson, a media law and ethics professor at the CUNY Graduate School of Journalism and Baruch College in New York, writes extensively on the topic of juror use of social media. He argued that the revision of the jury instructions and the use of the posters in courtrooms indicates that the Judicial Conference was not persuaded by FJC study's conclusion that "detected social media use by jurors is infrequent, and that most

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Julie A. Robinson, CACM Committee chair. "The judges recommended that jurors frequently be reminded about the prohibition on social media before the trial, at the close of a case, at the end of each day before jurors return home, and other times, as appropriate. Jurors should be told why refraining from use of social media promotes a fair trial. Finally, jurors should know the consequences of violations during trial, such as mistrial and wasted time. Those recommendations are now part of the guidelines.")

[228] *Id.*

judges have taken steps to ensure jurors do not use social media in the courtroom."[229] Rather, Robinson asserted the changes reflect a concern that the problem is growing.[230]

The effectiveness of the use of these types of instructions addressing the use of social media and the Internet during a trial and deliberations and other related warnings has yet to receive much scholarly attention. To attempt to measure the success of such instruction, the FJC study asked judges to indicate whether social media were used after jury instructions were given.[231] More than half of the judges said social media were not used after the instructions were given, but slightly more than 45% of the judges surveyed said they had no way of knowing.[232] Thus, the study could not make strong conclusions regarding the effectiveness of the instructions.

A separate study surveyed jurors from 15 trials, finding that jurors generally understand the instructions not to use social media or the Internet to research the case or communicate about the trial, but that many of them wished they could use technology to do additional research about the cases.[233] The study was a baseline examination conducted by the National Center for State Courts for the Executive Session for State Court Leaders in the 21st Century, a three-year series of meetings of court leaders from around the country sponsored by the Bureau of Justice Assistance, the State Justice

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[229] Eric P. Robinson, *The Feds Try Again, But Just Won't Say Why*, DIGITAL MEDIA LAW PROJECT (Sept. 4, 2012), http://www.dmlp.org/blog/2012/feds-try-again-just-wont-say-why.

[230] *Id.*

[231] *See* FJC STUDY, *supra* note 176 at 6-7.

[232] *Id.* at 7.

[233] Paula Hannaford-Agor, David B. Rottman & Nicole L. Waters, JUROR AND JURY USE OF NEW MEDIA: A BASELINE EXPLORATION (National Center for State Court for the Executive Session for State Court Leaders in the 21st Century, 2012) [hereinafter "NCSC STUDY"].

Institute, and the National Center for State Courts.[234] Empaneled jurors from six criminal and nine civil trials, as well as jurors from the *voir dire* phase, were surveyed to include both jurors who were selected and those who were not.[235] Jurors from seven civil cases that settled during jury selection were also surveyed.[236] Among prospective jurors, 87% said they understood that they should not use the Internet or social media to communicate with friends or family or to post information about the case,[237] and two-thirds said that researching the case online would violate the judge's instructions.[238] Eighty-six percent (86%) of prospective jurors said they could refrain from using the Internet for the duration of the trial if they were instructed to do so by the trial judge, but 14% said they would not be able to abide by the instruction.[239]

Although the prospective jurors understood that they should not use social media or the Internet, the study revealed that many jurors had a desire to do so. Significant percentages of the jurors indicated that they wished they could use the Internet to obtain information about legal terms (44 %), the case (26%), the parties involved (23%), the lawyers (20%), the judge (19%), the witnesses (18%), and their fellow jurors (7%).[240] Fewer jurors indicated that they would have liked to use the Internet to communication

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[234] *Id.* at 1.

[235] *Id.* at 3-4.

[236] *Id.* at 4.

[237] *Id.*

[238] *Id.*

[239] *Id.*

[240] *See*, NCSC STUDY, *supra* note 233, at 6.

with family and friends about the trial (8%).[241] Five percent (5%) or fewer of the jurors said they would like to use the Internet to connect with other jurors, connect with one of the trial participants (3%), tweet about the trial (3%), blog about the trial (3%), or post information about the trial on a social networking site (2%).[242] The study found that the levels of interest were virtually equal when comparing criminal and civil trials.[243] The evidence also indicated a greater interest in using the Internet for case-related research, rather than for *ex parte* communications.[244] However, when looking just at seated jurors and alternates, the study revealed 29% wanted to use the Internet for *ex parte* communications and that 28% wanted to use it to conduct case-related research.[245] The critical question the study asked was whether jurors engaged in misconduct with or without the Internet during the trial.[246] The "short answer" was "yes," but only in old-fashioned ways like prematurely discussing the case with other jurors (10%) or face-to-face or telephone conversations with family and friends about the trial (6%).[247] Based on its findings, the report concluded that the "tentative findings encourage cautious optimism that the frequency of juror misconduct involving new media is less than one might imagine based on the number of recent news media accounts of jurors run

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[241] *Id.*

[242] *Id.*

[243] *Id.*

[244] *Id.*

[245] *Id.*

[246] *See*, NCSC STUDY, *supra* note 233, at 6.

