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SILENCING THE “TWITTERING JUROR”: THE NEED TO MODERNIZE PATTERN CAUTIONARY JURY INSTRUCTIONS TO REFLECT THE REALITIES OF THE ELECTRONIC AGE

“[I]t becomes painfully evident that the easy access and global reach of wireless technology is in danger of transforming the jury box into Pandora’s box.”¹

INTRODUCTION

Today’s jurors engage in a variety of “digital misadventures,”² endangering the sanctity of trial. Generation Y’s “just-Google-it-citizens” enter the jury box and change the entire tradition with which courts are familiar.³ Armed with temptation and capability,⁴ these jurors are naturally inclined to turn to the Internet when seeking an-

1. John Browning, ‘*When All That Twitters Is Not Told: Dangers of the Online Juror—Part 3*, ROCKWALL HERALD BANNER (July 31, 2009), <http://rockwallheraldbanner.com/opinion/x1446229554/-When-All-That-Twitters-Is-Not-Told-Dangers-of-the-online-juror-Part-3> [hereinafter Browning, *Part 3*]; see also John G. Browning, *When All That Twitters Is Not Told: Dangers of the Online Juror*, 73 TEX. B.J. 216, 219 (2010) [hereinafter Browning, *Dangers of the Online Juror*] (noting that courts must catch up with juror use of technology “to prevent jurors from turning the jury box into a Pandora’s box”).

2. Hilary Hylton, *Tweeting in the Jury Box: A Danger to Fair Trials?*, TIME ONLINE (Dec. 29, 2009), <http://www.time.com/time/nation/article/0,8599,1948971,00.html>. Judges and lawyers also engage in “digital misadventure[s].” *Id.* See also Michael W. Hoskins, *At a Juror’s Fingertips: Legal Community Adapts to an Online World*, INDIANA LAW., May–June 2009, at 7, 7–8, available at http://www.theindianalawyer.com/html/detail_page_Importfram.asp?content=3907. With respect to judges, the issue arose at a recent annual meeting of the Seventh Circuit Bar Association. See *id.* Judge Richard Posner explained how judges use the Internet to look up information not submitted by the parties’ attorneys for cases over which they preside. See *id.* Two cases exemplify the tendency. In *Gilles v. Blanchard*, 477 F.3d 466 (7th Cir. 2007), Judge Posner attached a Google satellite photo of the location at issue in the case—something that was not included in the original record. *Id.* at 469; see also Hoskins, *supra*, at 7. In *United States v. Boyd*, 475 F.3d 875 (7th Cir. 2007), the panel opinion expressed frustration that “no satellite photo . . . was placed in evidence,” so the judges found one themselves. *Id.*

3. Hylton, *supra* note 2. Generation Y is also known as the “Millennium Generation.” Ellen Neuborne & Kathleen Kerwin, *Generation Y*, BUS. WK., Feb. 15, 1999, at 80, 82, available at http://www.businessweek.com/1999/99_07/b3616001.htm. Generation Y represents those born between 1979 and 1994. Hylton, *supra* note 2. The Chicago Tribune reports that Generation Y—also dubbed “Millennials”—is “history’s first ‘always connected’ generation, treating phones and similar devices almost like body parts.” Duaa Eldeib, ‘*Millennials: The Greatest (Connected) Generation*, CHI. TRIB., Feb. 24, 2010, at 9.

4. Jurors are likely to enter the courthouse “digitally linked to the outside world.” Ralph Artigliere et al., *Reining in Juror Misconduct: Practical Suggestions for Judges and Lawyers*, 84 FLA. B.J. 8, 10 (2010).

swers to their questions. Don't understand the evidence presented at trial? Just Google it.⁵ Can't grasp a complicated subject? Wikipedia can simplify it.⁶ Need to locate the site of a witness's alibi or the scene of the crime? Turn to Mapquest.⁷ Is the lawyer's description of the plaintiff's medical condition too complicated? Generation Y's jurors can search WebMD.⁸

For several years now, Internet-centered juror misconduct has been on the rise.⁹ Amidst the tedium of trial, with iPhones in their pocket and laptops by their sides, Generation Y's jurors browse the Internet.¹⁰ But a new form of "digital misadventure" has become a phenomenon in America's courtrooms. Jurors are using social networking—Twitter and Facebook—to share their jury experience in real time.¹¹ These services, particularly Twitter, have "unsuspected depth."¹²

Twitter is the new face of "the 'super fresh' Web."¹³ It combines two dangerous elements: access to outside information and conversation.¹⁴ Twitter poses a threatening alternative to Google's near monopoly on Web searching and provides users immediate access to immense volumes of information. Moreover, "[r]apid-fire innovation" has redesigned Twitter to approximate in-person conversation.¹⁵

5. See Christopher Danzig, *Mobile Misdeeds: When Jurors Have the Web at Their Fingertips, Trials Can Quickly Unravel*, INSIDE COUNSEL, June 2009, at 38, 40 (quoting DLA Piper Partner Jeffery Rosenfeld: "You've got jurors who could literally be sitting in the [jury] box running an Internet search while testimony is going on"). The practice of jurors running Internet searches during trial has been dubbed the "Google mistrial[]" when it requires post-verdict relief. Renee Loth, Op-Ed., *Mistrial by Google*, BOS. GLOBE ONLINE (Nov. 6, 2009), http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2009/11/06/mistrial_by_google.

6. See Hylton, *supra* note 2.

7. See Hoskins, *supra* note 2.

8. See, e.g., Loth, *supra* note 5.

9. See Artigliere et al., *supra* note 4.

10. See generally Hoskins, *supra* note 2.

11. See, e.g., Hylton, *supra* note 2. In the U.K., a woman was dismissed from a jury for posting a poll on her Facebook profile that asked others to help her reach her decision in the child abduction and sexual assault case she was serving on. Browning, *Dangers of the Online Juror*, *supra* note 1, at 217. Similar incidents have occurred in the United States. *Id.*

12. Steven Johnson, *How Twitter Will Change the Way We Live (in 140 Characters or Less)*, TIME, June 15, 2009, at 32, 33.

13. *Id.* at 35. The author aptly points out, "If you're looking for interesting articles or sites devoted to Kobe Bryant, you search Google. If you're looking for interesting comments from your extended social network about the three-pointer Kobe just made 30 seconds ago, you go to Twitter." *Id.* Due to this immediacy, Twitter might be even more problematic to courts than Google; Twitter allows jurors to gather immediate responses to their questions. See *id.*

14. See *id.* at 32–35.

15. *Id.* at 34, 37.

Jurors no longer just share their experiences with people outside the courtroom: they now can view outsiders' responses as well.¹⁶

With instantaneous access to the Internet, old cautionary prohibitions—such as barring jurors from “outside research” or “external discussion”—are no longer specific enough.¹⁷ Jurors are rightfully confused as to whether these instructions apply to their phones and computers as well.¹⁸ With ambiguous instruction from the court, jurors continue to access the Web, potentially encountering outside information and being exposed to extraneous influence.¹⁹ Unsurprisingly, juror use of modern technology has been “hit[ting courts] right over the head.”²⁰ Accounts of technology-influenced juror misconduct made headlines in 2009.²¹ Jurors are imperiling the integrity of trial by using mobile devices in the jury box.²² Generation Y’s “Blackberry-addicted jurors,”²³ with their instinctual drive to stay “connected” and constant ability to hop online, make it increasingly necessary for judges to proactively prevent online interference with

16. *Id.* at 34.

17. This is the traditional precautionary instruction given to jurors by the judge at the beginning of a trial. *See, e.g.*, Third Circuit, Pattern Jury Instruction 1.3, available at http://www.ca3.uscourts.gov/civiljuryinstructions/Final-Instructions/november2009/1_Chaps_1_2_3_2009_November.pdf. A cautionary instruction is “[a] judge’s instruction for the jury not to be influenced by outside factors and not to talk to anyone about the case while the trial is in progress.” BLACK’S LAW DICTIONARY 874 (8th ed. 2004). These instructions are designed to prevent juror misconduct. Juror misconduct is defined as

[a] juror’s violation of the court’s charge or the law, committed either during trial or in deliberations after trial, such as (1) communicating about the case with outsiders, witnesses, attorneys, bailiffs, or judges, (2) bringing into the jury room information relating to the case but not in evidence, and (3) conducting experiments regarding theories of the case outside the court’s presence.

Id. at 1019.

18. *See, e.g.*, Dustin Bartholomew, *An Interview with the Juror “Who Tweets,”* FAYETTEVILLE FLYER (Mar. 13, 2009), <http://www.fayettevilleflyer.com/author/DustinBartholomew>.

19. *See, e.g.*, James A. Edwards, *Jurors Who Tweet, Blog, & Surf—Deciding and Discussing Your Case*, JD SUPRA (July 2009), <http://www.jdsupra.com/post/documentViewer.aspx?fid=60c18d09-7f61-477a-902b-5ae405f5dcd9>.

20. John Browning, ‘*When All that Twitters is Not Told: Dangers of the Online Juror*’ (Part 1), ROCKWALL HERALD BANNER (May 15, 2009), <http://rockwellheraldbanner.com/opinion/x1054522581/-when-all-that-twitters-is-not-told-Dangers-of-online-juror-part-1?> [hereinafter Browning, *Dangers*]. For an overview of the issues posed by technology in the jury box, see Douglas L. Keene & Rita Handrick, *The Darkside of the Internet: In the Jury Room*, AM. C. TRIAL LAWS. (2009), http://www.keenetrial.com/articles_15_2510325171.pdf.

21. *See, e.g.*, John Schwartz, *As Jurors Turn to Google and Twitter, Mistrials Are Popping Up*, N.Y. TIMES, Mar. 18, 2009, at A1.

22. *See, e.g., id.*

23. Ahnalese Rushmann, *Courtroom Coverage in 140 Characters*, 33 NEWS MEDIA & L. 28, 30 (2009).

trials.²⁴ The volume of information available online has become a “near-irresistible magnet for juror curiosity.”²⁵

“[T]echnology has far outpaced the court rules.”²⁶ Generation Y’s unchecked Internet usage puts America’s trials at risk. Mobile Internet devices threaten our adversary system of trial procedure because they enable jurors to immediately access information from outside the courtroom.²⁷ With the reach of the Internet in the palm of a juror’s hands, the situation is exacerbated by immediacy.²⁸ Judges must ensure jurors consider only the evidence provided in court.²⁹

While all juror Internet access potentially poses a threat to trial integrity, a focused discussion of Twitter is pertinent due to the Web site’s newfound fame. Juror Internet use has endangered trials for almost a decade, but networking Web sites pose the newest threat.³⁰ In 2009, the use of Twitter became the new “hot topic” in civil procedure and evidence law.³¹ Twitter presents to judges, litigants, and lawyers a new variation on an old problem: juror communication with people outside the courtroom and access to extraneous information.

To the dismay of the legal profession, Twitter has gained an alarming presence in the jury box.³² Since only an estimated six percent of lawyers and judges use Twitter, a brief overview of the Web site’s nature is in order.³³ Twitter is more of an “information network”³⁴ than

24. See generally Edwards, *supra* note 19.

25. Michael Hoenig, *Juror Misconduct on the Internet*, N.Y. L.J., Oct. 8, 2009, at 3.

26. Tresa Baldas, *For Jurors in Michigan, No Tweeting (or Texting, or Googling Allowed)*, NAT’L L.J. (July 1, 2009), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202431952628&hbxlogin=1> (quoting Josh Marquis).

27. See, e.g., Schwartz, *supra* note 21, at A1.

28. See Danzig, *supra* note 5, at 38; see also Duchess Harris, *Courts Wrangle with Twittering Jurors*, LITIG. NEWS (July 15, 2009), http://abanet.org/litigation/litigationnews/top_stories/twitter-jurors.html.

29. Excluding extraneous information from juror deliberations is one of the goals of the adversary system. See FED. R. EVID. 606(b). While the Internet has been causing problems for courts since 2001, the dramatic rise in frequency of use has peaked the attention of experts. See Keene & Handrich, *supra* note 20, at 1.

30. The Twittering juror issue first infiltrated courts in 2009. See *United States v. Fumo*, 639 F. Supp. 2d 544 (E.D. Pa. 2009).

31. The volume of professor, lawyer, and judge blog commentary on the Twittering juror exemplifies the issue’s rising fame. See, e.g., Jeffrey J. Kroll, *Michigan Jurors Prohibited from Using Electronic Communications*, CHI. ACCIDENT AND INJURY LAW BLOG (July 2, 2009), http://chicagoaccidentinjurylawyer.com/2009/07/michigan_jurors_prohibited_fro.html (a lawyer’s posting regarding new jury instructions proposed in Michigan).

32. To view the prevalence of jury duty on Twitter, simply go to <http://www.twitter.com> and type “jury duty” into the search field. The results will show, in reverse chronological order, the most recent tweets about jury duty.

33. Rosalind R. Greene & Jan Mills Spaeth, *Are Tweeters or Googlers in Your Jury Box?*, 46 ARIZ. ATT’Y, Feb. 2010, 38, 39.

a social network.³⁵ It is a microblogging service on the Internet.³⁶ The service poses to users one question—"What's happening?"—to which the text-based answer (a "tweet") can be up to 140 characters in length.³⁷ Users can post tweets for others to read, respond directly to other users' tweets, and share Internet links.³⁸ Twitter accepts messages from the Short Message Service (SMS),³⁹ the Web, and instant message services.⁴⁰ Due to its accessibility from various delivery systems, Twitter is extremely powerful.⁴¹ It has become a popular method for people to share and discover what is happening in real time.⁴²

34. Interview by John Battelle with Evan Williams, CEO, Twitter (Oct. 21, 2009), available at <http://www.youtube.com/watch?v=p5jXcgZnEa0&fmt=18> (quoting Twitter's founder Evan Williams).

35. Stuart Dredge, "Twitter Is Not a Social Network," Says VP, MOBILE ENTERTAINMENT FOR EVERYONE IN MOBILE CONTENT (Sept. 14, 2010), <http://www.mobile-ent.biz/news/38640/Twitter-is-not-a-social-network-says-Twitter-VP>.

36. See TWITTER: ABOUT, <http://twitter.com/about#about> (last visited Jan. 25, 2011). A blog, the contraction of the term "weblog," AMERICAN HERITAGE COLLEGE DICTIONARY 155 (4th ed. 2004), is a "personal [W]eb[]site on which the individual records opinions, links to other sites, etc. on a regular basis." CONCISE OXFORD ENGLISH DICTIONARY 147 (11th ed. 2008). A blog functions as an online personal journal with reflections, comments, and often hyperlinks to related information. See WEBSTER'S NEW WORLD COLLEGE DICTIONARY 157 (Anges ed. 2008). Twitter is a microblog. See, e.g., Leslie D'Monte, *Swine Flu's Tweet Tweet Causes Online Flutter*, BUS. STANDARD (Apr. 29, 2009, 4:03 PM), <http://www.business-standard.com/india/news/swine-flu%255Cs-tweet-tweet-causes-online-flutter/356604/>. A microblog consists of "short posts to a personal blog," focusing particularly on "happenings of the moment." *Microblog*, DICTIONARY.COM, <http://dictionary.reference.com/browse/microblogging> (last visited Jan. 25, 2011).

