SOCIAL MEDIA IN THE JURY BOX

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I. INTRODUCTION

In November, 2008 Sir Igor Judge, the aptly-named Lord Chief Judge of Great Britain, bemoaned the generational shift occurring as web-savvy citizens accustomed to getting their information online entered the jury box, and the potential consequences of this shift for the oral tradition of the trial by jury system. "If a generation is going to arrive in the jury box that is totally unused to sitting and listening but is using technology to gain the information it needs to form a judgment, that changes the whole orality tradition with which we are familiar," according to the Lord Chief Justice.[1] To cope with the impact that technology is having and will continue to have on jurors and how evidence is presented to them, the jurist cautioned that the courts system must be "capable of development and adaptable for the future."

II. JURORS GOOGLING MISTRIALS

The modern juror comes to the courthouse from an environment of unprecedented Internet dependence. Nearly 60% of American Internet users have profiles on social networking sites like Facebook (which boasts over 600 million users worldwide).[2] People have grown accustomed to getting everything from news to dates to driving directions from online sources. They're communicating electronically in ever-increasing numbers: three years ago, the wildly popular social networking/microblogging site Twitter handled 5,000 "tweets" a day, and by February 2010 it was processing a staggering 50 million per day.[3] As a result, it is more challenging than ever to ensure that jurors remain unbiased *tabulae rasa*, considering only the information and evidence presented during trial. Jurors not only have technology enabling them to access a wealth of information with just a few clicks and to communicated instantaneously with the outside world via tweets, texts, blogs, and emails, it's become second nature to use such devices. Far from being Mark Twain's lamented "intellectual vacuum" and the result of a jury system that he criticized as imposing "a ban upon intelligence and honesty," jurors today find it all too tempting and easy to seek out information online.

1. In November 2008, a juror on a child abduction/sexual assault trial in Lancashire, England, was torn about how to vote. So, she posted details of the case online for her Facebook "friends" and announced that she would be holding a poll. After the court was tipped off, the woman was dismissed from the jury.[4]

2. In March, 2009, an eight-week federal drug trial involving Internet pharmacies was disrupted by the revelation that a juror had been doing research online about the case, including looking into evidence that the court had specifically excluded. When U.S. District Judge William Zloch questioned other members of the jury, he was astonished to learn that eight other jurors had been doing the same thing, including running Google searches on the lawyers and the defendants, regarding online media coverage of the case and consulting Wikipedia for definitions. Peter Raben expressed his shock at the jurors' online activities. "We were stunned," he said. "It's the first time modern technology struck us in that fashion, and it hit us right over the head."[5]

3. In June 2007, a California appellate court reversed the burglary conviction of Donald McNeely when it was revealed that the foreman of the jury had committed misconduct and deprived the defendant of a fair trial by discussing deliberations on his blog. The foreman, a lawyer who had identified himself as a project manager for his company because it was "[m]ore neutral than a lawyer," blogged about McNeely, his fellow jurors and their discussions, particularly one juror who was "threatening to torpedo two of the counts in his quest for tyrannical jurisprudence."[6]

4. In November 2007, the Supreme Court of Appeals of West Virginia reversed the conviction of Danny Cecil for felony sexual abuse of two teenage girls. Two members of the jury had looked up the MySpace profile of one of the alleged victims, and shared its contents with other jurors. Even though it found that the online sleuthing had not necessarily revealed anything relevant, the court held that "the mere fact that members of a jury in a serious felony case conducted any extrajudicial investigation on their own

[1] Christopher Hope, "Web-Savvy Young Make Bad Jurors Because They Cannot Listen, Says Lord Chief Justice, *The Telegraph*, Nov. 6, 2008. *Id.*

[2] Amanda Lenhart, "Social Media and Mobile Internet Use Among Teens and Young Adults," *Pew Internet and American Life Project*, Feb. 2010.

[3] Sharon Gaudin, "Twitter Users Send 50 Million Tweets a Day," *Computerworld*, Feb. 23, 2010.

