Mistrial in 140 Characters or Less? How the Internet and Social Networking are Undermining the American Jury System and What Can Be Done to Fix It

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NOTE

MISTRIAL IN 140 CHARACTERS OR LESS? HOW THE INTERNET AND SOCIAL NETWORKING ARE UNDERMINING THE AMERICAN JURY SYSTEM AND WHAT CAN BE DONE TO FIX IT

I. INTRODUCTION

In a scene from the classic American film, 12 Angry Men, Henry Fonda, as the unwavering and steadfast Juror Number Eight, is the lone member of the jury convinced that the prosecution has failed to prove its case against the young defendant beyond a reasonable doubt.1 When deliberations turn to the supposedly unique knife that the young man allegedly used to kill his father, Fonda reaches into his pocket, dramatically pulls out a very similar switchblade, and plants its sharpened tip into the table next to the alleged murder weapon.2 He then reveals that he purchased the switchblade on a walk through the accused’s neighborhood.3 This begins to cast doubt into the jury’s mind, eventually resulting in an acquittal for the young man.4 While Fonda’s actions may have ensured that justice was done in this particular case, he disregarded the basic rules of jury deliberation.5 These acts amount to juror misconduct, as Fonda’s research provided extrinsic information for the members of the jury and brought in a new piece of evidence not presented at trial.6

Juror misconduct occurs when a juror violates his oath to the court and engages in improper conduct that affects his ability to remain

1. 12 ANGRY MEN (United Artists 1957).
3. Id. at 1398-99 & nn.43-44 (pointing out that Fonda’s actions constitute juror misconduct).
4. Id. at 1392.
5. See id. at 1399 n.44.
6. See id. (noting that Fonda would not have gotten away with such egregious conduct if he had been caught by a bailiff or turned in by a fellow juror, as this easily could have been declared a mistrial).
impartial and unbiased. Juror misconduct can include improper contact with third parties; exposure to non-evidentiary materials; conducting experiments to test the evidence; untruthful statements during voir dire; physical and mental impairment; and pre-deliberation discussions. Through his actions, Fonda committed two of the aforementioned types of misconduct.

Fast-forward to today. While it is unlikely that Fonda could have entered a modern courthouse carrying such a weapon, the temptation jurors have to do their own research remains. Although Fonda had to actually walk through the young man's neighborhood and physically purchase the knife, today's jurors could have gained similar information in a much easier way. Modern juries face the temptation of a more easily accessible, anonymous, and often untraceable form of misconduct by using the vast resources of the Internet.

Some of the Internet's most popular services put the jury system at great risk. Tools like Google, Facebook, Twitter, and Google Maps create myriad ways and often overwhelming temptation for jurors to improperly obtain information and communicate with others regarding events, locations, parties, and issues of law that may arise in the cases on which they serve. In the past, jurors have engaged in extrinsic research in encyclopedias, researched law treatises to find the explanation of legal concepts, looked up the possible sentences for certain crimes, and even searched law dictionaries for terms associated with their trials. Before the advent of the Internet, these types of searches were not as quick and easy as they are today, which creates the potential for even greater prejudice.

While some jurisdictions have taken steps to address the problem of jurors using the Internet, the traditional rules meant to prevent juror misconduct are no longer sufficient in the Internet age. A stronger approach is needed to drastically reduce the frequency of this type of juror misconduct. This solution must be realistic; its measures must ensure that jurors are not accessing information they should not be

8. Id.
10. Gershman, supra note 7, at 329.
11. Id. at 329-30.
12. Id. at 330.
13. Id.
14. Id. at 329.
accessing, nor communicating improperly, while taking into account the realities of today’s society. These measures must include more specific rules and instructions for jurors, increased enforcement of these rules and policies, and penalties for non-compliance to deter would-be errant jurors from jeopardizing the fairness of a trial.