37. See TWITTER, <http://www.twitter.com> (last visited Jan. 25, 2011).

38. See, e.g., Johnson, *supra* note 12, at 34.

39. Short Message Service is a communication service that allows the interchange of short text messages over mobile networks. Puneet Gupta, *Short Message Service: What, How and Where?*, WIRELESS DEVELOPER NETWORK, <http://www.wirelessdevnet.com/channels/sms/features/sms.html>. Twitter is often called the "SMS of the Internet." D'Monte, *supra* note 36.

40. See TWITTER: ABOUT, *supra* note 36. Users do not necessarily expect a response when they tweet:

On the receiving end, Twitter is ambient—updates from your friends and relatives float to your phone, IM, or web site and you are expected to pay as much or as little attention to them as you see fit. The result of using Twitter to stay connected with friends, relatives, and coworkers is that you have a sense of what folks are up to[,] but you are not expected to respond to any messages unless you want to. This means you can site in and out of the flow of information as it suits you. . . . Twitter is what you make of it—receive a lot of information . . . or just a tiny bit.

Isn't Twitter Just Too Much Information?, TWITTER, <http://twitter.com/about#about> (last visited Jan. 25, 2011).

41. Sarah Milstein, *How Twitter Can Help at Work*, N.Y. TIMES SHIFTING CAREERS BLOG (Sept. 7, 2008, 9:01 PM), <http://shiftingcareers.blogs.nytimes.com/2008/09/07/how-twitter-can-help-at-work/>.

42. Users can either subscribe to follow others' tweets or conduct a general search. See Edwards, *supra* note 19, at 5. Jurors communicate on Twitter with both friends and strangers. See *id.*

“Courtroom coverage in 140 characters” has been disrupting court proceedings across the country.⁴³ Jurors are “in ur [sic] jury box, tweetin [sic] ur [sic] verdict.”⁴⁴ Cases in 2009 illustrated how “thumb-nimble”⁴⁵ jurors use Twitter to gather information about a case or to share current jury service experiences.⁴⁶ The media accurately described these Twittering jurors as “wreaking havoc on trials around the country.”⁴⁷ The crux of the problem is the ability of the Twittering juror to access outside information and to be swayed by extraneous influence.

Juror use of Twitter during trial is problematic because the judicial process depends upon an impartial jury, unexposed to extraneous influence.⁴⁸ With the ability of an in-court juror to receive comments on his tweets from people outside the courtroom, the problem of the Twittering juror parallels the problems posed by communication with outsiders in general. Access to outside information threatens the sanctity of trial.⁴⁹ To ensure a fair trial, courts must preemptively control Twitter use by jurors; courts must “silenc[e] . . . the tweets.”⁵⁰

The Twittering juror could be silenced with a simple jury instruction. The traditional prohibition against external communication and outside research must be rewritten to meet the demands of the twenty-first century. Courts should adopt a standard jury instruction that prevents juror use of technology—including Twitter—during trial. The new instruction must specifically detail which technologies jurors are prohibited from using.⁵¹ It should incorporate the policy reason for the prohibition to contextualize forbidden behavior for jurors.⁵² The instruction should be provided to jurors orally and in written

43. Rushmann, *supra* note 23, at 28.

44. Lance Turner, *Morning News: Twittering Juror Prompts Request for New Trial*, WORDPRESS.COM (Mar. 13, 2009), <http://lanceturner.wordpress.com/2009/03/13/morning-morning-news-twittering-juror-prompts-request-for-new-trial/>. For an interesting discussion on when tweeting has and has not been allowed in the courtroom, see Richard M. Goehler et al., *The Legal Case for Twitter in the Courtroom*, 27 COMM. LAW., Apr. 2010, at 14 (detailing when courts have allowed reporters and jurors to use Twitter and when they have not).

45. Patrik Jonsson, *Tweets from the Jury Box: Jurors Using Twitter Jeopardize Trials*, CHRISTIAN SCI. MONITOR (Oct. 21, 2009), <http://www.csmonitor.com/USA/Justice/2009/1021/p02s26-usju.html>.

46. *See, e.g.*, *United States v. Fumo*, 639 F. Supp. 2d 544, 555 (E.D. Pa. 2009).

47. Schwartz, *supra* note 21, at A1.

48. Twitter could potentially bring extraneous prejudicial material into the courtroom. If courts leave jurors' access to extraneous information unchecked, then the uninformed citizen might be allowed to dictate the judgment, rather than the informed juror.

49. This is the premise behind Federal Rule of Evidence 606(b).

50. Baldas, *supra* note 26.

51. *See infra* notes 233–63 and accompanying text.

52. *See infra* notes 264–77 and accompanying text.

form to emphasize the importance of the prohibition.⁵³ The precautionary instruction should be issued repeatedly throughout trial. It should be used in combination with other preventative techniques, such as juror summons, voir dire questioning, and juror declarations.⁵⁴

This Comment addresses the problem of the Twittering juror and seeks to persuade courts to prohibit tweeting. It suggests a preventative measure: a new jury instruction satisfying the above criteria. Part II examines juror use of Twitter and discusses the relevant law and policy considerations for evaluating Twitter as an extraneous influence.⁵⁵ Part III summarizes recent court decisions concerning Twitter use, evaluates approaches currently underway for regulating Twitter use in court, and proposes a new preventative jury instruction that will correct the current approaches' flaws.⁵⁶ Part IV considers how courts and juries will be affected by the new instruction.⁵⁷ Part V provides a brief conclusion on the issue and makes predictions for the future.⁵⁸

II. BACKGROUND

The Twittering juror became a legal concern in 2009.⁵⁹ Against a background of Internet-centered juror misconduct, Twitter arose as a new rendition of a recognized problem.⁶⁰ An examination of the popularity of Twitter, its threat to the adversary system, and 2009's Twittering juror cases provide foundation for the development of a preventative solution.

A. *Technology in the Jury Box: A Threat to Trial Procedure*

Twitter provides a focused avenue to discuss juror use of technology. The problem is a pressing one: Twitter's statistical popularity makes it increasingly likely that a juror will be a Twittering one. With

53. See *infra* notes 278–88 and accompanying text.

54. See *infra* notes 302–20 and accompanying text.

55. See *infra* notes 59–170 and accompanying text.

56. See *infra* notes 171–320 and accompanying text.

57. See *infra* notes 321–34 and accompanying text.

58. See *infra* notes 335–51 and accompanying text.

59. See, e.g., Hylton, *supra* note 2.

60. See generally Johnson, *supra* note 12, at 37. An April 2009 survey by the Pew Research Center's Internet & American Life Project shows that fifty-six percent of American adults access the Internet daily by wireless means. Press Release, Pew Internet and American Life Project, Mobile Internet Use Increases Sharply in 2009 as More than Half of All Americans Have Gotten Online by Some Wireless Means (July 22, 2009), available at <http://www.pewinternet.org/Press-Releases/2009/Mobile-internet-use.aspx>. Nearly one-fifth of Americans use a mobile device to access the Internet everyday. *Id.* Thirty-nine percent have used a laptop computer to access the Internet. *Id.*

the need to maintain the integrity of jury deliberations, courts must tame this threat to trial procedure.

1. *Twitter as an Information and Social Network*

Twitter's popularity has increased as mobile technologies—such as the BlackBerry and the iPhone—have become more widespread.⁶¹ As most United States courtrooms do not confiscate jurors' mobile devices when they enter the courthouse,⁶² jurors can access these devices at any point during trial. Jurors are increasingly using their mobile devices to social network from the jury box.⁶³ This is a natural extension of Generation Y's habitual desire to stay connected.

Online social networking has become so common that, for a large sector of the population, it has become instinctual.⁶⁴ Statistics illuminate the popularity of social networking. Thirty-five percent of adult Internet users currently use a social networking Web site.⁶⁵ Twitter was the third most popular site in January 2009, with six million monthly visitors and a total of almost fifty-five million monthly visits.⁶⁶ Twitter's year-over-year growth rate from February 2008 to February 2009 was 1382%.⁶⁷ As of February 2009, Twitter is the fastest-growing Web site in the "member communities" category of Nielsen Media.⁶⁸ Interestingly, Twitter's popularity stems mostly from the adult population.⁶⁹ This differs from other social networking Web sites, such as Facebook, that draw a younger following.⁷⁰

61. *See id.*

62. *See* Hylton, *supra* note 2 ("[M]any judges are still loath to separate jurors from their cell phones and Blackberries . . ."); Charles Wilson, *Texting, Tweeting Tempt Jurors, Frustrate Judges*, ASSOCIATED PRESS ONLINE (Aug. 1, 2009), <http://www.wsbt.com/news/national/52234872.html>.

63. *See* Browning, *Part 3, supra* note 1.

64. *See* Trish Renaud, *Watch out for Blogging Jurors*, LAW TECH. NEWS (Feb. 17, 2009), <http://www.law.com/jsp/legaltechnology/pubArticleLT.jsp?id=1202428284825>.

65. Sharon Jayson, *Older Adults Among Newer Members on Social Networking Sites*, USATODAY.COM (Jan. 14, 2009, 6:58 PM), http://www.usatoday.cim/tech/hotsites/2009-01-14-social-networking_N.htm.

66. Andy Kazeniak, *Social Networks: Facebook Takes Over Top Spot, Twitter Climbs*, COMPETE BLOG (Feb. 9, 2009), <http://blog.compete.com/2009/02/09/facebook-myspace-twitter-social-network/>.

67. Michelle McGiboney, *Twitter's Tweet Smell of Success*, NEILSEN WIRE (Mar. 18, 2009), http://blog.neilsenonline_mobile/twitters-tweet-smell-of-success/.

68. *Id.*

69. *See* Claire Cain Miller, *Twitter? That's So, Like, for Grown-Ups*, N.Y. TIMES, Aug. 26, 2009, at B1.

70. *Id.*

As Twitter use has flourished—as of March 2004 there were an estimated two hundred and twenty-five million tweets per day⁷¹—it was inevitable that Twitter use would spill over into inappropriate environments such as the courtroom. Twitter user Keith Anderson, for example, tweeted: “Wow. Jury duty. First time ever. Can I be excused because I can’t be offline for that long?”⁷²

The prevalence of jurors who tweet during trial is truly astounding. A simple search of the phrase “jury duty” on the Twitter Web site retrieves thousands of “hits.”⁷³ While the majority of tweets are simple emotional reactions to receiving a jury summons, a large number of tweets recount details of ongoing trials.⁷⁴ Twittering jurors serve as citizen journalists, publishing comments on their jury service experience on the Web.⁷⁵ “Tweets are a part of everyday life, and this is what [jurors are] doing.”⁷⁶ Tweeting from the jury box potentially allows extraneous information to enter deliberations.

2. *Twitter Poses a Threat to Trial Integrity Due to a Twitter User’s Ability to Access Outside Information and Potential to Be Swayed by Extraneous Influence*

Like juror use of other Web sites, Twitter use potentially compromises the integrity of trial for litigants. This is because it conflicts with the traditional notion of the adversary system: to keep jurors insulated from outside information.⁷⁷ American trials are conducted us-

71. Robert A. Clifford, *Twittering in the Jury Box*, 32 CHI. LAW., June 2009, at 16, 17; Gina F. Rubel, *Is Twitter a Valuable Networking Tool or Just for the Birds?*, THE NAT’L LAW JOURNAL (Mar. 18, 2009), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202429165569&slreturn=1&hblogin=1>.

72. Erin Geiger Smith, *Today’s Top Tweets from Jury Duty: I Need My Twitter*, BUS. INSIDER L. REV. (Oct. 14, 2009, 1:54 PM), <http://www.businessinsider.com/todays-top-tweets-from-jury-duty-2009-10#i-need-my-twitter-7>.

73. See TWITTER, *supra* note 37 (type “jury duty” into the search box).

74. See Smith, *supra* note 72.

75. See Eugene Volokh, *Federal Rules Interpreted as Barring Twitter Coverage of Trial from Inside Courtroom*, THE VOLOKH CONSPIRACY (Nov. 9, 2009, 12:09 PM), <http://volokh.com/2009/11/09/federal-rules-interpreted-as-barring-twitter-coverage-of-trial-from-courtroom/>.

76. Hoskins, *supra* note 2 (quoting Chief Judge Robert Miller of the U.S. District Court for the Northern District of Indiana who said he has begun adapting his instructions in recent months to prohibit juror use of Twitter).

77. See RANDOLPH N. JONAKAIT, THE AMERICAN JURY SYSTEM 199 (2003). The court will instruct jurors “that they should consider only the evidence presented at trial and not other information.” *Id.* For example,

To help ensure that the jurors consider only the presented evidence, jurors will be told [via jury instruction] to restrict their behavior outside the courtroom during the course of trial: they should not talk to anyone about the case; they should avoid news coverage about the trial; and they should not otherwise seek out information about the matter.

Id.

ing the adversary system.⁷⁸ In the adversary system, the decisionmakers are to be neutral and passive.⁷⁹ As decisionmakers, the members of the jury are supposed to be “passive receiver[s] of information.”⁸⁰ The information presented to jurors in the courtroom is “selected, managed, and controlled by the parties and their attorneys.”⁸¹ Jurors are not to obtain information from any outside source.⁸²

Judges instruct jurors to decide the case based on the facts and evidence presented before them in court, in light of reason, common sense, and experience.⁸³ This instruction is intended to ensure that extraneous prejudicial information does not enter the jury’s deliberations.⁸⁴ While jurors are permitted to take into account their backgrounds and experiences, they are not allowed to use evidence from outside the courtroom—extraneous information—in the decision-making process.⁸⁵ While not all outside information is necessarily “prejudicial,”⁸⁶ our system nevertheless tries to eliminate it. The possibility of prejudice necessitates employing a strict preventative measure to uphold fairness and due process.⁸⁷

The Federal Rules of Evidence demonstrate that the use of extraneous information in deliberations is a serious matter. Typically, jurors may not testify about and courts may not inquire into the deliberation process.⁸⁸ However, the Rules provide three exceptions to the general premise.⁸⁹ The court can inquire into any extraneous information

78. STEPHAN LANDSMAN, *THE ADVERSARY SYSTEM: A DESCRIPTION AND DEFENSE* 1 (1984).

79. See JONAKAIT, *supra* note 77, at 172.

80. *Id.*

81. *Id.* at 175.