[4] Urmee Khan, "Juror Dismissed from a Trial After Using Facebook to Help Make a Decision," *The Telegraph*, Nov. 24, 2008.

[5] Paul Sussman, "11 Curious Jurors Google A Mistrial," *The Connecticut Law Tribune*, Mar. 25, 2009.

[6] People v. McNeely, No. D052606, 2009 WL 428561 (Cal. App. 4th Dist. 2009) (unpublished), rev. denied, No. S171530 (Cal. May 20, 2009).

is gross juror misconduct which simply cannot be permitted." As the court further noted, "Any challenge to the lack of impartiality of a jury assaults the very heart of due process."[7]

5. In the May 2009 case of *Zarzine Wardlaw v. State of Maryland*, No. 1478 (May, 2009), Maryland's Special Court of Appeals looked at the circumstances behind the conviction of a man charged with rape, child sexual abuse, and incest involving his 17-year old daughter. During the trial, a therapeutic behavioral specialist had testified about working with the victim on behavioral issues such as anger management and had opined that the girl suffers from several psychological disorders including oppositional defiant disorder (ODD). A juror took it upon herself to research ODD online, discovering that lying was a trait associated with the illness, and apparently shared this knowledge with the other jurors Another member of the jury sent a note informing the judge about this development. After reading the note to counsel for both sides, the judge denied a defense motion for a mistrial and simply reminded the entire jury of his instructions not to research or investigate the case on their own "whether it's on the Internet or in any other way." The appellate court found that this was not enough, and that since the victim's credibility was a crucial issue, the juror's Internet research and reporting her findings to the rest of the jury "constituted egregious misconduct" that could well have been "an undue influence on the rest of the jurors." As a result, the trial judge was reversed and a mistrial was granted.[8]

6. In October 2009, U.S. District Judge D. Brock Hornby denied a motion for new trial in a wrongful death case in which a juror admittedly sent Facebook "friend" requests to two of the plaintiffs, learned of their "party animal" ways from their Facebook pages, and emailed plaintiffs' counsel that his client had "advocated the use of mushrooms and weed smoking, and binge drinking all over the Internet." After the attorney brought the allegation of juror misconduct to the court's attention, Judge Hornby's investigation determined that the juror in question had found certain photos and postings on the social networking site "a day or two after" the verdict and that the juror insisted that the Facebook information was never discussed during deliberations. Accordingly, he denied the motion for mistrial.[9]

7. After the December 2009 embezzlement conviction of Baltimore Mayor Sheila Dixon, defense attorneys sought a new trial in part because five jurors had become Facebook "friends" during trial and allegedly discussed the case. According to Dixon's lawyers, these "Facebook friends" had communicated among themselves, writing on each other's Facebook walls, and one even received an outsider's online opinion of what the verdict should be.[10]

8. Also in December 2009, the Maryland Court of Special Appeals overturned the 2008 first-degree murder conviction of Allan Jake Clark, based on evidence that jurors had consulted Wikipedia for definitions. Printouts in the jury room revealed that among the information sought were details about how the settling of blood after death can help determine the time and place of death—issues that were raised at Clark's trial. Writing for the court, Judge Charles E. Moylan, Jr. noted that an "adverse influence on a single juror compromises the impartiality of the entire jury panel."[11]

9. Following a December 2009 verdict exonerating a police officer in a Taser-related wrongful death case in federal court in Louisville, Kentucky, lawyers for the estate of decedent Larry Noles filed a motion to set aside the verdict. They argued that at least two jurors, including the jury foreman, consulted Taser International's website and used information from the site to persuade other jurors that Tasers are non-lethal.[12] The court granted the motion based on juror misconduct.

10. In July 2009, a New Jersey appeals court reversed the convictions of three cousins charged with manslaughter because of a juror's online misconduct. In *State of New Jersey v. Justin Scott, et al.*, 2009 N.J. Super. Unpub., and "emotional" juror announced to several other jurors that she had researched the defendants, the victims, and even the possible sentence for conviction on the Internet. Although the trial court replaced that juror with an alternate, it denied a mistrial. The appellate court disagreed, concluding

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[7] State of Virginia v. Danny Cecil, 655 S.E.2d 517 (2007).