[247] *Id.*

amok."[248] However, the report cautioned the study was by no means conclusive and that additional research was needed in this area, especially as younger cohorts or "digital natives," who often have higher Internet usage become more pervasive in jury pools.[249]

The FJC study and the NCSC study are among the first attempts to comprehensively examine the effectiveness of jury instructions and other baseline questions to explore the growing concern over juror use of social media and the Internet. The NCSC acknowledged the anecdotal nature of the data about juror use of social media and called for more research in the area.[250] Limited legal scholarship has been done on this topic, but some scholars have been reluctant to find solace in jury instructions to overcome individuals' connections to technology.[251] Although the debate over the effectiveness of jury instructions addressing social media and the Internet continues, the Hon. Amy St. Eve of the U.S. District Court for the Northern District of Illinois, along with her law clerk, Michael Zuckerman, argued the use of social media jury instructions is a useful tool when judges give consideration to when and how it should be given.[252]

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[248] *Id.* at 7.

[249] *Id.* at 7-9.

[250] *See* NCSC STUDY, *supra* note 233, at 1, 7.

[251] *See, e.g.*, Ralph Artigliere, *Sequestration for the Twenty-First Century: Disconnecting Jurors from the Internet*, 59 DRAKE L. REV. 621, 639-40 (2011) ("To some jurors, the cell phone, iPad, notebook, or other digital device is a lifeline to which they feel addicted. These jurors require constant communication with others on events and matters from the mundane to the critical."); Marcy Zora, Note, *The Real Social Network: How Jurors' Use of Social Media and Smart Phones Affects A Defendant's Sixth Amendment Rights*, 2012 U. ILL. L. REV. 577 (2012) (stating instructions are not enough to shield jurors from the external influences of their daily lives). *But see*, Hon. Amy J. St. Eve & Michael A. Zuckerman, *Ensuring an Impartial Jury in the Age of Social Media*, 11 DUKE L. & TECH. REV. 1, 21-22 (2012) (discussing a survey in which only six out of 140 jurors reported having any temptation to use social media to communicate about the case).

[252] *See* St. Eve & Zuckerman, *supra* 251, at 27-28.

2. *Voir Dire* and Online Investigation of Jurors

Beyond jury instructions, another preventive effort used to avoid improper juror research and communications includes investigating jurors via *voir dire* questioning and via the Internet.[253] Most prospective jurors have at least one online reference or a "footprint," put on the Internet by them or by someone else.[254] Attorneys are taking advantage of jurors' digital trails[255] and keep tabs of jurors before, during, and after trials.[256] The most basic kind of search done is a name search via an Internet search engine like Google or Bing.[257] Additionally, many attorneys conduct more in-depth searches of jurors by collecting information from social networking sites and monitoring their online activities.[258]

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[253] *See, e.g.*, Adam J. Hoskins, Note, *Armchair Jury Consultants: The Legal Implications and Benefits of Online Research of Prospective Jurors in the Facebook Era*, 96 MINN. L. REV. 1100 (2012); Julie Kay, *Social Networking Sites Help Vet Jurors*, LAW TECH. NEWS, Aug. 13, 2008, http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202423725315&Social_Networking_Sites_Help_Vet_Jurors&slreturn=20130315160640; Jonathan Redgrave & Jason Stover, The Information Age, Part II: Juror Investigation on the Internet—Implications for the Trial Lawyer, 2 Sedona Conf. J. 211, 211 (2001).

[254] *See* Jocelyn Allison, *Tweets Let Attorneys Know When Jurors Misbehave*, LAW360 (Oct. 23, 2009, 4:18 PM), http://www.law360.com/articles/128603/tweets-let-attorneys-know-when-jurors-misbehave ("Everybody has something on them on the Web, and everybody can look it up.") (quoting Attorney Daniel Ross).

[255] For an in-depth look at this topic, *see* Thaddeus Hoffmeister, *Applying Rules of Discovery to Information Uncovered About Jurors*, 59 UCLA L. REV. 28 (2011). *See also* Jason H. Casell, *To Tweet or Not to Tweet: Juror Use of Electronic Communications and Social Networking*, 15 No. 5 J. INTERNET L. 1, 18 (2011) (advocating attorneys use Internet tools to track key words from the trial and monitor juror discussion).

[256] *See generally* Hoskins, *supra* note 241. Jeffrey T. Frederick, *Seasoned Jury Expert Shares Secrets of Voir Dire and Jury Selection*, YOURABA (Mar. 2011), http://www.americanbar.org/publications/youraba/201103article01.html.

[257] *See* Hoffmeister, *supra* note 255.

[258] *Id.*

Online investigation of jurors has become increasingly common and is gaining acceptance within the legal profession.[259] Additionally, courts and state bar associations have approved and, in some cases, encouraged this type of research.[260] Proponents assert that the online investigation of jurors during a trial can uncover juror misconduct.[261] Further, proponents also assert once jurors know their *voir dire* answers can be verified, they will either be more truthful or ask to be relieved from service.[262] Finally, proponents argue jurors who know their online activities are being monitored will be more likely to adhere to jury instructions given throughout the duration of the trial.[263]

Although law professor Thaddeus Hoffmeister agreed that "online juror investigation will reduce incidents of juror misconduct associated with the Digital Age," he cautioned that the practice does have its limitations.[264] For example, without imposing penalties, investigating jurors does not shed light on the reasons jurors violate court rules.[265] Additionally, Hoffmeister pointed out that unless courts impose some kind of

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[259] *Id. But see* Hope A. Comisky & William M. Taylor, *Don't be a Twit: Avoiding the Ethical Pitfalls Facing Lawyers Utilizing Social Media in Three Important Arenas – Discovery, Communications with Judges and Jurors, and Marketing*, 20 TEMP. POL. & CIV. RTS. L. REV. 297, 311-12 (2011) (noting that lawyers monitoring juror's activity on social media risks violating rule 3.5 of the ABA Model Rules of Ethics which prohibits attorneys from any ex parte communications with jurors).