82. See *id.* Jurors are to consider “only the presented evidence.” *Id.* at 199.

83. See, e.g., MINNESOTA JUDICIAL BRANCH, *HANDBOOK FOR PETIT JURORS*, available at <http://www.mncourts.gov/district/4/?page=747> (explaining the responsibilities of a juror).

84. See *id.*

85. See *id.*

86. Only juror exposure to prejudicial, outside information will elicit judicial response. See generally Martha L. Arias, *INTERNET LAW – Does Jurors’ Access to Extraneous Information on the Internet Support a Motion for a New Trial?*, INTERNET BUS. L. SERVICES BLOG (May 5, 2010), http://www.ibls.com/internet_law_news_portal_view.aspx?s=latestnews&id=2331. When evaluating whether access to outside information would merit a new trial, a judge must determine (1) whether the access was frivolous, and if not, (2) whether the access actually occurred, and if so, (3) whether the access was prejudicial. *Wilgus v. F/V Sirius, Inc.*, 665 F. Supp. 2d 23, 24–25 (D. Me. 2009); see also *United States v. Bristol-Märtir*, 570 F.3d 29, 42 (1st Cir. 2009).

87. See Artigliere et al., *supra* note 4, at 12.

88. FED. R. EVID. 606(b).

89. See *id.* The rule reads in the relevant part as follows:

(b) Inquiry Into Validity of Verdict or Indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury’s deliberations or to the effect of anything upon that or any other juror’s mind or emotions as influencing the juror to assent to or dissent from

or outside influence that is brought to a juror's attention.⁹⁰ If the extraneous information or outside influence is found to have prejudicially affected the jury verdict, then the court can impeach the verdict.⁹¹

When a court determines that extraneous information has entered deliberations, it must then determine whether the information is prejudicial.⁹² If prejudicial, there may be the need for a new trial; if not prejudicial, the verdict may be allowed to stand. In deciding whether extraneous information is prejudicial, courts rely on a number of presumptions. A presumption of prejudice arises when a juror privately communicates about a case with a third party who is associated with the case or who has an interest in the outcome of the case.⁹³ The presumption of prejudice is applied to immunize the trial against the "frailties of the jury."⁹⁴

Legal practitioners and scholars aptly argue that the presumption of prejudice that applies to in-person communication applies to other

the verdict or indictment or concerning the juror's mental processes in connection therewith. But a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror

Id.

90. *Id.* The extent and level of inquiry into an allegation of juror misconduct is left to the discretion of each district or trial court judge. *See, e.g.,* United States v. Gaston-Brito, 64 F.3d 11, 12–13 (1st Cir. 1995). However, "[a] court has a basic obligation to investigate and evaluate alleged juror misconduct." 75B AM. JUR. 2d *Trial* § 1392 (2007).

91. *See* Tanner v. United States, 483 U.S. 107, 121 (1987) (interpreting Federal Rule of Evidence 606(b) to prohibit juror testimony to impeach a verdict unless the testimony is regarding extraneous prejudicial information). "[T]he judge must assess [the taint-producing event's] probable effect on an average juror without regard, given the strictures of Rule 606(b), for the event's actual effect on particular jury deliberations." *Wilgus*, 665 F. Supp. 2d at 25 n.3 (citing United States v. Boylan, 898 F.2d 230, 262 (1st Cir. 1990)).

92. What constitutes extraneous, prejudicial information is debated. For an overview of the debate, see Brian W. Reidy, Comment, *No Jury Rigging in the Court of Appeals for the Seventh Circuit: An Analysis of Juror Testimony to Impeach Jury Verdicts*, 4 SEVENTH CIRCUIT REV. 428, 445–50 (2009). A general rule some courts use is to assess the probable effect of the "taint-producing event" on a "hypothetical average juror." *Wilgus*, 665 F. Supp. 2d. at 25 n.3 (quoting *Boylan*, 898 F.2d at 262).

93. *See* Remmer v. United States, 347 U.S. 227, 229 (1954) ("[A]ny private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial"); United States v. O'Brien, 972 F.2d 12, 14 (1st Cir. 1992) ("Any unauthorized private communication between jurors and persons associated with the case is presumptively prejudicial, unless its harmlessness is or becomes apparent."); *see also* Parker v. Gladden, 385 U.S. 363, 365 (1966).

94. *See* Edward T. Swaine, *Pre-Deliberations Juror Misconduct, Evidential Incompetence, and Juror Responsibility*, 98 YALE L.J. 187, 187 (1988). Another scholar similarly argues that "[t]he rules of evidence represent the most careful attempt to control the processes of communication to be found outside a laboratory." Edward W. Cleary, *Evidence as a Problem in Communicat-*ing, 5 VAND. L. REV. 277, 282 (1951).

mechanisms of communication as well.⁹⁵ Scholars contend that the new format of communication mechanisms should not affect how these presumptions apply to new technologies such as e-mail, instant messaging, or mobile phones.⁹⁶ These scholars rationalize that even if “impersonal,” these communications still involve the exchange and receipt of a great deal of information.⁹⁷ Because the goal of the system is to eliminate juror access to outside information, the presumption of prejudice must apply to modern technologies as well.

Any form of communication with a third party—whether by speaking, writing, texting, blogging, or tweeting—should result in a presumption of prejudice because all forms of communication have the potential to “disrupt the integrity of the proceeding.”⁹⁸ All forms of communication that subject a juror to extraneous information have the potential to be prejudicial.⁹⁹ An even stronger case can be made for omitting extraneous information gained through modern technologies.¹⁰⁰ Two main reasons exist: (1) the greater reach of modern technology increases the likelihood that jurors will encounter prejudicial information, and (2) people in today’s world tend to find the use of technology so instinctive that they are likely to forget that their service is confidential.¹⁰¹ These two reasons apply to most Internet Web sites, including Twitter.

95. Richard Raysman & Peter Brown, *How Blogging Affects Legal Proceedings*, N.Y. L.J. (May 13, 2009), <http://www.law.com/jsp/nylj/PubArticleNY.jsp?id=1202430647333&hbxlogin=1> (“A presumption of prejudice arises where a juror speaks with a third party about the case or communicates with any person who is associated with, or has an interest in, the outcome of the case.” (citing *O’Brien*, 972 F.2d at 14)). Communication naturally incorporates electronic correspondence. *See id.* This is an essential development of the law as “[t]echnology has made juror misconduct a more common issue than it used to be.” Susan Brenner, *Jury Misconduct and Technology*, CYB3RCRIM3 (Mar. 18, 2009, 3:19 PM), <http://cyb3rcrim3.blogspot.com/2009/03/juror-misconduct-and-technology.html>. The ease with which a juror has the ability to commit misconduct is readily apparent. “It used to be that to conduct their own investigations jurors had to go to the crime scene or to the library or otherwise take affirmative action in the real-world outside the courtroom. Now, though, they can use the Internet to look up information.” *Id.* This easy access makes it increasingly likely jurors will encounter prejudicial information. *See id.* It makes the decision of whether or not access to outside information that is presumptively prejudicial more important.

96. *See, e.g.*, Raysman & Brown, *supra* note 95.

97. *See, e.g., id.* This is especially true of blogging and tweeting, which allow readers to “post comments or images to foster an open forum of lively discussion.” *Id.*

98. *Id.* (“[R]ecent evidence suggests that blog posts and other electronic communications by jurors about ongoing trials can potentially disrupt the integrity of the proceedings.”).

99. *See generally id.*

100. *See* Johnson, *supra* note 12, at 36–37.

101. *See id.* Douglas Keene aptly describes the “addictive hold” that electronic communication has on many jurors. Douglas Keene, *Panic on Tweet Street: “Without Twitter, I Felt Jittery and Naked,” THE JURY ROOM* (Aug. 7, 2009), www.keenetrial.com/blog/2009/08 (“Some [Twitter] ‘users’ panicked as much as you might have expected from drug addicts. Users were ‘jittery,’

The pure reach of the Internet increases the chance that users will encounter prejudicial information. Access to information on the Internet is ubiquitous.¹⁰² If a juror's brief Internet search reveals information that was not provided during trial, jurors will likely become especially suspicious of the court's authority.¹⁰³ Allowing juror use of the Internet enables jurors to maintain their skepticism of authority.¹⁰⁴ With access to the Web, jurors are less willing to assume that the judge and attorneys are presenting them with everything that they need to decide a case.¹⁰⁵ Because jurors often are unaware of the need to keep certain types of information out of court, they view the withholding as erroneous, not proper.¹⁰⁶ Banning modern technology will prevent juror mistrust of the court.¹⁰⁷

Like other technologies, Twitter allows information to go both in and out of the courtroom. Information flowing in is more troublesome than information flowing out.¹⁰⁸ This is because it exposes the jury to outside information and leaves the juror potentially subject to extraneous influence. However, "[i]nformation flowing out of the jury box can . . . [put a juror] on a collision course with the law" as well.¹⁰⁹ Jury consultant Douglas Keene explains several reasons why this is so.¹¹⁰ For one, allowing jurors to use the Internet for any purpose "leads to a 'lowered social barrier of self-disclosure' among jurors."¹¹¹

'naked,' [and] 'freaked out.')

The author notes that for those not drawn to social networking Web sites, the reactions "seem frankly bizarre." *Id.* However, the reactions are becoming increasingly normal as the Internet is becoming "a place where [people] conduct their lives or a portion of their lives." *Id.*

102. See Douglas L. Keene & Rita R. Handrich, *Online and Wired for Justice: Why Jurors Turn to the Internet*, 21 JURY EXPERT 14, 14 (2009), available at <http://www.astcweb.org/public/publication/documents/Keene%20Online%20%20Wired%20TJE%20Nov20091.pdf>.

103. Hilary Hylton notes that jurors today are skeptical of authority. See Hylton, *supra* note 2.

104. Jurors are skeptical of the court because it is "a place and a system they know little about, except through cultural sources." Artigliere et al., *supra* note 4, at 9. A generation that is "totally unused to sitting and listening but is using technology" will change our jury system. Hylton, *supra* note 2 (quoting Sir Igor Judge).

105. See Hylton, *supra* note 2 ("[T]oday's jurors want to see the supporting evidence in detail.')

106. See Adam Worcester, *Jurors' Tweets, Texts Upset Trial Judge*, PORTLAND BUS. J. ONLINE (Sept. 23, 2009), <http://portland.bizjournals.com/portland/stories/2009/09/21/focus2.html?b=1253505600%5E2119281> ("The problem, many observers agree, is that jurors don't fully understand judges' admonishments about maintaining strict confidentiality. Indeed, many jurors believe they're doing their duty by using the Internet to more fully investigate a case . . .").

107. See *id.* (noting that when jurors find extraneous information online they "wonder why they're only hearing part of the story from lawyers").

108. *C.f.* Schwartz, *supra* note 21, at A1.

109. *Id.*

110. See Hylton, *supra* note 2.

111. *Id.* (quoting Douglas Keene).

This disrupts traditional adversary proceedings because jurors are more likely to search for information about the case or disclose information to others about it. Injecting Twitter into a proceeding “fundamentally change[s] the rules of engagement. It . . . [brings] a wider audience into what [would] have been a private exchange.”¹¹²

The Twittering juror is thus a modern extension of the general issues posed by juror access to outside information. While the threat used to come from access to books, magazines, and in-person conversations, the Internet has broadened the scope of information accessible to jurors and their ability to talk with others.¹¹³ All Internet search engines, including Twitter, should be considered presumptively prejudicial.¹¹⁴ This is especially true of Twitter because of its nature, which combines three dangerous elements of the Internet together: social networks, live searching,¹¹⁵ and link sharing.¹¹⁶

By treating juror use of Twitter as presumptively prejudicial, courts would be required to grant post-verdict relief if they discovered a Twittering juror. When taking into account the statistical popularity of Twitter, this could potentially entail an enormous expenditure of judicial resources. To dampen the Twittering jurors’ likelihood of affecting trials, a preventative solution is preferable.¹¹⁷ A jury instruction should be created to silence the Twittering juror.

112. Johnson, *supra* note 12, at 34. “Now a juror can communicate with thousands of people with one click . . .” Greene & Spaeth, *supra* note 33, at 39.

113. See Worcester, *supra* note 106 (“And armed with unprecedented access to encyclopedic information, [jurors] can search the Web for details about plaintiffs and defendants during lunch hour or even bathroom breaks.”).

114. See Kroll, *supra* note 31 (noting “‘research’ taints the judicial process”).

115. TWITTER, *supra* note 37. The Web site prompts visitors to search for a term in order to “See what’s happening—*right now*.” *Id.*

116. Johnson, *supra* note 12, at 35. The “cocktail . . . poses what may amount to the most interesting alternative to Google’s . . . searching.” *Id.* “Twitter is a more efficient supplier of the super-fresh Web than Google.” *Id.*

117. While not the subject of this Comment, remedial concerns are also an issue. If juror misconduct is found to have occurred, courts must determine “‘whether the jurors’ shenanigans during the trial actually had an impact on the verdict.’” *Portable Technology Causing Trouble in Courtrooms*, WISN.COM (Feb. 5, 2010, 12:03 PM), <http://www.wisn.com/news/22466309/detail.html> (quoting Milwaukee County Court Judge Rick Sankovitz). The court must determine whether to take remedial measures. See, e.g., *infra* notes 153–55 and accompanying text (discussing the court’s evaluation of juror Powell’s tweeting to determine whether Stoam’s motion for a mistrial should be granted).

In evaluating whether courts should take remedial measures, the judge looks to the specific facts of the case. “Nothing necessarily makes Twittering a problem any different than other forms of communication.” Scott Michels, *Cases Challenged over “Tweeting” Jurors: Lawyers Say They Will Appeal Verdicts After Jurors Comment on Facebook, Twitter*, ABC NEWS (Mar. 17, 2009), <http://abcnews.go.com/Technology/story?id=7095018&page=1> (paraphrasing lawyer and jury consultant Anne Reed). Courts should approach the issue the same as if whatever was said through Twitter was said offline. See *id.*

B. *Twitter and Its Twitterers: How Twitter has Entered the Jury Box*¹¹⁸

While many jurors understand the problem with turning to outside sources for information, they may not understand that this prohibition applies to Internet access.¹¹⁹ Due to the prevalence of technology in everyday life, jurors might not realize that gathering and sharing information on the Internet does not comport with appropriate courtroom conduct.¹²⁰ Jurors' "insatiable appetite for immediacy [clouds their] sense of propriety."¹²¹ While searching on the Internet poses the most obvious risk in terms of exposing jurors to outside information and extraneous influence, juror use of Twitter carries with it the same potential. This is because Twitter combines two dangerous features: search capabilities and the ability to chat. Just as jurors have repeatedly failed to comprehend the risks associated with technology in general, many jurors do not think that they are doing anything wrong when they tweet.¹²²

Perhaps this ignorance is more rational as applied to Twitter than the Internet because Twitter feels more like a private communication.¹²³ It is "so easy to update, that people tend to go to Twitter the second they've got something to say; just like you would whisper fresh gossip into your best friend's ear."¹²⁴ "People tend to forget that . . .