[8] Wardlaw v. Maryland, ____ Md. App. ____ at pp. 10–11 (May 8, 2009).

[9] David N. Wilgus and Garret-Thorbjornson and Estate of Gary Thorbjornson v. F/V Sirus, Inc., Civil Action No. 08-225-P-H (D. Maine, Oct. 27, 2009), "Order Denying Plaintiffs' Motion for a New Trial on the Grounds of Juror Misconduct."

[10] Ben Nuckols, "Sheila Dixon's Lawyers Ask for New Trial," *Associated Press*, Dec. 11, 2009.

[11] Andrea Siegel, "Judges Confounded by Jury's Access to Cyberspace," *Baltimore Sun*, Dec. 19, 2009.

[12] Andrew Wolfson, "Taser-Related Death Verdict Challenged Over Juror's Conduct," *Louisville Courier-Journal*, Jan. 9, 2010.

that "juror 14's misconduct tainted the jury as a whole."[13]

11. In June, 2010, a West Virginia appeals court granted a new trial in part due to the MySpace messages sent to the defendant prior to and during the trial by a juror.[14] The criminal defendant was a law enforcement officer accused of corruption (among other charges, diverting funds for a DUI task force into his own pocket). A juror named Amber Hyre had once lived in the same apartment complex as the defendant; when she got her jury summons, she sent him a message of encouragement and advice about "God's plan" for his life. During trial, she posted messages about her activities and "blah" mood. The trial court denied the motion for new trial, finding her to be "fair and impartial," but the court of appeals disagreed. It held that her lack of candor in failing to disclose her connection to the defendant was enough to presume bias, however benign her MySpace communications may have been. Interestingly, the defendant claimed he didn't bring this to the court's attention prior to his conviction because he didn't recognize that the juror and Amber from MySpace were one and the same, since she "looked very different from her photograph posted on the website."

12. In September, 2010, the Nevada Supreme Court granted a new trial to a defendant convicted of sexually assaulting a minor.[15] Apparently, the jury foreman had decided to search online for additional information about the types of physical injuries consistent with young victims of sexual assault.

III. PRETRIAL GOOGLING AND TWEETING FROM THE JURY BOX

Jurors going online is not just a recent phenomenon. During the 2001 New York trial of terrorism suspects in the African embassy bombings, a juror allegedly researched the concept of "aiding and abetting" on the Internet.[16] In a Colorado child abuse case, the defendant testified that she was taking the antidepressant Paxil at the time of the child's death. During deliberations, one of the jurors downloaded a description of the drug from the Internet and shared it with his fellow jurors the following day. In overturning the defendant's conviction, the Colorado Court of Appeals noted—in 2003—that "[a]lthough the Internet has made information more accessible for the average person, the information obtained thereby may be misleading, taken out of context, outdated, or simply inaccurate. In view of the problems and dangers associated with the unsupervised use of the Internet, trial courts should emphasize that jurors should not consult the Internet, or any other extraneous materials, at any time during the trial, including during deliberations."[17] Five years ago, a Georgia criminal defendant appealed his conviction for aggravated child molestation after a juror used his cellphone to Mapquest the distance between a store where the alleged molestation took place and the defendant's home (following the jury's questioning of evidence presented at trial).[18]

Nowadays, lawyers and judges need to be concerned about potential jurors' Googling—even before the trial begins. In *Shawn Russo, et al. v. Takata Corporation* (a Japanese seat belt manufacturer), *and TK Holdings* (its American subsidiary), the plaintiffs claimed that Takata's seat belts were defective and had unlatched during a rollover accident. When one of the would-be jurors received his jury duty summons, he did a Google search for Takata and TK Holdings, examining the web pages for the two companies that were previously unknown to him. During jury selection, the panel member was never directly asked if he'd heard of either company, and he didn't volunteer information about his online searching. He wound up serving on the jury. Several hours into deliberations, he responded to another juror's question about whether Takata had notice of prior malfunctioning seat belts claims by disclosing his earlier Google searches, and stating that his cybersleuthing hadn't turned up any other lawsuits. At least five other jurors either heard his comments directly or were made aware of them during the rest of the deliberations.