[260] Hoffmeister, *supra* note 179, at 443; see also Carino v. Muenzen, No. A-5491-08T1, 2010 N.J. Super. Unpub. LEXIS 2154, at *26-27 (N.J. Super. Ct. App. Div. Aug. 30, 2010) (admonishing a trial judge for forbidding counsel from investigating jurors online during jury selection).

[261] Hoffmeister, *supra* note 179, at 443.

[262] *Id.*

[263] *Id.* at 443-444.

[264] Hoffmeister, *supra* note 179, at 444.

[265] *Id.*

virtual sequestration in which jurors would subject all of their online activities and communication to potential judicial review, some misconduct will go undetected.[266]

But, Hoffmeister and others have argued gathering information online about jurors raises potential privacy concerns.[267] Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit has noted, "Most people dread jury duty — partly because of privacy concerns."[268] However, other legal thinkers argue that information about jurors freely and publically available online cannot possibly be considered private.[269] Additionally, some fear that jury summons response rates will plummet as citizens realize their online activity will be monitored if they are selected for jury duty.[270]

Finally, there is a concern that attorneys will not reveal the juror misconduct they discover online to the court or to opposing counsel, especially if the comment leads them to think the juror's views would be advantageous to their side.[271] Currently, few courts

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[266] *Id.*

[267] *Id.*

[268] United States v. Blagojevich, 614 F.3d 287, 293 (7th Cir. 2010) (Posner, J., dissenting from denial of rehearing en banc) (citation omitted).

[269] *See, e.g.*, Timothy P. Harkness & Dana L. Post, 'Friending' witnesses and researching jurors – Ethical parameters governing social media use, THOMPSON REUTERS NEWS & INSIGHT, (Apr. 10, 2013), http://newsandinsight.thomsonreuters.com/Legal/Insight/2013/04_-_April/%E2%80%98Friending%E2%80%99_witnesses_and_researching_jurors_%E2%80%94_Ethical_parameters_governing_social_media_use/ ("If information on a social website is publicly available, the prevailing view is that such information can be used in a litigation, even if obtained outside the formal discovery process.").

[270] Hoffmeister, *supra* note 179, at 444; *see also* Elaine Silvestrini, *Tampa Judge Threatens Jail for People Ignoring Jury Summons*, TAMPA BAY ONLINE (Oct. 3, 2011), http://tbo.com/news/tampa-judge-threatens-jail-for-people-ignoring-jury-summons-262486.

[271] Hoffmeister, *supra* note 179, at 444 (citing John E. Nowak, Jury Trials and First Amendment Values in "Cyber World," 34 U. Rich. L. Rev. 1213, 1225 (2001) ("The attorney with information about cyber activities of potential jurors will be able to use jury challenges for cause, and use preemptive challenges, in a strategically wise manner.").

mandate that attorneys reveal information discovered about jurors.[272] In terms of an ethical obligation to support such information, the Rules of Professional Responsibility have not been updated as quickly as technology has advanced. Rule 3.3, Comment 12 is the most relevant. It states:

> Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communication with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so.[273]

In many cases, a juror's post on a social networking site would not present an ethical duty mandating either the prosecution or the defense to report the information to the court. For example, during a trial in Michigan, the defense counsel's son discovered that a juror posted the following to her Facebook account at the conclusion of the first day of a two-day criminal trial: "[A]ctually excited for jury duty tomorrow. It's gonna be fun to tell the defendant they're GUILTY.:P."[274] The defense attorney reported the juror, who was removed, even though the act was neither fraudulent, nor criminal in the state of

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[272] Hoffmeister, *supra* note 179, at 444-45.

[273] MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 12 (2007). At least one state has a more expansive rule. See Tenn. Rules of Prof'l Conduct R. 3.3(i) (2011) ("A lawyer who, prior to conclusion of the proceeding, comes to know of improper conduct by of toward a juror or a member of a jury pool shall report improper conduct to the tribunal," confidentiality requirements notwithstanding.).

[274] Jameson Cook, *Facebook Post Is Trouble for Juror*, MACOMB DAILY (Aug. 28, 2010), http://www.macombdaily.com/article/20100828/NEWS/308289990/facebook-post-is-trouble-for-juror; *see also* Associated Press, *Juror Who Blurted out Verdict on Facebook Fined $250, Ordered to Write Essay*, CLEVELAND.COM (Sept. 2, 2010), http://www.cleveland.com/nation/index.ssf/2010/09/juror_who_blurted_out_verdict.html.

Michigan, despite it being improper juror conduct. The current legal system did not require the attorney to bring forward this misconduct.[275]

Even without conducting extensive online research about jurors, Retired Florida State Court Judge Ralph Artigliere asserted that, at a minimum, when lawyers are permitted to conduct *voir dire*, "they can inquire about a juror's online and communication habits."[276] He also argued that attorneys can use follow-up questions "to test the juror's ability and willingness to abide by court-imposed limitations" on their activity online.[277]

B. During Trial

1. Confiscation of Electronic Devices

A number of jurisdictions are removing the temptation by restricting access to jurors' access to cell phones and Internet-ready devices. This approach takes various forms. Some courts do not allow jurors to bring electronic devices into the courthouse.[278] Other courts confiscate phones during the trial and deliberations but allow access to them during recesses.[279]

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[275] Hoffmeister, *supra* note 179, at 446.