To determine whether the outside information or extraneous information prejudiced the juror, the "nature of the allegations" should be evaluated. Amy B. Sosin, *Influences on the Jury*, 86 GEO. L.J. 1638, 1643 (1998). There are several key considerations to be addressed by the judge when jurors micro-blog about trials in which they are currently participating: "[(1)] Did the jurors discuss the details of the trial? [(2)] Did the jurors display a pretrial bias for or against one party? [(3)] Did fellow sitting jurors read the blog or electronic communication during the trial and thus become unduly influenced?" Raysman & Brown, *supra* note 95.

118. See Johnson, *supra* note 12. A Twitter user is also cleverly called a "Twitizen." *Id.* at 36.

119. Some jurors do not understand that the new technology is off limits. Bruce Carton, *New Model Jury Instruction Takes Aim at Twittering Jurors*, LEGAL BLOG WATCH (Feb. 9, 2010, 10:21 AM), http://legalblogwatch.typepad.com/legal_blog_watch/2010/02/new-model-jury-instruction-takes-aim-at-twittering-jurors.html. This disconnect is largely due to the fact that "jurors may consider constant communication through cell phones, Blackberries and other devices to be a normal part of everyday life." Steven C. Bennett, *Texting Jurors Pose Problems for Courts*, INTERNET EVOLUTION (Feb. 16, 2010), http://www.internetevolution.com/author.asp?section_id=795&doc_id=187985 (quoting a Florida Bar committee report).

120. See Edwards, *supra* note 19, at 2.

121. David Chartier, *Juror's Twitter Posts Cited in Motion for Mistrial*, ARSTECHNICA (Mar. 15, 2009, 10:15 PM), <http://arstechnica.com/web/news/2009/03/jurors-twitter-posts-cited-in-motion-for-mistrial.ars>.

122. See Edwards, *supra* note 19, at 2.

123. See Stan Schroeder, *Your Honor, I Tweeted*, MASHABLE (Mar. 17, 2009), <http://mashable.com/2009/03/17/your-honor-i-tweeted/>.

124. *Id.*

twittering . . . is also speech.’”¹²⁵ Courts have found it difficult to tame the “subconscious distinction” jurors make between different types of speech.¹²⁶

The most publicized example illustrating this confusion occurred in the Summer of 2009. NBC Today Show weatherman Al Roker was called for jury duty.¹²⁷ Following his summons, he sent out a stream of tweets.¹²⁸ The tweets began the night before trial and continued while Mr. Roker was in the jury assembly room.¹²⁹ When he learned that he could not tweet, Mr. Roker’s initial response was that he “was doing nothing wrong.”¹³⁰ He just kept tweeting.¹³¹ Mr. Roker later realized the “errors of his tweeting” and publicly apologized via Twitter and in-person on the Today Show.¹³²

Instances in which jurors attempt to creatively circumvent the rules are more serious than instances in which jurors are merely ignorant of the rules. One juror blogged: “Hey guys! I know jurors aren’t supposed to talk about their trial, but nobody said they couldn’t LIVE-BLOG it, right? Am I right or am I right?!?”¹³³ Current jury instructions that fail to address blogging and tweeting leave room for this sentiment.

Attorneys have begun developing strategic solutions to deal with potential Twittering jurors. Some attorneys are using the voir dire process to inquire about potential jurors’ technology habits in an attempt to determine who is likely to break the rules.¹³⁴ Other attorneys have begun studying their jury’s social networking Web sites

125. Greg Moran, *Revised Jury Instructions: Do Not Use the Internet*, SAN DIEGO UNION-TRIB. (Sept. 13, 2009, 2:00 AM), <http://www.signonsandiego.com/news/2009/sep/13/revised-jury-instructions-do-not-use-internet/> (quoting Thomas Jefferson Law Professor Julie Cromer Young). While modern speech has “an impersonality about it . . . it is [still] a communication.”

Id.

126. *Id.*

127. Edwards, *supra* note 19, at 2.

128. Jen Carlson, *Roker Admits Mistake, Keeps Tweeting*, GOTHAMIST (May 29, 2009), <http://gothamist.com/2009/05/29/roker.php>; Dareh Gregorian, *OH, WHAT A TWIT!*, N.Y. POST ONLINE (May 29, 2009, 12:15 PM), http://www.nypost.com/p/news/regional/item_orPeW3RKHabFGbsbXOYCXI.

129. Edwards, *supra* note 19, at 2.

130. *Id.*

131. See Gregorian, *supra* note 128.

132. See Edwards, *supra* note 19.

133. Renaud, *supra* note 64.

134. See Danzig, *supra* note 5, at 40–41. These attorneys also ask if the potential jurors have already broken the rules. See *id.* This additional inquiry is wise in the modern age, as illustrated by a recent South Dakota case, *Russo v. Takata Corp.*, 774 N.W.2d 441 (S.D. 2009). A juror performed a Google search on the defendant seat belt manufacturer in a products liability wrongful death action after receiving his jury summons, but before voir dire. *Id.* The juror did not disclose that he had completed the search during voir dire. *Id.* at 445. During deliberations,

before and during trial.¹³⁵ Attorneys have monitored tweets for evidence of juror prejudice, prejudice, or the formation of opinions not based upon evidence admitted at trial.¹³⁶ While this monitoring might detect issues when they arise, it does not prevent them. Without prevention, there is likely to be a substantial expenditure of judicial resources. The Twitter cases in Arkansas and Pennsylvania illustrate poor judicial economy.

C. “Twittering Juror” Case Law: The Newest Form of the “Google Mistrial”

The Internet has been “wreaking havoc” in courtrooms since 2001.¹³⁷ The variety of juror misconduct that has occurred on the Internet is astounding.¹³⁸ The common forms of juror online miscon-

the juror shared the content of the search with the other members of the jury. *Id.* at 443. As a result, the verdict was vacated. *Id.* at 443–44.

135. See *Texts and “Tweets” by Jurors, Lawyers Pose Courtroom Conundrums*, TRIAL (Aug. 2009), <http://www.justice.org/cps/rde/xchg/justice/hs.xml/10049.htm>.

136. See generally Memorandum for Defendant’s Second Motion for New Trial at 15, *United States v. Fumo*, No. 06-CR-319 (E.D. Pa. July 9, 2009), available at <http://www.paed.uscourts.gov/documents/opinions/09D0800P.pdf>.

137. Schwartz, *supra* note 21; see also Keene & Handrich, *supra* note 20. The phenomenon of jurors using the Internet is not a recent one. Since confronted with Internet-accessing jurors, courts have had occasion to comment. Judicial opinions recognize the problems posed by the Internet as well as potential solutions. For example, in 2003, the Colorado Court of Appeals noted,

Although 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.

People v. Wadle, 77 P.3d 764, 771 (Colo. App. 2003).

138. The examples are numerous and varied. Jurors are using Internet search engines to research the case on which they are currently serving. The problem is prevalent. “[A] San Francisco Superior Court judge dismissed 600 potential jurors after several acknowledged going online to research the . . . case before them.” *Courts Cracking Down on Texting Jurors*, Fox News (Mar. 7, 2010), <http://www.foxnews.com/scitech/2010/03/07/courts-cracking-texting-jurors/>. In an eight-week federal drug trial, the judge declared a mistrial after learning that eight of the jurors were running Google searches, browsing online media coverage of the case, and consulting Wikipedia. See Browning, *Dangers of the Online Juror*, *supra* note 1, at 217. In *Wardlaw v. Maryland*, 971 A.2d 331 (Md. Ct. Spec. App. 2007), the court held that a juror’s investigation on the Internet of the nature of the defendant’s sexually abused daughter’s mental illness constituted “egregious misconduct.” A juror in *United States v. Bristol-Mãrtir*, 570 F.3d 29 (1st Cir. 2009), conducted an Internet search for definitions of certain terms and for laws. *Id.* at 36.

Jurors are also using Facebook. Baltimore Mayor Shelia Dixon challenged her embezzlement conviction after learning that five jurors had “friended” each other on Facebook during the trial. See *Courts Cracking Down*, *supra*. A juror in the U.K. posted a poll on her Facebook page asking her friends to help her decide how to vote in the child abduction case on which she was serving. *Id.*

duct occurring in America's courtrooms have been changing over time, as new Web sites become popular for jurors.¹³⁹

The prevalence of "Twittering juror" case law arose in 2009; it represents a twist on the general problem of technology in the courtroom. The first publicized instance of a juror using Twitter was in an Arkansas civil jury trial in March 2009.¹⁴⁰ The investors of a building products company brought suit against the company, Stoam Holdings, and its CEO, Russell Wright.¹⁴¹ The suit alleged that the defendants were involved in a Ponzi scheme.¹⁴² After deliberation, the jury entered a \$12 million dollar verdict against Stoam.¹⁴³ The defense requested a mistrial because of a "Twittering juror"—Jonathan Powell.¹⁴⁴ The court denied the motion, saying the tweets did not demonstrate that Powell was partial to either side.¹⁴⁵

Johnathan Powell tweeted before and during the trial.¹⁴⁶ Before the trial began, Powell tweeted, "Well, I finally got called for jury duty. It is kinda exciting."¹⁴⁷ Later he posted, "trying to learn about [j]ury duty for tomorrow, but all searches lead me to [s]uggestions for getting out of it, instead of rocking it."¹⁴⁸ When he showed up at the courthouse, Powell tweeted: "I guess Im [sic] early. Two Angry Men just wont [sic] do."¹⁴⁹

While most of the tweets contained inane details of his experience on the jury, two of his eight tweets during trial were particularly problematic.¹⁵⁰ Powell tweeted about the verdict: "So Johnathan, what did you do today? Oh nothing really, I just gave away TWELVE MIL-

Jurors have also been known to blog. A California appellate court reversed a conviction after learning that the foreman was discussing jury deliberations on his blog. See Browning, *Dangers of the Online Juror*, *supra* note 1, at 217.

139. *Portable Technology Causing Trouble in Courtrooms*, *supra* note 117.

140. See Chartier, *supra* note 121.

141. See *Ark. Juror 'Tweets' During Trial*, CBS 11 (Mar. 13, 2009, 10:45 AM), <http://cbs11.tv.com/watercooler/juror.uses.twitter.2.958447.html>.

142. See Chartier, *supra* note 121.

143. *Id.*

144. *Id.*

145. John G. Browning, *Dangers of the Online Juror*, D MAGAZINE (May 12, 2010), http://www.dmagazine.com/Home/D-Magazine/2010/Legal_Directory_2010/Dangers_of_the_Online_Juror.aspx.

146. See Larry Greenemeier, *Twitter This: Will Juror Tweeting Lead to New Trial*, SCI. AM. BLOG (Mar. 17, 2009, 7:27 PM), <http://scientificamerican.com/blog/60-second-science/post.cfm?id=twitter-this-will-juror-tweeting-le-2009-03-17>.

147. *Id.*

148. *The One Simple Rule When Jurors Go Online*, DELIBERATIONS, <http://jurylaw.typepad.com/deliberations/2009/03/the-one-simple-rule.html> (last visited Jan. 25, 2011).

149. Christopher Spencer, *Juror's Tweet Prompts New Trial Request*, MORNING NEWS, Mar. 13, 2009, at 3A.

150. *Id.*

LION DOLLARS of somebody else’s money!”¹⁵¹ Johnathan also wrote, thirty-four minutes later, “Oh and nobody buy Stoam. It’s bad mojo, and they’ll probably cease to exist, now that their wallet is \$12M lighter. <http://www.stoam.com>.”¹⁵²

In denying the motion for a mistrial, the court noted that Powell’s Twitter use was one-way.¹⁵³ Powell posted his comments, but did not see posts or replies from other users.¹⁵⁴ Therefore, Powell’s tweets did not subject the proceedings to extraneous influence, as Powell did not read anything from outside the courtroom.¹⁵⁵ Had Powell read replies from other Twitter users, the situation would have been different. Then, there would have been outside information entering the courtroom. While Powell shared information about the trial with his Twitter followers, the information he shared was not prejudicial to the verdict.

Powell’s post-trial confusion about what he had done wrong illuminates the misunderstanding of the average Twitterer. A post-trial interview with juror Johnathan Powell indicated that Powell was unaware that his Twittering had the potential to negatively affect the trial. When asked: “[w]hen you wrote [the tweets] . . . did you even consider that any of this might happen?” Powell responded, “[n]ot at all. I paid very close attention at the trial and followed all of [the court’s] rules . . . I was not trying to shake up the system here. I was just doing what I do every day.”¹⁵⁶ Furthermore, Powell said “[t]he rule was to not talk to anyone about the trial, during the trial . . . [w]e were allowed to have our cell[]phones and use them during the breaks. There was no rule against texting, or in my case, [t]weeting.”¹⁵⁷

In July 2009, another Twittering juror case made headlines.¹⁵⁸ In *United States v. Fumo*—a federal political corruption trial against an ex-Pennsylvania senator—the defense counsel moved to remove juror Eric Wuest.¹⁵⁹ The motion was based on Wuest’s posting of trial information on both his Facebook page and Twitter feed.¹⁶⁰ Wuest had

151. Greenemeier, *supra* note 146.

152. Chartier, *supra* note 121.

153. Spencer, *supra* note 149.

154. *Id.*

155. See John Gambrell, *Appeal Claims Juror Bias in ‘Tweets’ Sent During \$12 Million Case*, LAW.COM (Mar. 16, 2009), <http://www.law.com/jsp/article.jsp?id=1202429071686>.

156. Bartholomew, *supra* note 18.

157. *Id.*

158. Schwartz, *supra* note 21, at A1.

159. *United States v. Fumo*, 639 F. Supp. 2d 544, 547 (E.D. Pa. 2009).

160. See *generally* Motion of Defendant Fumo for Immediate Voir Dire of Deliberating Jurors, *United States v. Fumo*, 639 F. Supp. 2d 544 (E.D. Pa. 2009) (No. 06-CR-319).