After the jury returned a verdict in favor of Takata and TK Holdings, plaintiffs' counsel sought a new trial, arguing that the juror's information should not have been brought into deliberations. The trial judge agreed, and granted the motion. The defendants appealed to South Dakota's highest court, arguing in part that the fact the information was obtained before trial even began, and that this could have been discovered during voir dire, prevents it from being prejudicial. The South Dakota Supreme Court upheld the trial court's decision.[19]

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[13] State of New Jersey v. Justin Scott, et al., 2009 N.J. Super. Unpub., LEXIS 1901 (N.J. App. Div. July 20, 2009), cert. denied, 2009 LEXIS 1370 (N.J. Nov. 9, 2009).

[14] State v. Dellinger, Case No. 35273 (Va. Ct. App. June 3, 2010).

[15] Joshua Lockwood v. State of Nevada.

[16] Julie Bykowicz, "When Jurors Google," *Baltimore Sun*, July 27, 2008.

[17] People v. Wadle, 77 P.3d 764, 771 (Colo. Ct. App. 2003), *aff'd*, 97 P.3d 932 (Colo. 2004).

[18] Brown v. State, 275 Ga. App. 281 (Ga. Ct. App. 2005).

[19] Russo v. Takata Corp., 2009 S.D. 83 (S.D. 2009).

Controlling the flow of information into the jury room isn't the only problem. Equally troubling is the flow of information leaving the jury box. In March 2009, during the federal corruption trial of former Pennsylvania state senator Vincent Fumo, a juror posted updates on the case on Twitter and Facebook, even hinting to readers of a "big announcement" before the verdict was issued. The judge denied the defendant's motion for a mistrial, but after a guilty verdict was returned, Fumo's lawyers announced plans to use the Internet postings as a basis for appeal.[20]

Building materials company Stoam Holdings and its owner, Russell Wright, recently sought a motion for new trial after an Arkansas jury entered a $12.6 million verdict against them on February 26, 2009. Wright was accused by two investors, Mark Deihl and William Nystrom, of defrauding them; Deihl's lawyer, Greg Brown, described the building materials venture as "nothing more than a Ponzi scheme."

Shortly after the verdict, Wright's attorneys found out that a juror, Jonathan Powell, a 29-year old manager at a Wal-Mart photo lab, had posted eight messages, or "tweets," about the case on social networking site Twitter. Although several of the Twitter messages were sent during jury selection, the ones that attracted the most attention were those actually sent shortly before the verdict was announced.

In one such "tweet," Powell wrote "Oh and don't buy Stoam. Its bad mojo and they'll probably cease to exist, now that their wallet is $12m lighter." In another, Powell said "I just gave away TWELVE MILLION DOLLARS of somebody else's money."[21] One of the lawyers for Stoam and Wright maintained that the messages demonstrated not only that this juror was not impartial and had conducted outside research about the issues in the case, but also that Powell "was predisposed toward giving a verdict that would impress his audience." The court denied Stoam's efforts to set aside the verdict, saying that Powell's actions didn't violate Arkansas law, and that the Twitter messages didn't demonstrate the juror was partial to either side before the verdict.

As it turns out, Powell had nothing to worry about. Noting that Arkansas law requires defendants to prove that outside information found its way into the jury room and influenced the verdict, not that information from the jury panel made its way out, the court held in April that the juror's actions didn't violate any rules, and that the Twitter messages did not demonstrate any evidence of Powel being partial to either side. After the judge denied the defense's effort to set aside the verdict, Powell made perhaps his most prescient observation of the trial, warning that "[t]he courts are just going to have to catch up with the technology."