[276] Artigliere, *supra* note 251, at 645.

[277] Artigliere, *supra* note 251, at 645.

[278] *See, e.g.*, Press Release, Electronic Communication and Internet Devices Banned From All Circuit Court of Cook County Courthouses Except Daley Center, State of Illinois Circuit Court of Cook County, (Jan. 11, 2013), http://www.cookcountycourt.org/HOME/CellPhoneElectronicDeviceBan.aspx (Explaining that beginning April 15, 2013, by order of the court, the public would no longer be permitted to bring any electronic communication or Internet decides into any courthouse facilities of the Circuit Court of Cook County in Illinois. The ban includes laptops, cell phones, smartphones, tablets, and any other device capable of accessing the Internet or making audio and video recordings).

[279] *See, e.g.*, Michigan Court Rules, Rule 2.511(H) ("The court shall instruct the jurors that until their jury service is concluded, they shall not . . . use a computer, cellular phone, or other electronic device with

Although some commentators agree with bans on electronic devices in courtrooms, others have said it is too extreme.[280] Critics of this tool suggest that depriving jurors from these electronic devices for an entire day can cause them hardship.[281] It also creates difficulty for the courts when jurors insist an alternative form of communication be made available so that family members and employers can reach them.[282] Further, trials lasting more than one day render this procedure rather ineffective, as jurors are allowed to take their devices home with them and use them without court supervision.[283] Opponents of this policy have also pointed out that courts do not routinely seize jurors' televisions or radios even though a juror could learn about the case by using them.[284] Instead, jurors are simply told by judges to avoid watching or listening to

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communication capabilities while in attendance at trial or during deliberation. These devices may be used during breaks or recesses but may not be used to obtain or disclose . . . information about the case when they are not in court. . . . [I]nformation about the case includes, but is not limited to, . . . information about a party, witness, attorney, or court officer; news accounts of the case; information collected through juror research on any topics raised or testimony offered by any witness; information collected through juror research on any other topic the juror might think would be helpful in deciding the case.")

[280] Christopher Danzig, *Mobile Misdeeds: When Jurors Have the Web at Their Fingertips, Trials Can Quickly Unravel*, INSIDE COUNS., June 2009, http://m.insidecounsel.com/2009/06/01/mobile-misdeeds.

[281] David P. Goldstein, Note, *The Appearance of Impropriety and Jurors on Social Networking Sites: Rebooting the Way Courts Deal with Juror Misconduct*, 24 GEO. J. LEGAL ETHICS 589, 602 n. 108 (2011).

[282] Hoffmeister, *supra* note 179, at 439.

[283] Allison, *supra* note 254 ("Courts can also ban mobile devices from the courtroom—some already do—though there could be some backlash from jurors accustomed to being in constant communication with family and friends. And that still doesn't keep them from doing research on Google or tweeting when they get home.").

[284] Hoffmeister, *supra* note 179, at 440; *see also* Danzig, *supra* note 280 ("Limiting juror access to outside information has preoccupied legal professionals since the beginning of the American legal system. Before computers or newspapers, jurors could go home and discuss cases with their spouses.").

programs that may discuss the trial.[285] Some have questioned why Internet-ready devices should be treated differently.[286]

2. Sequestration

Sequestration is likely to be the most effective in curbing juror use of social media and the Internet. This is because the court directly controls the jury's environment. Although this tool has been used to thwart juror exposure to pretrial publicity and continued news coverage surrounding high profile trials, it is not widely used by courts today.[287] Sequestration is generally looked upon with disfavor because of the high burdens it places on both courts and jurors.[288] It requires an expensive undertaking by the court to lodge jurors and have them supervised throughout the trial.[289] Jurors also view it negatively as it requires them to live in a controlled environment away from their homes and daily routines.[290]

The Digital Age has resulted in one potential twist on sequestration called "virtual sequestration."[291] This allows jurors to remain in their own homes but consent to having

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[285] *Id.*

[286] *Id. See also* Amanda McGee, *Juror Misconduct in the Twenty-First Century: The Prevalence of the Internet and its Effect on American Courtrooms*, 30 LOY. L.A. ENT. L. REV. 301 (2010) (discussing the issue of juror use of technology and noting that "even though such misconduct is occurring through the use of a new medium, jury misconduct in general is not a new phenomenon").

[287] Hoffmeister, *supra* note 179, at 441; *see also* Strauss, *supra* note 137, at 71-72.

[288] *Id.*

[289] Hoffmeister, *supra* note 179, at 441.

[290] Strauss, *supra* note 137, at 106-07.

[291] Hoffmeister, *supra* note 179, at 441.

their Internet access blocked or monitored.[292] Although this is likely to be less burdensome on jurors and cost courts less, some still view it as overly intrusive. However, as has been previously discussed, many attorneys are already conducting this type of surveillance.