“violated [the] court’s admonitions by disclosing the status of deliberation to his friends (and a vast number of strangers).”¹⁶¹ The court denied the motion to remove juror Wuest and deliberations were allowed to continue.¹⁶² The decision was partially based on Judge Ronald Buckwalter’s meeting with Wuest.¹⁶³ The Judge declined to remove the juror because he found Wuest’s statement, that “no one outside the jury had influenced him,” to be credible.¹⁶⁴

After trial, the defendant moved for a mistrial and a new trial.¹⁶⁵ The motion for the new trial was based on the fact that other jurors knew Wuest was tweeting during trial.¹⁶⁶ The court denied both motions.¹⁶⁷ The Judge held that the defendant did not suffer prejudice that would have mandated a new trial.¹⁶⁸ There was no prejudice because the juror had not read any replies to his tweets.¹⁶⁹ Therefore, the juror did not access outside information and could not have been subject to extraneous prejudicial influence.¹⁷⁰

Although neither case found the tweeting to have merited post-verdict relief, both holdings highlight the potential for danger. Post-verdict relief was unnecessary in both cases because each Twittering juror sent tweets, but received no reply. Had the Twittering jurors received tweets, or received comments on their tweets, as opposed to just sending tweets, there would have been a greater likelihood that post-verdict relief would have been necessary. This is because there would have been access to outside information or the possibility that the juror was subject to extraneous influence. With only slightly altered factual details, litigants could have been denied justice due to the Twittering juror. This potential for harm should not go unchecked.

161. Greenemeier, *supra* note 146.

162. See Rebecca Porter, *Texts and “Tweets” by Jurors, Lawyers Pose Courtroom Conundrums*, AM. ASS’N OF JUST. ONLINE (Aug. 2009), <http://www.justice.org/cps/rde/xchg/justice/ns.xl/10049.htm>.

163. *Id.*

164. *Id.*

165. Memorandum for Defendant’s Second Motion for New Trial at 15, *United States v. Fumo*, 639 F. Supp. 2d 544 (E.D. Pa. 2009) (No. 06-CR-319), available at <http://www.paed.uscourts.gov/documents/opinions/09D0800P.pdf>.

166. *Fumo*, 639 F. Supp. 2d at 544.

167. *Id.* at 560.

168. *Id.* at 558.

169. See *id.* at 555 (noting that “Wuest’s postings . . . [did not] subject [] him to any outside influence”).

170. *Id.*

III. ANALYSIS

This Part proposes a preventative solution to silence the Twittering juror. In the hope of keeping technology out of the jury box, this Comment suggests a cautionary jury instruction and recommends additional preventative measures for judges and lawyers to employ. Academics, judges, and practitioners alike recognize the need for reform; in many jurisdictions they have begun working toward a preventative solution.¹⁷¹ Current preventative jury instructions provide a

171. Only a handful of states have adopted pattern jury instructions thus far. See Molly DiBianca, *Jury Instructions re: Technology Social Media*, GOING PAPERLESS BLOG (Apr. 10, 2010, 8:18 PM), <http://goingpaperlessblog.com/social-media-in-the-legal-profession/>. California, Connecticut, Florida, Illinois, Indiana, Michigan, Missouri, New York, South Carolina, and Wisconsin have written prohibitions against technology use by jurors into the preliminary cautionary jury instruction that is given to jurors before the deliberation process. *Id.*; see also California, Pattern Jury Instruction (Civil) 100, available at http://www.courtinfo.ca.gov/jury/civiljuryinstructions/documents/caci_20091215.pdf; Connecticut, Pattern Jury Instruction (Civil) 1.1-1, available at <http://www.jud.ct.gov/JI/Civil/part1/1.1-1.htm>; Florida, Pattern Qualifications Jury Instruction, available at http://www.floridasupremecourt.org/pub_info/summaries/briefs/10/10-51/Filed_01-14-2010_Appendix%20A.pdf; Illinois, Pattern Jury Instruction 1.01; Indiana, Pattern Preliminary Jury Instruction, available at <http://www.in.gov/judiciary/orders/rule-amendments/2010/0301-jury.pdf>; Michigan, Pattern Jury Instruction 2.511, available at <http://courts.michigan.gov/supremecourt/Resources/Administrative/2008-33.pdf>; New York, Pattern Preliminary Jury Instruction 6, available at http://www.nycourts.gov/cji/1-General/CJI2d.Jury_Admonitions.pdf; South Carolina, Pattern Social Media Jury Instruction, available at <http://goingpaperlessblog.com/2010/02/24/more-jury-instructions-to-deal-with-social-media-in-the-courtroom/>; Wisconsin, Pattern Jury Instruction (Criminal) 50, available at <http://www.postcrescent.com/assets/pdf/U014968718.PDF>. All the above instructions were adopted between May 2009 and July 2010. See DiBianca, *supra*. The instructions represent a revolutionary effort to combat technology use by jurors. However, many fall short of an ideal prohibitive instruction.

Several other states have only begun to confront technology use by jurors. For example, Mississippi created a commission to evaluate current jury instructions and make recommendations for alterations based on changes in the law and technology. See State of Mississippi Judiciary, Model Jury Instructions Commission Begins Work (2009), available at http://www.mssc.state.ms.us/news/2009/3_26_09_mji_commission.pdf. The commission noted “the capabilities of a juror to do [I]nternet research via a Blackberry device or talk about a case via the social media Twitter, even while deliberating in the jury room, are raising . . . concerns.” *Id.* Presiding Mississippi Supreme Court Justice George C. Carlson, Jr. said, “We are going to have to deal with [increasing use of technology by jurors], probably by way of instructions.” *Id.*

There is a movement toward new instructions in other American states. Wisconsin, Mississippi, Kansas, and Pennsylvania are also discussing new guidelines. Edwards, *supra* note 19, at 10. Several federal circuits confront the Twittering-juror problem with a prohibitive instruction. See DiBianca, *supra*. The Committee on Court Administration and Case Management recently issued a memorandum endorsing a suggested set of jury instructions that “judges should consider using to help deter jurors from using electronic technologies to research or communicate about cases on which they serve.” Memorandum from the Committee on Court Administration and Case Management of the Judicial Conference of the United States (Jan. 28, 2010), available at http://www.wired.com/images_blogs/threatlevel/2010/02/juryinstructions.pdf. The federal instruction is purely a recommendation and is not mandatory. See *id.* Several circuits have their own instructions. The Third, Eighth, and Ninth Circuits are among those circuits that attempt to keep technology out of their courtrooms by instruction. See Third Circuit, Pattern Jury Instruction 1.3, available at

springboard for the creation of a new jury instruction. An examination of current preventative approaches illustrates that the instructions are inadequate: the instructions (1) are not uniform;¹⁷² (2) lack specificity;¹⁷³ (3) do not provide the policy reasons behind the prohibited instructions;¹⁷⁴ and (4) are not provided both orally and in writing.¹⁷⁵ A new pattern instruction should be specific, provide reasons for the prohibition, and be given to jurors in writing.¹⁷⁶ A preventative solution is proposed.

A. *Judicial Recognition of the Need for a Technology-Inclusive Instruction*

Courts are “grappling with how to deal with this . . . new world of instant electronic information.”¹⁷⁷ Most judges are recognizing the need to go beyond the current boilerplate instructions to specifically prohibit the use of the Internet and social networking media in their instructions.¹⁷⁸ One judge reported that he had a “strong feeling that jurors are turning to the Internet more and more.”¹⁷⁹ “[J]udges should be very concerned . . . now is the time to get real specific . . . because this technology has become so seductive that we almost [turn to it] mindlessly.”¹⁸⁰

“[D]igital intimacy has become the social norm” and judges see jurors’ tendency to use the Internet in the courtroom.¹⁸¹ “Today’s jurors come to the courthouse wired with laptops, PDAs and smart phones.”¹⁸² They have a need to be constantly connected.¹⁸³ Jurors’ instinct to turn to the Internet, compounded by the amount of mate-

ber2009/1_Chaps_1_2_3_2009_November.pdf; Eighth Circuit, Pattern Jury Instruction (Civil) 1.05, available at http://www.juryinstructions.ca8.uscourts.gov/civil_manual_2008_expanded.pdf; Ninth Circuit, Pattern Jury Instruction (Civil) 1.12, available at <http://207.41.19.15/web/documents.nsf/18d8322df5fb351c8825728200016dd0/3af4479d9540726088257289007b7d6e?OpenDocument>.

172. See *infra* notes 206–32 and accompanying text.

173. See *infra* notes 233–63 and accompanying text.

174. See *infra* notes 264–77 and accompanying text.

175. See *infra* notes 278–88 and accompanying text.

176. See *infra* notes 289–301 and accompanying text.

177. Dennis M. Sweeney, *Commentary: Twitter and Tweeting During Jury Service*, BALT. REC., Apr. 20, 2009, available at http://findarticles.com/p/articles/mi_qn4183/is_20090420/ai_n31575792/.

178. Browning, *Dangers of the Online Juror*, *supra* note 1, at 219.

179. Jessica Stephen, *The Move to Silence Juror Twittering*, Wis. L.J. (Apr. 20, 2009), <http://www.wislawjournal.com/article.cfm/2009/04/20/The-move-to-silence-juror-Twittering>.

180. Tom Murse, *Rosburo Jurors’ Facebook Posting Pose Problems*, LANCASTER ONLINE (Aug. 4, 2009), <http://articles.lancasteronline.com/local/4/240616>.

181. Browning, *Dangers of the Online Juror*, *supra* note 1, at 220.

182. *Portable Technology Causing Trouble in Courtrooms*, *supra* note 117.

183. See Keene & Handrich, *supra* note 102, at 15.

rial easily accessible online, is the foundation of the problem.¹⁸⁴ The need for a new approach is clear.

Some judges have adeptly responded to technology entering their courtrooms. During the decades of the rise in popularity of the Internet, former Illinois state Judge Warren Wolfson used an instruction that prohibited jurors from using it.¹⁸⁵ Judge Wolfson tied the prohibition on Internet use to the policy reasons behind it, in the hope that it would further encourage jurors to abide by his instruction.¹⁸⁶ But an instruction that simply highlights the Internet is no longer enough.¹⁸⁷

There is a growing recognition of the need to incorporate into jury instructions Web sites that are specifically prohibited. "[S]ome judges have already started adapting their instructions to address everything from searches on Google Earth to Twitter updates."¹⁸⁸ Milwaukee County Circuit Chief Judge Jeffery A. Kremers gives a jury instruction that has been adapted to modern technologies.¹⁸⁹ Judge Kremers believes that judges are increasingly instructing jurors using a technology-inclusive instruction.¹⁹⁰ While these instructions are currently being given on a court-by-court basis, the instructions prohibiting technology use by jurors are quickly becoming the new norm across the country.¹⁹¹

184. See Jesse Fray, *Judges Beefing up Jury Instructions to Avoid Improper Use of Cell Phone, Internet, Technology*, KTKA (Mar. 24, 2009), http://www.ktk.com/news/2009/mar/24/judges-beefing_jury_instructions_avoid_improper_us/.

185. Warren Wolfson, *Judges to Jurors re: Internet Instruction* (on file with author) [hereinafter *Wolfson Instruction*], received during an interview with Judge John Grogan, Circuit Court of Cook County, in Chicago, Illinois on November 5, 2009 [hereinafter *Interview with John Grogan*]. The instruction reads,

Some of you might know how to use a computer well enough to look things up on the [I]nternet. You must resist the temptation to look up anything that might be related to this case. Our system of law is based on the principle that a jury's decision will be based only on the evidence and law heard and seen in the courtroom. If you were to use an information from some outside source, like the [I]nternet, or a magazine, or something someone says to you, you would be violating your oath as a juror. I know you want to be fair to all parties in this case. That means you must rely only on what you hear and see in this courtroom.

Id. Judge Wolfson was a trial judge in the 1990s and an appellate judge until recently. Interview with Warren Wolfson, Dean, DePaul Univ. Coll. of Law, in Chi., Ill. (Oct. 19, 2009) [hereinafter *Interview with Warren Wolfson*].

186. *Wolfson Instruction*, *supra* note 185.

187. Interview with Warren Wolfson, *supra* note 185.

188. Stephen, *supra* note 179 (quoting Milwaukee County Chief Judge Jeffery A. Kremers).

189. *Id.*

190. *See id.*

191. *Id.*

Judges in Illinois have similarly recognized the growing need for a cautionary jury instruction. Illinois trial Judge John Grogan uses a jury instruction to warn his juries of the potential problems likely to be caused by technology in the jury box.¹⁹² Grogan uses his preliminary instruction to warn jurors of the prohibition against technology use.¹⁹³ He feels it is a necessity in the modern era.

The need for a new instruction is not a viewpoint shared by all judges. One judge commented,

[J]udges [who] I have discussed the issue with believe that the best they can do is to reiterate the traditional warnings from the pattern jury instructions and leave it at that. In their view, to be more specific simply suggests ways that the jurors can access information or violate the rule, and in any event, a more specific instruction is bound to be under-inclusive in light of rapid technological developments.¹⁹⁴

However, this view is largely rejected.¹⁹⁵ Judges who feel there is a need for an instruction prohibiting technology use generally argue for detailed instructions.¹⁹⁶ This is because the risks of being more specific are drastically outweighed by the usefulness of identifying specific prohibited behavior. Because they are naturally invested in the concept of judicial economy,¹⁹⁷ judges ought to err on the side of caution by using a potentially under-inclusive instruction.¹⁹⁸ Without specificity, jurors remain confused about the distinction between acceptable and prohibited behavior.

192. Interview with John Grogan, *supra* note 185.

193. *Id.* Judge Grogan's instruction reads,

The use of cell phones, text messaging, Internet posting and Internet access devices in connection with your duties violates the rules of evidence and you are prohibited from using them.

You should not do any independent investigation or research on any subject relating to the case. What you have seen or heard outside the courtroom is not evidence. This includes . . . any information available on the Internet. Such . . . information [is] not evidence and your verdict must not be influenced in any way by such material.

John Grogan, Preliminary Cautionary Instructions §§ 6–7 (on file with author).

194. Thaddeus Hoffmeister, *Proposals to Rein in Juror Twittering and Online Research*, JURIES BLOG (Apr. 21, 2009, 3:05 AM), <http://juries.typepad.com/juries/2009/04/proposals-to-rein-in-juror-twittering-and-online-research.html>.

195. *See* Stephen, *supra* note 179. The Committee on Court Administration for the federal courts wrote that a "more explicit mention" of the prohibition "would help jurors better understand and adhere to the scope of the prohibition." Committee on Court Administration and Case Management, *supra* note 171, at 2.