In fact, instances of jurors venturing onto the Internet, consulting online sources, and communicating about the case via social media has become so prevalent that Reuters Legal did a study in December, 2010. Using data from Westlaw of reported decisions alone, Reuters Legal searched cases from 1999 forward for instances in which judges considered granting a motion for new trial or overturning a verdict as a result of jurors' online conduct. The study revealed that in that period of time, at least 90 verdicts had been challenged because of alleged online juror misconduct—more than half in the last 2 years. Since January 2009, judges granted new trials or overturned verdicts in a least 21 cases because of jurors' Internet forays, according to Reuters. Of course, these statistics do not take into consideration the many cases that do not progress up to the appellate courts, nor do they take into account the presumably frequent incidents which never come to the lawyers' or judges' attention.

IV. PREVENTING JURORS FROM VENTURING ONLINE

So what can be done to prevent jurors from turning the jury box into Pandora's box? Some observers believe that one starting point is educating prospective jurors about why outside research is forbidden. Psychologist, attorney, and jury consultant Robert Gordon of Dallas' Wilmington Institute says "[j]urors go online because they can; the anonymity of the Internet makes it possible, and more alluring. You have to explain [why Internet research is harmful]; you have to actually talk to them."[22]

For a growing number of jurisdictions, the answer has been to formally revise the existing juror instructions to specifically address Internet research and electronic communications. New York's admonitions caution jurors not to research any fact, issue, or law related to the case by any means including the Internet; not to "Google or otherwise search for any information about the case, or the law which applies to the case, or the people involved in the case;" not to "use Internet maps or Google Earth or any other program or device to search for and view any location discussed in the testimony;" and not to communicate with anyone about the case by any means, including by "text messages, email, Internet chat or chat rooms, blogs, or social websites, such as Facebook, MySpace,

[20] John Schwartz, "As Jurors Turn to Web, Mistrials Are Popping Up," *N.Y. Times*, Mar. 17, 2009.

[21] Jon Gambrell, "Appeal Says Juror Sent 'Tweets' During 12.6M Case," *Associated Press*, Mar. 13, 2009.

[22] John Browning, "Dangers of the Online Juror," *D Magazine Legal Directory 2010*, p. 10.

or Twitter."[23] Similarly, Connecticut admonishes jurors not to "look anything up on the Internet concerning information about the case or any of the people involved," not to use "Internet maps or Google Earth," and not to communicate to anyone about the case by any means including "Internet chat rooms, blogs, and social websites like Facebook, MySpace, YouTube or Twitter."[24] As of September 1, 2009—per new rules promulgated by the Michigan Supreme Court—Michigan judges are required to instruct jurors not to use any handheld devices, such as iPhones or Blackberrys, while in the jury box or during deliberations. Moreover, all electronic communications by jurors during trial, whether Twitter "tweets" or text messages, are banned.[25] On January 15, 2010, the Supreme Court of Florida issues the report of its committee charged with revising standard jury instructions in civil and criminal cases, providing new language warning jurors against doing Internet research or using "electronic devices or computers to talk about this case, including tweeting, texting, blogging, emailing, posting information on a website or chat room, or any other means at all. (Previously, in 2006, the Florida Supreme Court had approved changes in the civil instructions to add the words "including the Internet" to prohibiting language concerning research). Maryland, Wisconsin, and several other states are in the process of revising their juror admonitions as well.

Other jurisdictions have followed suit. After an entire panel of 600 prospective jurors had to be excused when a number of them admitted conducting Internet research about a case, the San Francisco Superior Court adopted a rule as of January 1, 2010 instructing jurors "[y]ou may not do research about any issues involved in the case. You may not blog, Tweet, or use the Internet to obtain or share information."[26] And in San Diego Superior Court, jury instructions specify not to use the Internet and jurors are asked to sign declarations saying that they will not use personal electronic and media devices to research or communicate about any aspect of the case.