3. Threat of Criminal Punishment

At least one state has adopted a statute that specifically prohibits jurors from using social media and the Internet to research or disseminate information related to the trial.[293] California passed the law in 2011, and it expanded the state's existing jury instructions.[294] Under the law, "willful disobedience by a juror of a court admonishment related to the prohibition of any form of communication or research about the case, including all forms of electronic or wireless communication or research," is punishable by contempt of court or a misdemeanor.[295]

VII. A BALANCING ACT: WHERE THE FIRST AMENDMENT MEETS THE SIXTH AMENDMENT

A substantial portion of this thesis has been dedicated to discussing the ways in which the courts can and are attempting to curtail juror use of social media and the Internet in the name of providing a defendant with a fair and impartial trial. As has been

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[292] *Id.*

[293] 2011 Cal. Laws chap. 181, *available at* http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0101-0150/ab_141_bill_20110805_chaptered.pdf.

[294] *Id.*

[295] *Id.*

previously discussed, the Sixth Amendment guarantees a defendant these rights.[296] However, the media or an individual's desire to relay information to the broader public about the case often conflicts with a judge's concern for this guarantee. The First Amendment gives the press and the public a conditional right of access to report on pre-trial proceedings and trials.[297] For a court to deny public access to a criminal trial, it must show that the closure of the proceedings "is necessitated by a compelling governmental interest and is narrowly tailored to serve that interest."[298] Thus, a trial is presumptively open to the press and the public unless the judge can show such a compelling interest. A judge must balance the interest of the defendant with the interests served by maintaining open proceedings.

Much of the jurisprudence responsible for developing this right to access courtrooms is based on the theory that the press acts watchdog or a check on the government and that granting access to judicial proceedings can actually have the effect of improving the fairness of government proceedings.[299] Specifically, the media often act

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[296] U.S. CONST., Amend. VI.

[297] *See*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980) (holding that "[a]bsent an overriding interest" the First Amendment impliedly guarantees a right of the press and public to attend criminal trials);

[298] Globe Newspaper Co. v. Superior Court for Norfolk County, 457 U.S. 596, 606-07 (1982). *But see*, Sheppard v. Maxwell, 384 U.S. 333 (1966) ("If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered . . . the courts must take such steps by rule and regulation that will protect their process from prejudicial outside interferences. Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers . . . should be permitted to frustrate its function.").

[299] *Richmond Newspapers*, 448 U.S. at 596 ("[P]ublic access to trials acts as an important check, akin in purpose to the other checks and balances that infuse our system of government. 'The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.") (Brennan, J. concurring) (citing *In re Oliver*, 333 U.S., at 270).

as a representative for the public by attending trials and reporting on the events that take place inside the courthouse walls.

A. Is Juror Use of Social Media Protected Speech?

The question of whether content posted online via social media and online-only platforms deserves robust First Amendment protection akin to the protection the traditional press enjoys is a highly debated topic. A few states have begun to address the issue in the context of deciding whether state shield laws should apply to bloggers attempting to protect confidential sources.[300] But as a plurality of the U.S. Supreme Court stated in *Branzburg v. Hayes*:[301]

> Freedom of the press is a fundamental personal right which is not confined to newspapers and periodicals . . . The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion . . . . The informative function asserted by representatives of the organized press . . . is also performed by lecturers, political pollsters, novelists, academic researchers, and dramatists. Almost any author may quite accurately assert that he is contributing to the flow of information to the public . . . .[302]

Thus, the Court has made clear that First Amendment protection extends far beyond the traditional press and beyond individual state shield law definitions of whom it defines as a journalist.

B. Juror Use of Social Media Serves Fundamental First Amendment Principles

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[300] *See, e.g.*, Too Much Media, LLC v. Hale, 206 N.J. 209 (N.J. 2011) (declining to find that a blogger was considered a journalist under New Jersey's state shield law); Mortgage Specialists, Inc. v. Implode Explode Heavy Industries, Inc., 160 N.H. 227, 233 (N.H. 2010) (upholding a website operator's right to claim reporters privilege because the website served an "informative function and contributes to the free flow of information to the public.").

[301] 408 U.S. 665 (1972).

[302] *Id.* at 704.

Some argue that with the advent of social media, "anyone with a computer and Internet access can produce and disseminate news."[303] Law professor Adam Cohen argued that new media[304] embodies several classic First Amendment values, including contributing to public debate, bringing information into public discussion, self-expression, and checking the government's power.[305] Cohen noted that new media creates a "sphere of legitimate debate,"[306] and suggested that even Internet users who do not attempt to produce news stories still take part in building public opinion by sharing links, posting comments, and participating in online discussion.[307] He argued that new media may provide a stronger and more effective check on government than traditional media because as the organized media loses revenue and manpower, new forms of media cover the stories that old media cannot or will not cover.[308]

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[303] *See*, Cohen, *supra* note 20 at 3. *See also*, *Id*. at 4 ("The public now not only consumes news, but reports it, disseminates it, critiques it, and talks back to it.").

[304] Cohen defines "new media" which he dubs "the Fifth Estate" in broad categories, which include individual bloggers, non-profit investigative sites, online news communities, journalism by non-journalistic organizations, collaborative journalism, for-profit internet-based sites, and social media and raw data platforms. *Id*. at 15-18.

[305] *See*, *id*. at 22-34.