196. Interview with Warren Wolfson, *supra* note 185.

197. *See, e.g.*, Jerry Palmer, *Specificity in Jury Instructions*, 10 KAN. J.L. & PUB. POL. 129, 129 (2000). Judges have no desire to unnecessarily retry a case. *See id.*

198. Interview with Warren Wolfson, *supra* note 185.

As a trend, judges are beginning to instruct their juries more thoroughly than they have in the past.¹⁹⁹ In addition to the general cautionary warning, judges inform their juries about the most flagrant and commonly encountered types of juror misconduct: turning to the Internet for information and social networking.²⁰⁰ Among these judges, most share the viewpoint that a uniform policy to combat technology in the jury box is a necessity.²⁰¹ Work must be done to produce a “technology-inclusive jury instruction.”²⁰²

B. Current Treatment of Juror Use of Technology in the Jury Box

Courts are attempting to prevent technology from entering the jury box by using technology-inclusive jury instructions.²⁰³ Rules committees in a number of states have created a new jury instruction to combat technology use by jurors.²⁰⁴ These instructions vary in the strength of their prohibition. While the instructions are a good start, they generally fall short because they (1) are inconsistent, (2) are not specific, (3) do not inform jurors of the policy reasons behind the prohibition, and (4) are generally not in writing. In the words of one commentator “[T]echnology has far outpaced the court rules.”²⁰⁵

1. Litigants Would Be Better Served by Pattern Jury Instructions

Courts currently lack uniformity in how they prevent juror use of technology. Some courts ban technology from the courtroom altogether, some take a discretionary approach allowing judges to decide whether it will enter the courtroom, and others have developed pattern jury instructions.²⁰⁶ A uniform approach, across jurisdictions and within a jurisdiction, would better serve litigants.

Some courts have banned electronic devices altogether from their courtrooms.²⁰⁷ These courts take away cell phones, PDAs, BlackBerries, iPhones, laptops, and other mobile technology when a juror enters

199. See Stephen, *supra* note 179.

200. *Id.*

201. Fray, *supra* note 184.

202. Stephen, *supra* note 179.

203. See Browning, *Dangers of the Online Juror*, *supra* note 1, at 219.

204. See *supra* note 171 and accompanying text.

205. See Baldas, *supra* note 26.

206. See Porter, *supra* note 162; see also DiBianca, *supra* note 171.

207. See Porter, *supra* note 162; see also Vill Vidonic, *Juries v. Technology: Secrecy Bubble Bursting*, BEAVER COUNTY TIMES, Mar. 30, 2009; see also Sweeney, *supra* note 177. Legal bloggers have characterized these courts as “lack[ing] . . . WiFi love.” John Bringardner, *May Jurors Blog Jury Duty?*, LAW.COM (Oct. 3, 2005, 3:56 PM), http://legalblogwatch.typepad.com/legal_blog_watch/2005/10/may_jurors_blog.html#com.

the courtroom.²⁰⁸ These courts are especially strict about keeping the devices out of reach during the deliberation process.²⁰⁹ This complete ban on technology is not the wisest approach.²¹⁰

Even when technology is banned from the courtroom, there is a problem: judges, attorneys, and litigants cannot stop jurors from using their mobile technological devices on their own time.²¹¹ Jurors still have access to technology during any breaks from trial and, in multi-day trials, in between sessions.²¹² While courts easily have the ability to monitor the jurors' activities when they are in the courthouse, courts lack the ability to monitor any activity that occurs when jurors are on recess, on lunch break, or when they go home for an evening in between sessions.²¹³ Taking away mobile technology when a juror enters the courthouse does not solve the problem if the jury is not sequestered.²¹⁴

Furthermore, taking away cell phones, smartphones, and laptops from jurors will cause unnecessary frustration.²¹⁵ Judge Sweeney notes,

This policy . . . prevents jurors—who are performing a valuable public service—from being able easily to contact family and their workplaces during the many breaks that may occur in a lengthy trial. Given the culture that has developed, this can be perceived as burdensome and unreasonable. And of course, as soon as jurors return to their cars at lunchtime or at the end of the day, they can pick up their smartphones and be fully connected.²¹⁶

For this reason, banning technology from the courtroom is not a complete solution.²¹⁷

In the majority of jurisdictions, the decision about whether to use a technology-oriented prohibitive jury instruction is left to the discretion of the individual judges.²¹⁸ This discretionary approach is inadequate because there is no guarantee that jurors will be instructed not

208. Sweeney, *supra* note 177.

209. *See id.*

210. *See id.* “Economics, not to mention inconvenience and discomfort of jurors” decreases the feasibility of the option. Artigliere et al., *supra* note 4, at 9.

211. *See Wilson, supra* note 62.

212. *See id.*

213. *See id.*

214. *See Browning Part 3, supra* note 1.

215. *See Sweeney, supra* note 177.

216. *Id.*

217. *See id.*

218. *See Porter, supra* note 162.

to use technology.²¹⁹ Further, a discretionary approach does not provide consistency within a jurisdiction to all litigants.²²⁰

The wisest approach courts use to confront juror use of technology is a pattern jury instruction.²²¹ Pattern instructions result in the most consistency for litigants.²²² Only a handful of states have developed pattern jury instructions regarding juror use of technology.²²³ Committees draft pattern jury instructions.²²⁴ These committees are composed of judges, trial lawyers, and law professors who, due to their experience with jurors, can anticipate comprehension problems better than the average lawyer.²²⁵ During the past few decades,²²⁶ pattern instructions have been based on juror comprehension and plain-English principles.²²⁷ Studies of juror deliberations have shown that pattern instructions can increase juror comprehension.²²⁸ More

219. *See id.*

220. *See id.*

221. Pattern instructions are also termed "standard," "approved," or "uniform" instructions. *Model Jury Instructions: A 'Basic Practice' Guide*, MARQUETTE UNIVERSITY SCHOOL OF LAW, <http://law.marquette.edu/cgi-bin/site.pl?2130&pageID=1869> (last visited Jan. 25, 2011). A pattern instruction is "[a] form jury charge usually approved by a state bar association or similar group regarding matters arising in a typical case." BLACK'S LAW DICTIONARY 875 (8th ed. 2004). "Courts usually accept model jury instructions as authoritative." *Id.* Pattern instructions are used in both state and federal courts, for both civil and criminal trials. *See* MARQUETTE UNIVERSITY SCHOOL OF LAW, *supra*.

222. *E.g.*, Interview with Warren Wolfson, *supra* note 185. This is because jury instructions must "communicate the law to jurors." Peter M. Tiersma, *Communicating with Juries: How to Draft More Understandable Instructions*, 10 SCRIBES J. LEGAL WRITING 1, 1 (2005).

223. *See infra* note 173 and accompanying text. This figure is notably small, as forty-eight states use basic pattern jury instructions to provide a framework for the charge to the jury. *Jury Instructions*, THE LAW OFFICES OF MILLER & ZOIS, L.L.C., http://www.millerandzois.com/jury_instructions.html (last visited Jan. 25, 2011).

224. *See* Ellen Chilton & Patricia Henley, *Improving the Jury System*, PUB. L. RESEARCH INST. (1996), <http://w3.uchastings.edu/plri/spr96tex/juryinst.html>.

225. *See id.*

226. *Id.* at 3. Jury instructions might never be clear to all jurors, but they should be clear to the average juror. Tiersma, *supra* note 224, at 3. Instructions that communicate the law to the average juror allow courts to assume that "in most cases the majority of jurors will correctly understand the law." *Id.* at 3.

227. A plain-English jury instruction advocates everyday language rather than more complex legalese. *See Frequently Asked Questions*, NATIONAL CENTER FOR STATE COURTS, <http://www.ncsconline.org/Juries/InnPlainEnglishFAQ.htm> (last visited Jan. 25, 2011). These instructions "make an effort to be clear, concise, and effect[ive] in conveying complicated legal ideas in normal English." *Id.*

228. *See generally* Amiram Elwork, Bruce D. Sales & James J. Alfini, *Juridic Decisions: In Ignorance of the Law or in Light of It?*, 1 LAW & HUM. BEHAV. 163 (1977). Jurors often reach improper verdicts when they misunderstand a judge's instructions. *See id.* at 164. Elwork, Sales, and Alfini's experiments simulated a civil trial, giving three separate juries different instructions. *See id.* at abstract. In the experiment, one jury received the current Michigan pattern instructions, another received rewritten Michigan pattern jury instructions, and the last jury received no set of instructions at all. *See id.* When identical videotaped trials were shown to the mock juries, the jury receiving the rewritten pattern instructions in plain English found the correct verdict.

comprehensibly written instructions illuminate to jurors the importance of their role in the trial process.²²⁹ Jurors who recognize that their service is significant will be more likely to put in the time and effort necessary to reach a correct verdict.²³⁰ The use of incomprehensible instructions “sends a message to jurors that the law is an unexplainable mystery and that juror understanding of the law is not important.”²³¹ When jurors understand an instruction, they are likely to apply it correctly.²³²

2. *Jury Instructions Should Be Detailed Because a Lack of Specificity Leaves Room for Juror Confusion*

Current pattern jury instructions are problematic because they lack specificity. Most instructions give absolutely no direction to jurors concerning technology.²³³ Others only vaguely prohibit using the Internet.²³⁴ These two types of unspecific instructions both result in confusion for jurors.²³⁵ Without specificity, instructions are unable to fulfill the goal of promoting juror self-restraint.²³⁶

The United States Court of Appeals for the Third Circuit’s model preliminary jury instruction similarly lacks specificity. The instruction cautions jurors against “do[ing] any independent research or investigation on your own on matters relating to the case or this type of case.”²³⁷ The instruction tells jurors not to use the Internet for re-

Id. The juries receiving the old pattern instructions and the jury receiving no instructions at all performed substantially worse than the jury with the new instructions. *See id.*

229. *See, e.g.*, Chilton & Henley, *supra* note 224, at 14–15.

230. *See id.*

231. *Id.*

232. *See id.* at 11–12.

233. *See, e.g.*, American Bar Association, Pattern Preliminary Jury Instructions, available at <http://www.abanet.org/labor/lel-trialad/09/Jury-Instructions.pdf>. This instruction, exemplary of those that do not prohibit Internet use, instructs jurors,

Your verdict must be based only on the evidence presented during the trial and the law. You must not conduct any investigation on your own. Accordingly, you must not visit any of the places described in the evidence and you must not read or listen to any reports about the case. Further, you must not discuss this case with any person and you must not speak with the attorneys, the witnesses, or the parties about any subject until your deliberations are finished.

Id. The instruction does not even mention the Internet. *See id.* The current Seventh Circuit instructions similarly do not mention the Internet. *See* Seventh Circuit, Pattern Jury Instruction (Civil) 2.01, available at http://www.ca7.uscourts.gov/Pattern_Jury_Instr/7th_civ_instruc_2009.pdf (instruction before recess). Neither do the Fifth Circuit’s instructions. *See* Fifth Circuit, Pattern Instructions (Civil) 1.1, available at <http://www.lb5.uscourts.gov/juryinstructions/2006CIVIL.pdf>.

234. *See infra* note 171, detailing the Florida instruction.

235. *See, e.g.*, Bartholomew, *supra* note 18.

236. *See id.*

237. Third Circuit, Pattern Jury Instruction 1.3, available at http://www.ca3.uscourts.gov/civiljuryinstructions/Final-Instructions/november2009/1_Chaps_1_2_3_2009_November.pdf.

search purposes.²³⁸ But the instruction does not highlight any of the particularly problematic services available on the Internet—such as Twitter.²³⁹ Thus, while the instruction contextualizes the Internet in the larger scheme of prohibited material, it does not sufficiently address the new problems posed by technology.²⁴⁰

Other courts are making progress toward the adoption of a more detailed jury instruction. Michigan has created a new jury instruction addressing technology in the courtroom.²⁴¹ The instruction went into effect on September 1, 2009.²⁴² It was the first jury instruction prohibiting juror use of technology to be adopted statewide.²⁴³ The court instructs jurors that until their jury service is concluded, “they shall not . . . use a computer, cellular phone, or other electronic device with communication capabilities while in attendance at trial or during deliberation . . . or to obtain or disclose information about a case when they are not in court.”²⁴⁴ The instruction is to be given after the jury is empanelled.²⁴⁵

Although the Michigan instruction highlights different forms of technology that jurors are prohibited from using—for example, “computer[s] and cellular phone[s]”²⁴⁶—it does not specify what jurors are prohibited from actually doing with those technologies. The instruction does not enumerate what Web sites a juror is prohibited from using to research or discuss the case on which they are serving. Without such enumeration, jurors are likely to be confused. Listing prohibited Web sites would provide context to the extent of the prohibition.

Illinois’ new instruction is quite similar to Michigan’s. Illinois Civil Preliminary Cautionary Jury Instruction 1.01 embodies the state rule.²⁴⁷ The Illinois Pattern Jury Instruction Committee recently modified the old instruction to include a new prohibition against technol-

238. *See id.*

239. *See id.*

240. *See id.*

241. *See* MICH. CT. R. 2.511(H)(2)(c)–(d).

242. *Id.*

243. *See* DiBianca, *supra* note 171.

244. MICH. CT. R. 2.511(H)(2)(c)–(d). “Information includes . . . information about a party, witness, attorney, or court officer; news accounts of the case; information collected through juror research.” *Id.*

245. *See id.*

246. *Id.*

247. Illinois, Pattern Jury Instruction 1.01.

ogy use by jurors.²⁴⁸ The instruction prohibits the use of cell phones, text messaging, Internet postings, and Internet access devices by jurors in connection with their service.²⁴⁹ It forbids jurors from conducting independent investigation, including browsing any “information available on the Internet.”²⁵⁰ Yet the instruction is not specific enough. Like the Michigan instruction, it mentions forms of technology that jurors are not permitted to use. However, it does not sufficiently detail what jurors are prohibited from doing with those technologies. Without such details the instruction is not likely to be sufficiently effective.

In Multnomah County, Oregon, courts use a more specific instruction²⁵¹ that prohibits Internet use and social networking.²⁵² The instruction is much closer to an ideal one. It lays out which activities jurors are prohibited from engaging in during jury service: “no emailing, text messaging, tweeting, blogging, or any other form of communication.”²⁵³ The language is very clear and “down-to-earth,” making it easy for jurors to understand.²⁵⁴ This effectively alerts jurors to what they are not allowed to do.

The newly issued Proposed Model Jury Instructions for the federal courts—the so-called “Twitter instructions”²⁵⁵—are appropriately specific.²⁵⁶ The proposed instruction is a set of two instructions: one to be given before trial and one at the close of the case, before deliberations.²⁵⁷ The two vary in the specificity of the prohibition. The instructions were developed to “address the increasing incidence of juror use of such devices as cellular telephones or computers to con-

248. See *New Jury Instructions Address Technology Concerns*, PASSEN LAW GROUP BLOG (Nov. 2, 2009, 7:20 AM), <http://www.passenlaw.com/blog/personal-injury-law/jury-instructions-address-technology-concerns>.