In Part II, this Note will relate several recent examples of Internet-related juror misconduct, illustrating the number of ways in which the Internet can collide with the rules of the jury system. In Part III, this Note will discuss the current set of tools available to courts to deal with alleged instances of juror misconduct and the limitations of these tools in providing an adequate remedy in all situations. Additionally, this Part will examine several recent federal cases demonstrating the procedure used by the courts in dealing with juror misconduct. Part IV will discuss the need for new rules and procedures for dealing with Internet-related juror misconduct and will propose a standard by which new jury instructions and procedures should be evaluated. Part V of this Note will use the proposed standard to evaluate new jury instructions enacted by several jurisdictions in an attempt to better inform jurors of the problems specifically created by the Internet. Part VI of this Note will propose new rules and procedures that should be enacted by jurisdictions to deal with Internet-related juror misconduct more effectively.

II. THE PROBLEM OF INTERNET-RELATED JUROR MISCONDUCT

The Internet has become an enormous source of information upon which many rely daily, and in many cases, multiple times per day. In today’s society, the need to satisfy one’s thirst for this easily accessible information is met by any number of powerful tools, and the names of many, such as Google, Facebook, and Twitter, have become ubiquitous in today’s culture. The Internet’s ability to rapidly provide us with any information sought on demand has benefitted our society greatly; however, it is the very speed, accessibility, and availability of the Internet that results in a number of difficult problems for the legal system that were not even contemplated before its widespread use became common.

Within the jury system, the Internet and its vast resources of instant information can wreak havoc. The purpose of the jury is to present a

17. See Brickman et al., supra note 15, at 242.
18. See Porter, supra note 9, at 12.
group of people with evidence that is deemed by the tribunal to be admissible.\textsuperscript{19} Jurors are intended to base their decisions on the facts presented at trial, and these facts alone.\textsuperscript{20} In the modern jury system, jurors have generally been forbidden from seeking extrinsic information because it undermines the fairness of a jury trial.\textsuperscript{21}

In the past, the jury system was not the closed process that it is today.\textsuperscript{22} This eventually changed, however, and during most of the modern jury system's development, information was not as readily available as it is over the Internet today, making it easier to insulate jurors from prejudicial information.\textsuperscript{23} In the past, it was very simple to instruct a jury not to speak to other persons involved in a case or to read information about a case in the newspaper.\textsuperscript{24} Since today's juries learn about a case only from the evidence presented at trial,\textsuperscript{25} the advent of the Internet and its ability to provide an incredible amount of information quickly and easily, has ended the days of simply instructing a jury to avoid reading news stories.\textsuperscript{26}

One important aspect of the jury system in the United States is the fact that deliberations are done in secret.\textsuperscript{27} This is done for a number of important reasons, but primarily, this requirement protects jurors from outside influences.\textsuperscript{28} If the general public knew what jurors discuss each day during deliberations, the frequency of attempts to influence individual jurors or the general direction of deliberations would be much greater.\textsuperscript{29} For example, if deliberations were done publicly, individual jurors could feel pressure to take a certain position, to reach a verdict on someone's guilt based on his popularity, or to award monetary damages based on the popular will. For these reasons, and many others, the secrecy of the deliberative process should remain to protect the sanctity

\begin{thebibliography}{9}
\bibitem{19} \textit{NANCY S. MARDER, THE JURY PROCESS} 7 (2005).
\bibitem{20} \textit{id.}
\bibitem{21} Brickman et al., \textit{supra} note 15, at 290.
\bibitem{22} \textit{See MARDER, supra} note 19, at 18. In fact, medieval jurors were often chosen because of their knowledge of the parties or the facts and circumstances surrounding a case, and they were expected to perform fact-finding outside of the court. \textit{id.}
\bibitem{23} \textit{See Brickman et al., supra} note 15, at 291.
\bibitem{24} \textit{id.}
\bibitem{25} \textit{See MARDER, supra} note 19, at 18.
\bibitem{26} \textit{See Ross, supra} note 16, at 54.
\bibitem{27} MARDER, \textit{supra} note 19, at 149.
\bibitem{28} \textit{See id.}
\bibitem{29} \textit{id.} at 149-50.
\end{thebibliography}
of the decision-making process. The improper use of the Internet by jurors, however, threatens this sanctity.