[306] *Id*. at 5 (*quoting* Jay Rosen, Audience Atomization Overcome: Why the Internet Weakens the Authority of the Press, PressThink, Nieman Journalism Lab (Oct. 14 2010, 10:30 AM), http://niemanlab.org/2010/10/the-newsonomics -of-replacement-journalism/).

[307] *Id*. at 14. *See also*, *id*. at 17 ("On Facebook, ordinary citizens can act as editors, directing news stories or links that they like to members of their network, or they can write news bulletins of their own."). *But see*, O'Grady v. Superior Court, 139 Cal. App. 4th 1423, 1459 (Cal. App. 2006) (noting the difference between "open and deliberate publication on a news-oriented Web site of news gathered for that purpose by the sites operators" and "the deposit of information, opinion, or fabrication by a casual visitor to an open forum such as a newsgroup, chatroom, bulletin board system, or discussion group" and suggesting that the "latter type . . . may indeed constitute something other than the publication of news. But posting of the former type appears conceptually indistinguishable from publishing a newspaper . . . .").

[308] *See*, Cohen, *supra* note 20 at 23-35. Cohen discusses several examples of events and information that new media journalists covered that traditional media did not, and suggests that new media brings

Cohen's observations can be applied to the posts and comments that jurors make online. Even jurors who do not post with the intent of creating "news" are still adding to the marketplace of ideas, a central theoretical tenet underpinning the First Amendment, by generating discussion about both the trial and the judicial system as a whole.[309] Another fundamental purpose of the First Amendment is to "assure freedom of communication on matters relating to the functioning of government."[310] Jurors utilizing social media and online platforms have a unique perspective and ability to communicate about the effectiveness of trial proceedings and the justice system. Speech related the functioning of the government has historically received the highest protection. Finally, juror use of social media also implicates the First Amendment ideal of protecting self-expression and self-actualization because it allows jurors to voice their thoughts and opinions throughout the case.[311] This expression many help them to reflect on the role of the judicial system and society and gain an appreciation for their service. Although many scholars might agree with this analysis, many would also argue that to balance a defendant's Sixth Amendment rights, jurors must not engage in these types of activities

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information that traditional media no longer has the financial ability to uncover. *Id*. at 24-26. He also argues that because new media does not have relationships with the government or with private companies similar to traditional media, they have more freedom to criticize these entities. *Id*. at 29-34.

[309] Abrams v. U.S., 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas-that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .").

[310] *Richmond Newspapers*, 448 U.S. at 575.

[311] *See*, Martin H. Redish, *The Value of Free Speech,* 130 U. PA. L. REV. 591, 593-94, 601-04, 627-29 (1982) (arguing that self-expression is the most fundamental value protected by the First Amendment). *See also*, Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878-87 (1963) (noting that inherent to the First Amendment justification of individual self-fulfillment is every man's right "to form his own beliefs and opinions. And it also follows, that he has the right to express those beliefs and opinions. Otherwise they are of little account.").

until the completion of the trial, at which time they are welcome to tweet, blog, and comment about their experiences.

C. Applying First Amendment Jurisprudence to Juror Use of Social Media

Because online postings by jurors embody several of the basic purposes of the First Amendment, it can be argued that they deserve protection under the First Amendment. The traditional press is granted presumptive access to court proceedings and is free to report on what transpires in the open courtroom.[312] To the extent that online juror postings serve the same functions as traditional media in contributing to public debate — serving a checking function against the government and sharing information with the public — it is not unreasonable to assert that they deserve the same fervent First Amendment protection extended to traditional media entities. However, courts have long recognized special rules related to juror conduct because of the sensitive nature of their duties and jurors are free to discuss the case upon its conclusion.

1. Jury Instructions Pass Heightened First Amendment Analysis

A court's decision to prohibit access to traditional media (which effectively prevents them from reporting the trial events to the public) is subject to strict scrutiny review.[313] A court instructing jurors not to tweet, post, or blog about a trial similarly prevents that juror from reporting the events that transpire during the trial to the public. Courts may engage in both of these prohibitions in an attempt to protect a defendant's Sixth Amendment rights. Part II of this thesis explored Supreme Court precedent related

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[312] *Richmond Newspapers*, 448 U.S. at 575.

[313] *Globe Newspaper*, 457 U.S. at 606-07.

to pretrial publicity and the historical concern over juror exposure to media. To ensure juror impartiality, courts in the past have banned the presence of the media,[314] placed a gag order on all parties to litigation,[315] or utilized many of the tools discussed in Part III.[316]

Recall that jury instructions are being utilized in many jurisdictions to prohibit juror use of social media. This type of ban can be analogized to a judge closing the courtroom to the press and public, which is considered a form of prior restraint that would be presumptively unconstitutional.[317] These types of restraints are subject to a strict scrutiny analysis, requiring a compelling government interest and the most narrowly tailored means of achieving that interest.[318] Certainly, courts have interest in protecting a defendant's Sixth Amendment constitutional rights to a fair trial and impartial jury and the government is sure to argue that jury instructions limiting jurors' speech about the trial proceedings, for a limited period of time, are narrowly tailored. The First Amendment is not absolute and courts have consistently held that speech can be subject to reasonable time, place, and manner restrictions.[319] But, just because the judicial

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[314] H.H. Henry, *Exclusion of public during criminal trial*, 48 A.L.R.2d 1436 (1956).