249. Illinois, Pattern Jury Instruction 1.01. The Illinois instruction can be given either before opening statements, or with other jury instructions that are given by the judge to the jury at the close of the case, or both. *Id.* (see Notes on Use).

250. *Id.*

251. See Anita Ramasastry, *Why Courts Need to Ban Jurors' Electronic Communications Devices*, FINDLAW (Aug. 11, 2009), <http://writ.news.findlaw.com/ramasastry/20090811.html>; see also Marcia Oddi, *Managing the Electronic Communication Revolution in the Indiana Courtroom*, THE INDIANA LAW BLOG (Aug. 15, 2009, 11:29 AM), http://indianalawblog.com/archives/2009/08/ind_courts_cont_5.html.

252. See Oddi, *supra* note 251.

253. *Id.*

254. *Id.*

255. *Courts Cracking Down on Texting Jurors*, *supra* note 138.

256. See Committee on Court Administration and Case Management, *supra* note 171, at Attachment. While almost ideal in terms of specificity, the instruction lacks other necessary elements, such as outlining policy considerations. See *id.*

257. See *id.* The instruction to be given before trial is more detailed and more specific than the instruction to be given at the close of the case. See *id.*

duct research on the Internet or communicate with others about cases."²⁵⁸

The instruction to be given before trial warns jurors not to "search the [I]nternet, [W]eb[]sites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case."²⁵⁹ The instruction also tells jurors that they

may not communicate with anyone about the case on [their] cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or [W]eb[]site, through any [I]nternet chat room, or by way of any other social networking websites, including Facebook, My Space, LinkedIn, and YouTube.²⁶⁰

By listing the names of commonly used social media Web sites, the explanation of the prohibition against communication is specific.²⁶¹ But the instruction fails to list Web sites commonly used for research. The instruction could be improved by listing common Web sites used for research.

The proposed federal instruction to be given at the close of the case is not as specific as the instruction to be given before trial. Like the instruction to be given before trial, the instruction to be given at the close of the case specifically mentions the Web sites jurors are prohibited from using to communicate about the case.²⁶² However, the instruction is again not specific enough in terms of forbidding online research.

In states where there is no standard instruction prohibiting technology use, some attorneys and judges have taken matters into their own hands. Even before the increase in specificity of pattern instructions became a trend, instructions created by individual attorneys and judges tended to be more specific than the pattern instructions adopted by states.²⁶³ The move towards increased detail is a positive one.

258. See *Courts Cracking Down on Texting Jurors*, *supra* note 138.

259. See Committee on Court Administration and Case Management, *supra* note 173, at Attachment.

260. See *id.*

261. See *id.*

262. See *id.* The language is the same as the instruction to be given before trial. See *id.*

263. A judge in Arkansas gave a "high tech" instruction in his April 21, 2009 trial. Sharon Nelson, *Web 2.0 Jury Instructions in Arkansas*, RIDE THE LIGHTNING BLOG (May 8, 2009, 7:00 AM), <http://ridethelightning.seseient.com/2009/05/web-20-jury-instructions-in-arkansas.html>. The instruction was extremely detailed. He instructed jurors to "not use any electronic device or media, such as the telephone, a cell or smart phone, Blackberry, PDA, computer, the Internet, any Internet service, any text or instant messaging service, any Internet chat room, blog, or website such as Facebook, MySpace, YouTube, or Twitter to communicate to anyone any information about this case" or conduct any research until the judge accepted the verdict. *Id.* The

3. *Jurors Are More Likely to Abide by Instructions that Provide Insight into the Policy Reasons Behind the Prohibitions*

An ideal jury instruction would provide jurors with a clear and persuasive explanation of the policy reasons behind the prohibition. Research shows that jurors are more likely to abide by an instruction that is tied to policy concerns.²⁶⁴ This is likely because policy reasons contextualize the prohibition for the juror, giving the instruction an increased importance. Further, psychological studies have consistently shown that judicial admonitions given without proper reasoning create hostility on the part of jurors.²⁶⁵ “[W]hen [a] juror’s freedom to act is taken away by the court [without explaining the proper reasoning], those jurors tend to rebel and engage in the prohibited behavior more than [they would have] had they not been warned in the first place.”²⁶⁶ Jury consultants recommend that policy content be carefully chosen and respectfully explained to jurors.²⁶⁷

The previously discussed Oregon instruction²⁶⁸ could be redrafted to better emphasize the policy behind the prohibition. The mere statement, “[y]ou must resist that temptation for our system of justice

“web 2.0 jury instruction” nicely highlights all of the prohibited technologies and what jurors are prohibited from doing on those technologies. *Id.*

Judge Dennis Sweeney, a retired judge from Maryland, who chairs the state’s Judiciary Committee on Jury Use and Management, has suggested a specific instruction. See Dennis M. Sweeney, *Commentary: Judge on the Jury: Jurors Online*, DAILY REC. (June 1, 2009), http://findarticles.com/p/articles/mi_qn4183/is20090601/ai_31935039/. The judge developed his instruction after taking suggestions from other trial judges. *Id.* His instruction states,

During the trial, you may not communicate with others about the trial or discuss it with family, friends, or anyone else. *This includes on-line discussions, chat rooms, or postings on Internet sites such as Facebook, MySpace, Twitter or similar means of communication.*

You may not do any personal research of your own about the case, the attorneys, the parties or the issues in the case. *This includes Internet research of any type whether on a cell phone, smartphone or laptop or other device as well as consulting books, newspapers and magazines.*

Id. (emphasis added). The instruction could be improved merely by clarifying that the listed Web sites are not an exhaustive list.

These two instructions were extremely specific compared to other pattern instructions given at the time. The instructions compare to the revised pattern instructions incorporating the prohibition against juror use of technology. Perhaps the individual instructions served as an impetus for the revision of pattern instructions.

264. See Edward Schwartz, *Remedy for the Googling Juror? Just Ask!*, JURY BOX (Mar. 18, 2009, 11:20 AM), <http://juryboxblog.blogspot.com/2009/03/remedy-for-googling-juror-just-ask.html>; see also Paula Hannaford-Agor, *Jury News: Google Mistrials Twittering Jurors, Juror Blogs, and Other Technological Hazards*, 24 CT. MANAGER 42, 43 (2009), available at www.ncsconline.org/d_Research/cjs/JuryNews2009Vol24No2.pdf.

265. *See id.*

266. *Id.*

267. *See id.*

268. *See supra* notes 251–54 and accompanying text.

to work as it should,"²⁶⁹ is not enough. To constitute a more effective preventative measure, the instruction should provide a clear explanation of why the use of technology by jurors is prohibited.²⁷⁰ Without such reasoning, jurors are less likely to abide by the instruction.²⁷¹ The court should explain to jurors that the reason that they are only permitted to use information presented by the parties is because otherwise it will create an unfair trial.

Similarly, Illinois' new instruction should further describe the policy reasons for a prohibitive instruction.²⁷² The instruction currently announces that jurors are prohibited from accessing the Internet because doing so "violates the rules of evidence."²⁷³ While a reference to the rules of evidence nicely contextualizes the prohibition for lawyers, jurors do not necessarily understand what the rules of evidence are. The instruction should instead explain the reason for the ban in plain English. Interestingly, the instruction's official comments do just that. "The use of Web search engines, wireless handheld devices, and Internet-connected multimedia smartphones by jurors . . . has the potential to cause a mistrial . . . [and] it is critical to the administration of justice that these electronic devices not play any role in the decision-making process of jurors."²⁷⁴ The comment nicely details the connection between the prohibition against technology and the underlying policy. The Illinois Committee should consider using the language from the commentary in the instruction.

Comments made during the drafting process in Wisconsin recognize the need to connect the prohibitive instruction to policy.²⁷⁵ Judge Kremers reports, "'We're working on drafting an instruction that would incorporate [twittering] . . . and warn jurors not only not to do it, but also give some information on why they shouldn't do it.'"²⁷⁶ The policy reasons would help jurors to navigate the so-called gray areas of when technology can compromise a case and when it can be used merely as a tool in everyday life.²⁷⁷

269. Oddi, *supra* note 251.

270. See, e.g., Interview with Warren Wolfson, *supra* note 185.

271. See *id.*

272. See Illinois, Pattern Jury Instruction 1.01 §§ (6)-(7).

273. *Id.*

274. *Id.* § (6) cmt.

275. "State officials are drafting an instruction aimed at keeping the World Wide Web out of the jury box." Stephen, *supra* note 179. Despite the fact that no incidents have yet occurred in any proceedings in Wisconsin, the court has recognized the prevalence of the issue, the havoc Twittering is causing in other parts of the country, and the "growing use of text messaging and social networking" by jurors. *Id.*

276. *Id.* (quoting Judge Kremers).

277. *Id.*

4. *Jury Instructions Should Be Provided both Orally and in Written Form to Emphasize the Importance of the Prohibition*

The majority of the current technology-prohibitive jury instructions are given orally.²⁷⁸ Oral instructions, without a complementary written instruction, are not ideal.²⁷⁹ Jury instructions banning technology use need to be in writing in order to emphasize the importance of the prohibition.²⁸⁰ A certain level of formality can remind participants that a trial is a serious event and will preserve respect for the judicial system.²⁸¹

A written instruction must be carefully drafted. The instruction should not use incomprehensible language that is hard to follow.²⁸² Legalistic language should also be avoided and everyday language should be used.²⁸³ Research shows that most jurors do not understand the instructions presented to them,²⁸⁴ so the simpler the instructions, the better.

Exemplifying the growing trend of issuing prohibitive instructions in writing is a proposed jury instruction in San Francisco County.²⁸⁵ One of the proposed changes requires that a cover letter be attached to juror venire questionnaires warning jurors against using the Internet or social networking devices to research the case or share information.²⁸⁶ A draft of the civil questionnaire cover sheet currently reads in part, "You 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."²⁸⁷ Judges believe that putting the social network-

278. See, e.g., Interview with Warren Wolfson, *supra* note 185.

279. See *id.*

280. See *id.*

281. Tiersma, *supra* note 222, at 4.

282. JONAKAIT, *supra* note 77, at 206.

283. *Id.* at 207.

284. *Id.*

285. The rule was scheduled to go into effect on January 1, 2010. See Eric Sinrod, *Jurors: Keep Your E-Fingers to Yourselves*, TECHNOLOGIST BLOG (Sept. 15, 2009, 9:29 AM), <http://blogs.findlaw.com/technologist/2009/09/jurors-keep-your-e-fingers-to-yourselves.html>. The rule is not yet in effect. See *id.*

286. Kate Moser, *Court Lays Down Law on Jury Internet Use*, LAW.COM (Sept. 9, 2009), <http://www.law.com/newsire/cache/1202433656715.html>. Although the county has yet to experience a problem with jurors blogging and tweeting, court officials in the area noted that "there's a lot of buzz in the national jury press about how to handle jurors' use of social networking Web sites." *Id.*

287. *Id.* The proposed rule was largely adopted because the San Francisco Superior Court had to excuse an entire panel of 600 jurors after several jurors admitted conducting Internet research about the case. Sinrod, *supra* note 285. During interviews, the jurors indicated "confusion about whether the admonition that had been given about not conducting outside research applied to the Internet." *Id.*

ing instruction on the civil questionnaire will provide more consistency to their court system.²⁸⁸

C. *Silencing the Twittering Juror: A Jury Instruction Proposed*

The Twittering juror could be silenced with a proper jury instruction.²⁸⁹ The jury instruction proposed here is a realistic, preventative solution to the problems that modern technology poses. An ideal instruction would (1) be implemented jurisdiction wide, (2) be specific, (3) tie the prohibition to the policy behind the instruction, and (4) be given orally and in writing. The instruction would read as follows:

The American court system requires that jurors decide the outcome of a case using only the information presented to them in court by the parties and their attorneys. This is because the parties do not have the opportunity to test evidence from outside the courtroom. Therefore, our rules of evidence require jurors to remain unexposed to external information or influence. Until the judge has entered the verdict, external research and communication with outsiders is prohibited.

This means you may not discuss the issues posed by the case, the parties, the parties' attorneys, the judge, or your personal experience on jury service with anyone outside of the deliberation process. You may not share any information with, or receive any information from, any source outside the courtroom.

It is imperative that you understand that the prohibition against research and communication applies to the Internet and other electronic mediums. For example, you cannot Google anything about the trial. You cannot Wikipedia definitions or concepts that are applicable to the case. You cannot blog or tweet about anything relating to the case or your jury service. You may not use any social networking service, including, but not limited to, Twitter, Facebook, MySpace, and YouTube, to send or receive messages about the trial. This court prohibits you from conducting any online research or engaging in any communication with outsiders during trial about the case.

288. See Sinrod, *supra* note 285. One commentator notes,

[It] makes abundant sense for judges to be very clear in admonishing jurors that not only are they to refrain from trying to learn about a case from traditional outside sources, they also must be told specifically not [to] seek case information from any electronic source, and examples of such prohibited sources should be enumerated.

Id.

289. Some judges think that an effective jury instruction can prevent potential contamination problems posed by Twittering jurors. See, e.g., Interview with Warren Wolfson, *supra* note 185. However, Douglass L. Keene, President of the American Society of Trial Consultants, has said that "[i]t's really impossible to control" jurors seeking information outside the courtroom. Ashby Jones, *Twelve Twittering Men?*, WSJ LAW BLOG (Mar. 18, 2009, 8:59 AM), <http://blogs.wsj.com/law/2009/03/18/twelve-twittering-men/>.

If you are unclear about the behavior prohibited by this instruction, please consult with the judge. You should consult the judge before you engage in the questionable behavior. You must always err on the side of caution. If you feel that you cannot abide by this prohibition, tell the judge immediately.

Failure to abide by this instruction will disrupt the integrity of trial for the parties. It will result in an unfair trial, because the information that you view or share online has not been tested in this court of law. Juror use of technology threatens the nature of our adversary system. Juror use of technology could force this court to retry the case, wasting valuable time and resources.

Use of outside information will be considered a violation of your oath to this court. Failure to adhere to these instructions could result in you being held in contempt of court.

The instruction should be issued in all courts within a jurisdiction to provide consistency. It would provide all litigants in a jurisdiction with the same likelihood that jurors will not look to extraneous information.

The instruction rightfully places the onus on the judge to explain to jurors why it is crucial that they not use technology to communicate about or research the trial during their jury service.²⁹⁰ The instruction is sufficiently specific. It clarifies which technologies the jury is prohibited from using. It further alerts jurors to prohibited conduct. By mentioning specific problematic services—for example, Twitter, Facebook, Google, and YouTube—the instruction details for jurors what conduct is prohibited.²⁹¹ This will allow jurors to adjust their behavior accordingly.²⁹²

The proposed instruction also ties the prohibition against technology use to the policy reasons behind the prohibition. The instruction explains its two basic goals: protecting the right to a fair trial and promoting judicial economy.²⁹³ The incorporation of policy helps jurors understand why doing outside research or having outside contact is unfair to the trial process.²⁹⁴ This will encourage jurors to refrain from using technology as prohibited.