Before Texas revised its jury instructions to address the growing problems of jurors' online misconduct, a growing number of judges were supplementing the old instructions with admonitions against Internet use. Judge Gena Slaughter of Dallas County's 191st Civil District Court, for example, gave specific instructions against doing online research, blogging, or otherwise communicating about the case during jury service, and she estimates that roughly half of her colleagues in the Dallas judiciary do likewise. Judge Susan Criss of Galveston's 212th District Court instructed her civil jurors against having cell phones, Blackberrys, or similar devices while in the courtroom and has such wireless devices removed from the jury room. She also directed jurors not to "post or read about the case or subject matter of the case or persons in the case on blogs, internet news sites or social media including but not limited to Wikipedia, MySpace, Twitter or Facebook . . . . You cannot post anything about whether a verdict has or will be reached or when a verdict has or will be reached or announced in court."[27]

Effective April 1, 2011, Texas changed its jury instructions to address the persistent problem of the Googling juror. Under Rule 284, immediately after jurors are selected for a case, the court must instruct them to turn off electronic devices like cell phones and "not to communicate with anyone through any electronic device while they are in the courtroom or while they are deliberating." In addition, the court must also instruct them that, during their jury service, "they must not post any information about the case on the Internet or search for any information outside of the courtroom, including on the Internet, to try to learn more about the case." In addition, the revised jury instructions of Rule 226(a) also spell out prohibitions against investigating the case or communicating about the case online. They expressly include a warning not to "communicate by phone, text message, email message, chat room, blog, or social media networking websites such as Facebook, Twitter, or MySpace." Later on, the instructions also admonish against posting "information about the case on the Internet before these court proceedings end and you are released from jury duty," as well as refraining from investigating the case on one's own—including cautioning against looking "anything up on the Internet to try to learn more about the case."

For some jurisdictions, painful experience has prompted changes in juror instructions. Rhode Island adopted a new policy in May 2009 that warns jurors against talking about the case "either personally or through computers, cell phone messaging, personal electronic and media devices or other forms of wireless communication," and also forbids conducting Internet searches about the case or participating in chat rooms

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[23] *Jury Admonitions in Preliminary Instructions*, http://wwwnycourts/gov (last visited Jan. 15, 2010).

[24] Connecticut Criminal Preliminary Jury Instructions 1.2–10 (revised 6/12/09).

[25] "Texts and 'tweets' by jurors, lawyers pose courtroom conundrums," http://www.justice.org/cps/rde/xchg/justice/hs.xsl/10049.htm.

[26] "Jurors: Keep you E-Fingers to Yourselves," http://blogs.findlaw.com/technologist/2009/09/jurors-keep-your-e-fingers-to-yourselves.html.

[27] "Instructions to Civil Jury," courtesy Judge Susan Criss, 212th Judicial District Court, Galveston, Texas.

or blogs discussing the case. The revised policy was, in part, a reaction to incidents like the Destie B. Ventre mistrial. Ventre had his first conviction for a 1998 murder overturned due to faulty jury instructions, only to have the second trial in 2004 end in a mistrial as well. A juror, hoping to move deliberations along, had consulted the Internet for definitions of manslaughter, murder, and self-defense. As bad as this was, the error was compounded because the juror looked up definitions in California, not Rhode Island. (The third time wasn't the charm either; conviction #3 was overturned due to improper instructions on the burden of proof, and Ventre eventually pleaded no contest to the murder in 2007).[28]

Federal judges struggling with the need to deter jurors from online misconduct can find guidance in a new set of model jury instructions issued by the Judicial Conference of the United States' Committee on Court Administration and Case Management in February 2010. The instructions admonish jurors that they should not consult dictionaries or reference materials, search the Internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help decide the case," and that they "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, through any internet chat room, or by way of any other social networking websites, including Facebook, MySpace, LinkedIn, and YouTube." Judge Julie Robinson, the committee's chair, expressed the belief that "more explicit mention in jury instructions of the various methods and modes of electronic communication and research would help jurors better understand and adhere to the scope of the prohibition against the use of the devices."[29]

Keeping jurors from texting, tweeting, Googling, and blogging requires more than just instructions from the court. It begins with educating jurors about why outside research is forbidden. As psychologist and jury consultant Dr. Robert Gordon of Dallas' Wilmington Institute notes, "Jurors go online because they can; the anonymity of the Internet makes it possible, and more alluring. You have to explain [why Internet research is harmful], you have to actually talk to them." Additional steps beyond education may also be called for. In September 2010, the American College of Trial Lawyers issued a series of recommendations intended to address the problem of the Googling juror. They include everything from including a written warning against online research with the initial jury summons, to having empaneled jurors sign an agreement acknowledging the court's instructions against social media communications and online research, to actually confiscating jurors' electronic devices while at the courthouse.