[315] U.S. v. Brown, 218 F.3d 415 (5th Cir. 2000) (holding a gag order that generally prohibits attorneys, parties, and witnesses from discussing a criminal trial did not violate the First Amendment); *see also* Laura Hunter Dietz, et al., *Gag Orders*, 75 Am. Jur. 2d Trial § 138 (2013).

[316] *See infra* Part III.

[317] Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976) ("Truthful reports of public judicial proceedings have been afforded special protection against subsequent punishment. For the same reasons the protection against prior restraint should have particular force as applied to reporting of criminal proceedings . . . ."); *see also* Near v. Minnesota, 283 U.S. 697 (1931).

[318] *Id*.

[319] *See, e.g.*, Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984).

procedures in place most likely pass First Amendment muster and balance constitutional interests, does not mean that juror misconduct online should presumptively result in a new trial. This is where pretrial publicity precedent can become instructive to courts addressing jurors' use of social media and the Internet to post content related to the trial.

VIII. A PROPOSAL FOR THE USE OF SUPREME COURT PRETRIAL PUBLICITY PRECEDENT IN SHAPING JURISPRUDENCE INVOLVING JUROR USE OF SOCIAL MEDIA

Although there are many tools available to trial judges to discourage and attempt to prevent juror use of online platforms, current case law demonstrates that in some cases jurors will disregard judicial orders or a method employed by a judge will prove ineffective in curbing the behavior. When this occurs, a court must then consider what action should be taken in response to the juror misconduct. Clearly, a distinction can be drawn between a situation where a juror conducts online research outside the scope of information presented in court pursuant to the rules of evidence, like that in *Wardlaw v. State*,[320] and one where a juror tweets or posts about his general thoughts and opinions, like that in *U.S. v. Fumo*.[321] By its nature, conducting outside research provides a juror with extraneous information that could likely skew his or her decision in the case. A juror posting on Facebook that he or she is unsure about his or her decision does not have such a clear effect on the juror's impartiality. A juror posting an opinion about unrelated criminal trials across the country likewise does not necessarily implicate the juror's

[320] 185 Md. App. 440 (Md. Ct. Special App. 2009) (granting a motion for mistrial on the basis of juror misconduct where a juror used the Internet to research an illness at issue in the case).

[321] 655 F.3d 288 (3d Cir. 2011) (involving a juror who tweeted statements about his experience, stating he was "not sure about tomorrow," telling his followers to "[s]tay tuned for the big announcement . . . ." after the first week of deliberations, and before the jury announced its verdict, announcing, "[t]his is it . . . no looking back now!").

impartiality.[322] The distinction between these types of posts should be central to a court's analysis in deciding what the appropriate action is in relation to the juror — i.e. removal, contempt, court fine — and the trial — i.e. declare a mistrial, replace the juror, or continue moving forward.

Because juror online postings do not always implicate a juror's ability to remain impartial, most courts that have dealt with this issue have recognized that not all cases of juror misconduct should be treated the same. However, a clear standard has yet to emerge, leaving each court free to create its own framework and leaving those involved with jury trials unclear on what constitutes an egregious violation.

Although media commentary and some scholars have asserted that the use of social media by jurors is detrimental to the idea of the fair trial, scholarship and commentary on this issue have also shown that juror misconduct often occurred in the past, just without the digital evidence to prove it. For example, a juror may have talked with a spouse or neighbor about the case, listened to a radio broadcast, or read a newspaper. These violations, however, did not include a name, date, and time stamp that attorneys could use to challenge the juror's impartiality. Those most concerned over a defendant's Sixth Amendment rights would argue that this behavior was always a problem and that technology has only improved the judicial system's ability to spot issues of juror misconduct and provide a remedy, perhaps more easily than before. But the evolution of media and technology has not just provided for an easier way to detect juror misconduct it has also given many citizens the access and the ability to act as a

[322] *See*, *e.g.*, State v. Goupil, 154 N.H. 208 (N.H. 2006).

publisher, and their actions online, in some cases, embody strong First Amendment ideals.

Recall the categories of juror conduct defined earlier in this thesis: (1) jurors as creators; (2) jurors as consumers; and (3) jurors as discussants. Category one includes juror thoughts and observations published through an online medium that result in no interaction with the public. Category one statements provide the least threat to a defendant's Sixth Amendment rights because they are merely the publishing of a juror's inner thoughts. Although these thoughts are made public by being posted on social media or a personal blog, this action is no different than if the juror went home and wrote his or her thoughts about each day of the trial in a diary. The First Amendment interest here is significantly higher than in other circumstances. This type of speech contributes to the marketplace of ideas and self-fulfillment. It may also serve a watchdog function if the speech brought to the public's attention that a court officer's conduct, for example, was illegal or violated a defendant's rights.

Category two statements, which are of less relevance to this thesis, present situations in which the Sixth Amendment interest is at its highest. Here, jurors could be exposed to prejudicial publicity, as was always a possibility even before the Internet. Online tools, however, give jurors more opportunities and resources to conduct extraneous research. These types of actions by jurors have little to no First Amendment value. Because of this, courts have historically always restricted media consumption during a trial and the consumption of information on the Internet is not being treated differently.