Some of the newer destinations on the Internet, such as social networking sites like Facebook, and new forms of instant communication like Twitter, can be problematic for the jury system. Facebook can be used to “friend” a party in a case and communicate with them. Google Maps can be used to virtually visit a crime scene, and Twitter can be used to give out confidential information during the deliberation process or to improperly comment on the case. According to the Pew Internet and American Life Project, seventy-four percent of American adults use the Internet. Facebook alone currently has over five hundred million users, and research shows that Facebook users routinely engage in “social searching,” which is the use of this social network to find people they already know, or became aware of offline, in order to find out more about them. The danger is that Facebook will be used by jurors to search for individuals involved in the trials they are serving on, satisfying their curiosity to gain information either not presented in or purposely excluded from the case. Facebook can also be improperly used by jurors to communicate directly with individuals in a case. The possibilities are truly endless for jurors to find information and communicate improperly online.

This almost unlimited trove of information and the powerful tools individuals can use to access it on the Internet has had several negative

31. See also Jeffrey T. Frederick, You, the Jury, and the Internet, BRIEF, Winter 2010, at 12, 14 (“Twitter is the most popular ‘microblogging’ service, which allows users to post short—140 characters maximum—messages or ‘tweets’ that can be read and responded to by anyone logged onto Twitter.com.”).
32. See http://www.twitter.com (last visited Aug. 21, 2010) (for example, perform a search for “#juryduty,” a so-called “hashtag” which allows Twitter users to associate their tweets with jury duty and allows anyone to easily narrow down all of the Twitter messages users have posted about jury duty).
33. See Frederick, supra note 31, at 14.
34. See Ross, supra note 16, at S5.
35. See Frederick, supra note 31, at 14.
36. See Frederick, supra note 31, at 17-18.
38. See Kathleen Kerr, Juror Admits Error, NEWSDAY, July 31, 2009, at A5.
effects on the jury process. Juror misconduct of this type subverts the purpose of evidentiary rules and taints the information upon which jurors will reach a verdict. Internet-related juror misconduct can be particularly dangerous because information found online can often be incorrect or incomplete. Also, jurors may come across information that may be outdated. Most seriously, information that has been purposely excluded from a case by a judge could be obtained by a wayward juror through use of the Internet. For example, since records of prior convictions are often excluded from trial, and such information is often published by states in online inmate-locating databases, a simple Google search could allow a juror to obtain this highly prejudicial information.

Also, jurors may communicate about the trial with others via the Internet, divulging confidential information or revealing aspects of the deliberative process. During the course of deliberations, jurors may inappropriately reveal feelings and opinions about the case through social networking sites. Television weatherman Al Roker of Today on NBC recently demonstrated the problem presented by Twitter, specifically by taking pictures of other potential jurors waiting to be called at a Manhattan court and posting them on his account. Although Roker was not yet on a trial and caused no real damage, this high-profile episode demonstrates how Twitter, Facebook, and personal blogs present the greatest temptation for juror misconduct, as many people are used to sharing the details of their day with their friends and “followers” via these services.

Other factors have also contributed to the increased frequency of juror misconduct via the Internet. The length of trials has generally increased over time, and, as a result, there is more time for jurors to potentially misbehave. The general abandonment of sequestration has

42. Ross, supra note 16, at S5 (noting that Wikipedia, an online encyclopedia that relies on contributions from the general public, is the perfect example of this).
43. Id.
44. See id.
45. See id.
46. Neil Vidmar, Case Studies of Pre- and Midtrial Prejudice in Criminal and Civil Litigation, 26 L. & HUM. BEHAV. 73, 88 (2002); see also Porter, supra note 9, at 12.
47. See Porter, supra note 9, at 12.
49. See id.
50. See Frederick, supra note 31, at 14.
51. See Nancy J. King, Juror Delinquency in Criminal Trials in America, 1796-1996, 94 MICH. L. REV. 2673, 2712 (1996) ("Longer trials, with their recesses and breaks, allowed jurors
also led to decreased supervision of jurors, resulting in more chances for Internet-related misconduct. Between the increased time jurors spend serving and the decreased supervision of jurors during their service, opportunities for misconduct will surely continue to arise unless changes are made.