But what about punishment and its deterrent effect? There have been several reported instances of fines issued for contempt as a result of a juror's online misconduct, but they are few and far between. In Macomb County, Michigan in 2010, Judge Diane Druzinski took advantage of a "teachable moment." A juror in her court, Hadley Jones, posted on Facebook—before the verdict was in—that she was actually "excited for jury duty tomorrow" because "It's gonna be fun to tell the defendant they're GUILTY." Judge Druzinski found her in contempt and not only ordered her to pay a $250 fine, but also to write an essay about the importance of the Sixth Amendment. The stiffest punishment came in June, 2011, when a juror in the United Kingdom was sentenced to 8 months in prison for contacting a criminal defendant on Facebook. 40 year-old Joanne Fraill of Manchester had contacted defendant Jamie Sewart during deliberations in a multimillion dollar drug trial of Sewart's co-defendants. Fraill admitted feeling "empathetic," prompting not only her Facebook chats with Sewart but also her Internet searches regarding Sewart's boyfriend and co-defendant Gary Knox. In passing judgment, Lord Igor Judge of London's High Court noted that "Her conduct in visiting the Internet repeatedly was directly contrary to her oath as a juror, and her contact with the acquitted defendant, as well as her repeated searches on the Internet, constituted flagrant breaches of the orders made by the judge for the orderly conduct of the trial." The solicitor general who prosecuted the case, Edward Garnier QC, commented "Long before social networks, the courts have been in no doubt that discussions inside the jury room must stay there. The Internet doesn't make judges' warnings not to talk about a case or research it any less important."

V. SOCIAL MEDIA IN JURY SELECTION

Has voir dire become "voir Google?" It certainly seems so, as more and more lawyers turn to researching a prospective juror's online presence and social media sites as part of the jury selection process. The online selves of prospective jurors were explored in high profile cases like the Barry Bonds perjury trial and certainly the first corruption trial of former Illinois governor Rod Blagojevich. In another high profile case, the murder trial of Casey Anthony in Florida, prosecutors armed with Internet information on prospective jurors used challenges to dismiss an individual who allegedly posted the jury instructions on his Facebook page and also joked about writing a

[28] Talia Burford, "New juror policy accounts for new technology," *Providence Journal*, May 17, 2009.
[29] Marein Coyle, "No Talking, No Texting, No Tweeting," *The Blog of Legal Times*, Feb. 8, 2010.

book, as well as one man who tweeted "Cops in Florida are idiots and completely useless."

But "facebooking the jury" isn't just for high profile cases. Cameron County District Attorney Armando Villalobos has issued iPads to his prosecutors so that they can check out the Facebook profiles of potential jurors. And you never know what you may find. As jury consultant Jason Bloom of Dallas' Bloom Strategic Consulting explains, "Jurors are like icebergs—only 10 percent of them is what you see in court. But you go online and sometimes you can see the rest of the juror iceberg that's below the water line." In criminal cases, lawyers or jury consultants have employed online research which revealed that juror who had professed to having no opinion n capital punishment had actually written an op-ed piece for his local paper on the death penalty. Missouri criminal defense attorney Jennifer Bukowsky was defending an African-American male accused of sexual assault, and elected to keep a white female juror on the panel after observing that the woman's Facebook page contained several photos of her with a black man—an encouraging sign that the woman was not racist.