Category three statements present some kind of interactive component that occurred because of the juror's conduct. This may be something as simple as a Facebook status that receives "likes" from family and friends or more direct interaction between the juror and other members of the public. For example, a juror may publish a blog post and then respond to reader comments and engage in a deeper discussion of his or her thoughts and experiences related to the trial before it has concluded. The original posts are essentially category one actions, but become category three actions when the interactive component occurs. The First Amendment interest here is the same as category one, but the Sixth Amendment interest is heightened because the juror in these situations could be exposed to prejudicial commentary.

To balance a defendant's Sixth Amendment rights with a juror's First Amendment rights whose misconduct falls within category one or category three, the author proposes that courts adopt a modified version of the test the Supreme Court first articulated in *Murphy v. Florida* to evaluate whether incidents of juror misconduct online resulted in an unfair trial for the defendant.[323] Courts would evaluate (1) if there was an apparent departure from fundamental due process and decorum that resulted in an intrusion of external influences and (2) whether there were any indications in the totality of the circumstances that the defendant's trial was not fundamentally fair.[324]

In addressing the problem of pretrial publicity, the first prong of the test evaluates the court's actions. In applying this test to the problem of juror use of social media, a court would review whether the trial judge appropriately utilized the tools it has available

[323] 401 U.S. at 799.

[324] *Id.*

to deter this type of activity, This includes use of jury instructions, limits on juror access to electronic devices during the trial and deliberations, sequestration in extreme cases, and so forth. If the judge acted appropriately, the examining court would look to the second prong of the test.

In *Murphy*, the Court articulated three important factors to consider: (1) the *voir dire* record, looking specifically for juror hostility, (2) the atmosphere of the community and (3) the length to which the court had to go to select an impartial jury. To modify the test for purposes of evaluating a juror's use of social media, the author proposes that the first factor remain unchanged. When evaluating the *voir dire* record, a court would look at a juror's answers to questions about his or her social media use, whether he or she could refrain from using social media during the trial, and evaluate the *voir dire* record for any general hostility. The other two factors would be revised to examine (2) whether the atmosphere of the online community reaches into the deliberation room and (3) the nature of the juror's activity.

The second factor would have the court evaluate the juror's posts in relation to his or her online community. In *Murphy* the court said the atmosphere must be "sufficiently inflammatory" against the defendant.[325] In the case of online posts, a court may look at whether the post generated influential, inflammatory comments or if the post resulted in a back-and-forth inflammatory discussion involving the juror (category three). Did the juror's posts spur independent online groups to form or new followers on social media websites? Did the posts result in inflammatory news coverage? All of these questions should be considered under this factor to determine whether the online community could

[325] *Murphy*, 421 U.S. at 802.

be perceived to have influenced jury deliberations. Utilizing the categories or juror conduct established by this thesis, juror conduct falling within category one is likely to weigh against a finding that benefits the defendant, while category three would require a deeper analysis.

The third factor under prong two of the test would have a court consider the nature of juror's online activity. This constitutes a subjective analysis in which the court examines the content of the post and assesses its prejudicial potential. Currently, most courts that have faced this issue are making decisions solely based on this type of analysis. By including it as a part of a broader framework, it only becomes one part of the equation in deciding whether the juror's conduct should result in a mistrial or other remedial action. This structure also provides a stronger balance of First and Sixth Amendment rights in situations where there is a strong First Amendment interest in the speech and lesser Sixth Amendment concerns.

Taken together, these three factors result in a court's conclusion under prong two as to whether in the totality of the circumstances the defendant's trial was not fundamentally fair. Utilizing a modified pretrial publicity test would serve two important purposes: (1) it provides a legal analysis for all courts rooted in Supreme Court jurisprudence that already takes into consideration both the First and Sixth Amendments and (2) it can inform the process of instructing jurors about the use of social media and the Internet and how any juror misconduct would be evaluated.

Just as not all pretrial publicity exposure results in an unfair trial, neither do all juror uses of social media. As the Court said in *Irvin v. Dowd* and reaffirmed in *Murphy*,

"To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court."[326]

VIIII. CONCLUSION

Americans are spending 20% of their time on the computer and 30% of their time on their mobile phones on social networking sites.[327] The top social media sites on the Internet have membership numbers in the hundreds of millions, and in some cases billions, with many of those residing in the United States. Mobile technology has made these services available instantaneously no matter the location. The new media landscape has already impacted changed the way individuals, industry, and the government operate.

Individuals who use social media now have new ways to contribute to public debate and disseminate information, but when these individuals receive a jury summons, a conflict arises. Juror misconduct involving use of social media has garnered national attention, and courts are now faced with how to best protect a defendant's Sixth Amendment right to a fair trial. The number of trials that are challenged on the basis of Internet-related juror misconduct is growing alongside the number of social media users.

On the other hand, social media has allowed everyday citizens to contribute to the creation and dissemination of news. Courts across the country are debating questions of

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[326] *Murphy*, 421 U.S. 794, 800 (citing *Irvin*, 366 U.S. at 723).

[327] *See* NIELSEN REPORT, supra note 152, at 4.

whether individual contributions via social media constitute “news” in the traditional sense and who constitutes a “journalist” in today’s digital environment. Because social media use often embodies the same First Amendment values as traditional media, it deserves similar First Amendment protections and considerations.

This thesis asserts that because juror use of social media has First Amendment value, court should employ a modified version of the Supreme Court’s pretrial publicity test to appropriately balance the First Amendment rights of jurors with the Sixth Amendment rights of defendants.

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