A. Social Networking: Improper Contact With a Party

Many people use Facebook to find and become “friends” with the people they meet in their everyday lives. However, this is inappropriate within the context of a trial when jurors use Facebook to “friend” parties in the case whom they should not be contacting. This type of misconduct presented itself in the recent criminal trial of Cesar Rios, a building manager who was being prosecuted for allowing illegal walls within his apartment building. These illegal walls eventually hindered firefighters during a large blaze, which ultimately forced several of them to jump out of the windows to escape, resulting in their deaths. During the course of the trial, a firefighter who served as a witness was contacted by a female juror who wished to be friends with him on Facebook. At first, he did not recognize her and ignored her request. Mr. Rios was convicted, and after the verdict, the juror sent the firefighter a message, explaining to him that she was a juror in the trial. After accepting her friend request and sending a message in reply, the firefighter, perhaps realizing that this type of contact was improper under the circumstances, contacted prosecutors to advise them of what had happened. At a hearing held on the matter, the defense questioned those involved. During the hearing, the juror stated that she “friended” the firefighter by impulse and realized immediately that what she did was wrong. State Supreme Court Justice Margaret Clancy eventually denied a motion to set aside the verdict based on juror

many more opportunities to expose themselves to outside influence, conduct experiments, visit the scene of the event, share liquor, or otherwise act improperly before the verdict was returned.”

52. See id. at 2713.
54. See Frederick, supra note 31, at 14.
55. Kerr, supra note 40.
56. Id.
57. Id.
59. Id. at 6.
60. Id.
61. Id. Defense attorneys even insinuated during questioning that the delinquent juror may have been infatuated with the firefighter, something which she denied. Id.
62. See id. at 5.

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misconduct. However, the verdict was set aside on the unrelated ground of legal insufficiency of the trial evidence.

**B. Broadcasting Details of Deliberation**

The use of social networking to contact parties in cases is not the only source of trouble for the jury system. Jurors can also use services like Facebook and Twitter to broadcast a virtual play-by-play of the trial and deliberations. In the criminal corruption trial of former Pennsylvania State Senator Vincent J. Fumo, the defense moved for a mistrial before the verdict because a juror was discovered to have been posting continuous updates of the trial on Facebook and Twitter. The juror even shared with his followers that there would be a “big announcement” on the day the verdict would be handed down. The mistrial was not granted, and, unsurprisingly, Mr. Fumo’s attorneys planned to use this alleged misconduct as grounds for appeal. The court denied the appeal because it found that the comments posted by the juror in no way prejudiced the defendant, and thus a mistrial was not warranted. The judge stated that the juror’s “comments were [n]othing more than harmless ramblings” and did not discuss specific facts of the trial nor show a bias toward either party. Although no confidential information was apparently revealed in this case, the delinquent juror easily could have revealed confidential information using the same method.

63. See id. at 7 (noting that there was no indication in the record that the “feelings” of the female juror in any way affected her decision making as a juror).
64. See id. at 4.
66. Id.
68. See Memorandum of Law in Support of Post-Trial Motion of Defendant Fumo for Judgments of Acquittal or New Trial at 13, United States v. Fumo, 639 F. Supp. 2d 544 (E.D. Pa. 2009). The defendant’s memorandum of law reveals additional details, stating:

   The [in camera] hearing revealed that this juror had commented publicly about the progress of the deliberations through internet posts on the Facebook and Twitter social networking platforms. Worse, he did so in a manner which invited responses from persons who were not members of the jury. And finally, the juror revealed that he had listened to at least one television news report about the case, in blatant violation of the Court’s instructions.