The same principles apply in civil cases. In a Florida products case involving an industrial accident that occurred in a tight, confined space, the plaintiff's jury consultant researched the social media pages of the potential jurors. One had on his MySpace page the fact that he belonged to a support group for claustrophobics. Sensing an empathetic juror in the making, they kept him on the panel; he wound up being the foreman of the jury which delivered a significant verdict. In another products case, lawyers for food giant Conagra were defending a case brought by a woman who alleged that she had contracted a rare lung disease caused by ingesting large amounts of microwave popcorn containing the chemical diacetyl, made by Conagra. After the jury was sworn in, Conagra's lawyer discovered that one juror had a Facebook page filled with anti-corporate rants and links to websites critical of large corporations like BP and McDonald's. They argued that he had been deceptive during voir dire about his anti-company bias, and the judge agreed, dismissing the juror. Conagra later won a defense verdict.

Despite the obvious importance of information that can be gleaned from a prospective juror's social networking profile, attitudes vary around the country about technology-aided voir dire. In a 2009 medical malpractice case in New Jersey, for example, plaintiff's counsel was on his laptop doing online research on members of the jury pool. The judge ordered the attorney to stop, saying "it's my courtroom and I control it." After a defense verdict, plaintiff's counsel appealed, arguing that the court erred by prohibiting him from doing online research as part of jury selection. The appellate court agreed, finding that banning web searches during voir dire was unreasonable. The court noted

> There was no suggestion that counsel's use of the computer was in any way disruptive. That he had the foresight to bring his laptop computer to court, and defense counsel did not, simply cannot serve as a basis for judicial intervention in the name of "fairness" or maintaining "a level playing field." The "playing field" was, in fact, already "level" because internet access was open to both counsel, even if only one of them chose to utilize it.[30]

The Missouri Supreme Court takes things a step farther, ruling that investigating one's jury pool is not only permitted, but that you might even have a duty to use such online tools. In a medical malpractice suit, counsel for plaintiff asked the panel during voir dire about their civil litigation history. While various members of the panel answered affirmatively, one—Ms. Mims—failed to respond. After a defense verdict, plaintiff's counsel investigated Mims' civil litigation history using Missouri's Case.net automated service. He found there was no reason for Mims to stay mum; the juror had been a defendant in a personal injury case, as well as numerous debt collection matters. Plaintiff's counsel filed a motion for new trial, arguing that Mims had intentionally failed to disclose her prior litigation experience during voir dire. The trial court granted a mistrial, and the defendant appealed.

Although the Missouri Supreme Court upheld the mistrial, it had some choice words about the responsibility of attorneys to discover information about jurors. It observed,

> In light of advances in technology allowing greater access to information . . . it is appropriate to place a greater burden on the parties to bring such matters to the court's attention at an earlier stage. Litigants should not be allowed to wait until a verdict has been rendered to perform a Case.net search for jurors' prior litigation history when, in many instances, the search also could have been done in the final stages of jury selection or after the jury was selected but prior to the jury being empanelled . . . a party must use reasonable efforts to examine the litigation history on Case.net of those jurors selected but not empanelled and present to the trial

[30] Carino v. Muenzen, 2010 WL 3448071 (N.J. Super. A.D. August 30, 2010).

> court any relevant information prior to the trial.[31]

In an age in which a few clicks of a mouse can reveal an abundance of information about prospective jurors (sometimes too much information) and in which people are revealing more than ever about themselves online, doing social media research during voir dire makes more sense than ever. Not only can you avoid having a juror with a hidden agenda sitting on your panel, but you might actually prevent a mistrial or overturned verdict on appeal.

VI. CONCLUSION

The cherished principles underlying a court's responsibility for controlling the jury's access to information are strong enough to have endured for centuries, yet fragile enough to be violated with the speed of a search engine. As mistrials and overturned verdicts continue to dot the legal landscape, it's become painfully evident that the easy access and global reach of wireless technology—combined with a generational shift in which digital intimacy has become the social norm—demand that courts do a better job of instructing jurors about the "off limits" nature of online conduct. Such instructions may be better received by jurors accustomed to getting information from the Internet and sharing their lives on Facebook if greater efforts are made to educate them about the constitutional protections that mandate the court's control over access to information.

[31] Johnson v. McCullough, No. SC90401, Supreme Court of Missouri (March 9, 2010).