To reemphasize, the proposed instruction should be issued both orally and in writing. The oral instruction should be read to the jurors at the beginning of trial, at each recess and lunch break, and at the

290. See Jones, *supra* note 289. However, “[i]t’s up to Juror 11 to make sure Juror 12 stays in line.” *Id.* This self-policing is important to ensure that extraneous influence does not enter the courtroom. See *id.*

291. See Browning, *Part 3, supra* note 1, at 219–20.

292. See *id.*

293. See, e.g., Illinois, Pattern Jury Instruction 1.01 §§ (6)–(7).

294. See Stephen, *supra* note 179.

end of the session each day.²⁹⁵ It should be delivered in a manner that emphasizes the importance of adhering to the instruction.²⁹⁶ "Good communication with jurors is more than [just] words: it is timing, delivery, and creating the best climate for juror acceptance of the message."²⁹⁷ In addition to reading the instruction to jurors, the instruction should be provided to the jurors in writing.²⁹⁸ Writing reinforces the seriousness of the endeavor.²⁹⁹ An instruction must be repeated often to remind the members of the jury how they should conduct themselves.³⁰⁰

Use of a preventative cautionary instruction will help to tame juror misconduct on the Internet. A clear, comprehensive instruction will help jurors to avoid accidental misconduct and deter intentional misconduct.³⁰¹ Judges and lawyers should also use additional preventative measures.

D. Keeping Technology Out of the Jury Box: Additional Preventative Measures

In addition to using a technology-inclusive cautionary jury instruction, courts should employ other preventative measures to keep technology out of the jury box. Numerous scholars and practitioners have suggested preventative means, such as notice in the jury summons, attorney investigation of potential jurors, voir dire examination, and juror certifications.³⁰² Given the high stakes of a mistrial, judges and lawyers should take all reasonable steps to ensure that the Internet does not enter the jury box.³⁰³

In some jurisdictions, court administrators prospectively advise jurors of the prohibition on technology use.³⁰⁴ Some courts have recommended that the juror summons highlight the prohibition against juror Internet research and social networking during trial.³⁰⁵ This warning is apt to prevent juror exposure to extraneous information and influ-

295. See Jana Lauren Harris, *Social Media in the Jury Room Can Sabotage Trials*, FINDLAW KNOWLEDGEBASE (July 21, 2009), <http://knowledgebase.findlaw.com/kb/2009/Jul/32426.html>.

296. E.g., Interview with Warren Wolfson, *supra* note 185.

297. Artigliere et al., *supra* note 4, at 12.

298. See Interview with Warren Wolfson, *supra* note 185.

299. See *id.*

300. See *id.*

301. See Artigliere et al., *supra* note 4, at 10–12.

302. See *infra* notes 308–23 and accompanying text.

303. See, e.g., Ron Spears, *Looking for "Facts" in All the Wrong Places*, 98 ILL. B.J., Feb. 2010, at 102, 102. What steps are reasonable in any given trial may vary depending on the length, the complexity, and the stakes of a case. See *id.*

304. See *id.*

305. See *id.*

ences, as it would warn jurors up front about what technology is “off-limits.”³⁰⁶

Courts are also adding statements about the prohibition against technology use into the statements given to the general juror pool before the beginning of voir dire.³⁰⁷ The instructions tell jurors not to research or talk about cases that are taking place in the courthouse.³⁰⁸ Lawyers and judges are also wisely altering voir dire questioning to include questions about whether any prospective jurors have already conducted any prohibited research or networking online.³⁰⁹ Attorneys also access prospective jurors’ social media Web sites to determine the likelihood that the juror will engage in prohibited conduct and to determine whether each juror has already done so.³¹⁰ In fact, trial consultants have already developed methods of searching Web sites and creating useful data for attorneys.³¹¹

During trial, judges and lawyers should use the cautionary instruction. Repetition of the instruction is warranted.³¹² Also, judges should consider asking the jurors each day if they have been abiding by the prohibition against technology use.³¹³ The judge could simply greet jurors by asking them if they have been able to follow his instructions, including refraining from discussing the case or doing outside research.³¹⁴ Post-trial, during deliberations, courts could consider barring computers and phones from the jury room.³¹⁵ But taking phones and computers from jurors should only be done in rare instances.³¹⁶

The court should also require jurors to sign a declaration attesting that each juror did not use a personal electronic device to research or

306. Carton, *supra* note 119.

307. See, e.g., Eric P. Robinson, *Michigan High Court Sends Message to Twitterers*, CITIZEN MEDIA L. PROJECT (Feb. 12, 2009, 4:32 PM), <http://www.citmedialaw.org/blog/2009/michigan-high-court-sends-message-tweeters>.

308. See *id.*

309. See Spears, *supra* note 303, at 102. In order to conduct a meaningful examination, lawyers and judges will need to be familiar with the language and terminology associated with the social media Web sites. See Greene & Spaeth, *supra* note 33, at 44.

310. See Ann T. Greeley, *Understanding Jury Psychology Through Research: A Powerful Technique for Your Trial Preparation Arsenal*, 39 A.B.A. BRIEF, Spring 2010, at 48, 50.

311. See *id.*

312. See Committee on Court Administration and Case Management, *supra* note 171, at Attachment (recommending an instruction before trial and at the close of the case).

313. See Spears, *supra* note 303, at 102–03.

314. See Artigliere et al., *supra* note 4, at 14.

315. See Spears, *supra* note 303, at 103.

316. See *supra* notes 207–17 and accompanying text.

communicate about the trial.³¹⁷ In their declaration, jurors should attest that they did not research the case on the Internet, communicate through a social networking forum about the case, or use any other electronic forum to gain access to outside information.³¹⁸ The declaration should be signed at the beginning and end of each case.³¹⁹

Although it is inevitable that a rogue juror will disrupt trial occasionally through the use of technology, a combination of preventative mechanisms is likely to lessen accidental technological "misadventures" by jurors.³²⁰ Use of a cautionary prohibitive instruction along with these other preventative techniques will help courts to tame juror misuse of technology. It is the duty of the courts to keep technology out of the jury box.

IV. IMPACT

Courts must tame Internet-centered juror misconduct. Preventative measures have the potential to positively impact American courts. Jurors, judges, and the adversary system are all likely to benefit from the use of a pattern jury instruction incorporating a prohibition against technology use in combination with other preventative measures. Updating preventative techniques is essential to modernize courts.

A more specific instruction could facilitate juror comprehension and prevent juror misconduct.³²¹ A detailed instruction would reduce juror confusion by clarifying what conduct is (and what is not) allowed.³²² Jurors could better fulfill their roles as fact-finders by basing their decisions upon the controlled set of facts presented in court within the articulated legal standard.³²³ The instruction would prevent jurors from committing unintentional misconduct.³²⁴ With a spe-

317. See Michael Fertik, *Jury Instructions: No Facebook, No Twitter, No Internet!*, REPUTATION DEFENDER BLOG (Sept. 17, 2009), <http://www.reputationdefenderblog.com/2009/09/17/jury-instructions-no-facebook-no-twitter-no-internet/>. The approach is especially important for highly publicized cases or cases that have gathered media attention.

318. See Courtney L. Davenport, *Radio Station to Blame for Woman's Death During Water-Drinking Contest*, TRIAL, Mar. 2010, at 55, 55 (detailing the approach used in the Jennifer Strange water-intoxication case).

319. See *id.*

320. Jonsson, *supra* note 45.

321. See Stephen, *supra* note 179.

322. *Id.* Recent juror behavior analysis has concluded that it is important to tell jurors what to do and what not to do. See JURY: BEHAVIORAL ASPECTS—REACTIONS TO THE LAW, INCLUDING NULLIFICATION, <http://law.jrank.org/pages/1424/Jury-Behavioral-Aspects-Relations-law-including-nullification.html> (last visited Jan. 25, 2011). This helps to facilitate comprehension. See *id.* Failing to address erroneous beliefs or questions does not make issues go away. See *id.*

323. See Edwards, *supra* note 19, at 2.

324. SUMMARIES OF SUCCESSFUL JURY MISCONDUCT CASES THROUGH SEPTEMBER 2004, http://www.capdefnet.org/hat/contents/constitutional_issues/jury_misconduct/

cific instruction, courts could dissuade the rogue juror from technological misadventures.³²⁵

Judges would also benefit from pattern instructions prohibiting juror use of technology. Judges prefer to use pattern instructions because they pose less risk to the judge of being reversed on appeal.³²⁶ Using language that has already been approved by the courts would allow judges to feel confident in their charge to the jury.³²⁷ This confidence would prove especially helpful due to constantly changing technology; a pattern instruction would list the prohibited technologies for the judge, giving him confidence that he is not forgetting an important one.

The proposed instruction would positively affect the adversary system.³²⁸ The integrity of verdicts would be improved.³²⁹ The instruction would encourage jurors to use only the information presented in the courtroom when deliberating.³³⁰ Litigants would be afforded a fair trial because extraneous information would be excluded.³³¹

A new instruction would promote judicial economy because there would likely be fewer tainted deliberations necessitating new trials.³³² Judges should charge the jury with an instruction that appropriately balances the expenditure of time against the dangers of prejudice. Through a clear instruction prohibiting technology use by jurors, judges could use judicial resources more efficiently.³³³ To preserve the adversary system, a detailed instruction is a far superior solution.

Courts must respond to the presence of technology in their courtrooms. They must adapt to the twenty-first century juror. Developing an instruction to “[keep] the modern juror . . . insulated from the on-

jury_misconduct.htm (last visited Jan. 25, 2011). While juror misconduct as a result of intentional disobedience is always a possibility, the new instruction will eliminate misconduct by those jurors who are simply uninformed. *Id.*

325. See Glenna Herald, *Twitterpated*, CINCINNATI B. ASS'N REP., Oct. 2009, at 18, 19.

326. See Chilton & Henley, *supra* note 224, at 14 (“[J]udges are talking to the appellate judges and not the jury when giving the [jury] instructions.”).

327. *See id.*

328. While the adversary system would likely benefit from an instruction prohibiting juror use of technology, some will likely resist adopting pattern instructions. *See, e.g., id.* Some judges and lawyers simply do not believe there is the need for a new instruction. *See id.* Also, lawyers are concerned with preparing jury instructions that will benefit their clients. *See id.* There may be cases in which a lawyer believes that the possibility of extraneous information entering trial could be to his client's benefit. *See id.*

329. *See id.*

330. *See generally* LANDSMAN, *supra* note 78.

331. *See generally id.*

332. *See* Stephen, *supra* note 179.

333. *See id.*

slaught of potentially prejudicial communications—will be an ongoing challenge for the judiciary and the bar.”³³⁴

V. CONCLUSION

Courts must constantly adapt to the modern world and the modern juror. They must do so to continually protect litigants' rights to a fair trial, free from extraneous influence. In keeping with the American adversary system's prohibition on extraneous influence entering the deliberation process,³³⁵ courts must alter preventative mechanisms to keep the Twittering juror out of the courtroom. Prevention is the appropriate measure.

Technology in the jury box has become increasingly problematic. With the rise in popularity of mobile Internet devices, twenty-first century jurors are likely to arrive at the courthouse accompanied by one.³³⁶ Courts must combat what has become an instinctual habit of online research and networking.³³⁷ New Web sites, such as Twitter, have made online social networking dangerously similar to an in-person conversation.³³⁸

In 2009, Twitter became the new “hot topic” in civil procedure and evidence law, as practitioners and academics struggled to adapt traditional rules to modern problems.³³⁹ Two poignant cases illustrated Twitter's potential for harm.³⁴⁰ These cases alerted courts across the country to the general problems caused by technology and the specific harms posed by Twitter.³⁴¹ Several states responded by beginning the drafting process for a new jury instruction, warning jurors not to use their mobile devices during trial to either research or discuss the case.³⁴² These current instructions are insufficient.³⁴³

Precautionary jury instructions must prohibit juror use of technology during trial. Courts need to instruct the jury accordingly in order to prevent unknowing misconduct. The prohibitive instruction should enumerate specific prohibited technologies, including Twitter.³⁴⁴ It

334. Jonsson, *supra* note 45 (quoting Judge Dennis M. Sweeney).

335. *See, e.g.*, LANDSMAN, *supra* note 78, at 1.

336. *See supra* notes 61–76 and accompanying text.

337. *See* Hoenig, *supra* note 25. The “dazzling blitz of electronic information tidbits can easily become a near-irresistible magnet for juror curiosity.” *Id.*

338. *See supra* note 38 and accompanying text.

339. *See supra* notes 59–170 and accompanying text.

340. *See id.*

341. *See id.*

342. *See supra* note 171 and accompanying text.

343. *See id.*

344. *See supra* notes 289–301 and accompanying text.

should use non-legalistic, plain-English language that jurors can easily comprehend.³⁴⁵ Judges should illuminate for jurors the policy reasons behind the prohibition.³⁴⁶ The instruction should be repeated frequently and provided to jurors in written form.³⁴⁷ The instruction should also be complimented by additional preventative measures, such as warnings in juror summons, voir dire questioning, and signed declarations.³⁴⁸ The proposed instruction and increased preventative measures “reflect the realities of the electronic age.”³⁴⁹

The adversary system must adapt to the “techno-savvy” Twittering juror. A new jury instruction must be adopted to prevent technology from adversely affecting a litigant’s right to a fair trial. It is a necessary development in a gradually changing legal world, which now contains jurors with handheld Internet devices and excessive social networking tendencies.³⁵⁰ Twenty-first century instructions need to be given to address twenty-first century technology.³⁵¹ American courts must silence the Twittering juror.

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345. *See id.*

346. *See id.*

347. *See id.*

348. *See supra* notes 304–11 and accompanying text.

349. Nora Lockwood Tooher, *Tackling Juror Internet Use*, LAWYERS USA (Mar. 24, 2009), <http://lawyersusaonline.com/blog/2009/03/24/tackling-juror-internet-use/>.

350. *See* Danzig, *supra* note 5. Experts suspect that courts will adopt updated rules of procedure to “jive with” the rising issue of technology in the jury box. *Id.* Re-writing precautionary juror instructions to include an explicit ban against technology use by jurors would be a modernization of rules similar to the recently updated Federal Rules of Civil Procedure that now include e-discovery guidelines. *Id.*

351. *See* Tooher, *supra* note 349.

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