Id.
71. Id. at 555.
72. See id.
C. Do-it-Yourself Legal Research

Like Henry Fonda’s character, jurors often feel compelled to do their own research on issues present in the case, and the Internet has made this urge even more of a problem. As a result, courts often already have jury instructions that inform jurors that they are strictly prohibited from conducting outside research. However, the Internet makes doing this improper research quicker and easier, and the problem continues. In one Florida criminal case, the defendant was accused of illegally selling prescriptions through pharmacies on the Internet. When one juror complained that another juror had been doing Internet research, the judge assumed that he could simply remove the juror and proceed with trial. However, upon further investigation the judge found that eight other jurors had done the exact same thing. Some had even found information that had been explicitly excluded from the case. The jurors had done Google searches on the lawyers and the defendant, read online news articles regarding the case, searched Wikipedia for legal definitions, and searched for excluded evidence. The defendant’s motion for a mistrial was granted, and the U.S. Attorney’s Office submitted a motion to dismiss the indictments against the defendants, mentioning the rampant juror misconduct that occurred during the trial. When asked by the judge why he had done his own research, one juror stated, “Well, I was curious.” This simple statement by the juror is very telling; curiosity is often a difficult temptation to ignore.

73. Gershman, supra note 7, at 329-30.
74. See id. at 346.
75. Id. at 329.
76. Schwartz, supra note 65.
77. Id.
78. Id.
79. Id.
80. Id.
82. Id.
83. Schwartz, supra note 65.
84. See Jim Dwyer, The Officer Who Posted Too Much (Or Maybe Just Too Callously), N.Y. TIMES, Mar. 11, 2009, at A24. Interestingly, at least in this case, the jury was allowed to see the postings of an arresting officer on MySpace, a social networking site, which demonstrated that he may be prone to brutality and violence. The case rested on his credibility, and thus, parts of his online presence were admitted to the case. Clearly, information gleaned from the Internet can be used by enterprising defense attorneys to their advantage as well. Id.
D. Blogging and "Tweeting" Your Opinion

Jurors also cause trouble for the courts when they use the Internet as an outlet for their personal opinions. Even lawyers, who should know better as officers of the court, can find themselves in trouble as a result of their actions as jurors.85 In one particularly egregious case, a lawyer from San Diego, Frank Wilson, blogged about the details of a case that he was serving on as a juror.86 In his postings, he described, and was critical of, the judge and defendant in the case.87 Mr. Wilson also quipped sarcastically about the lack of rules that would prohibit him from blogging about the case.88 His actions ultimately resulted in the verdict being set aside, and the case was sent back to a lower court.89 Unfortunately for Mr. Wilson, the California State Bar became involved and brought disciplinary action against him,90 and he ultimately received a 45-day suspension, paid $14,000 in legal fees, and lost his job.91 Thus, when attorneys commit profound juror misconduct, they can face serious professional consequences; however, lay persons are not subject to such disciplinary review.92

Twitter, a relatively new social networking platform, has already proven to be a problem when utilized by jurors. Twitter users post "tweets," which are the real-time updates users write to let their friends know what is on their mind or what they are doing at a particular time.93 In one Arkansas case, a juror posted Twitter messages about the trial on which he was serving.94 In this case, a judgment of over twelve million was made against Stoam Holdings.95 The juror “tweeted” several inappropriate comments online, including, “oh and nobody buy Stoam. Its bad mojo and they’ll probably cease to Exist, now that their wallet is

86. See Stipulation RE Facts, Conclusions of Law and Disposition and Order Approving Actual Suspension at 10, In re Wilson, No. 06-O-13109 (Cal. State Bar Ct. 2008).
87. Id.
88. See id.
89. Id. at 2.
90. Id. at 1.
91. Schwartz, supra note 85.
92. See also Judges, Lawyers Can't be Facebook 'Friends,' NEWSDAY, Dec. 12, 2009, at A21. Some states are starting to take an active role in regulating lawyers’ use of social networking. In fact, a Florida judicial ethics panel recently ruled that lawyers and judges could no longer be "friends" on social networking sites to prevent any impression of bias or impropriety. Id. Interestingly, some have criticized the decision, saying that lawyers and judges interact frequently and can still maintain their impartiality. Id. Regardless, this recognition by the panel of the many problems the Internet can cause in the context of the courtroom is a step in the right direction.
93. See Frederick, supra note 31, at 14.
94. Schwartz, supra note 65.
95. Id.
12m lighter' and ‘So Johnathan, what did you do today? Oh nothing really, I just gave away TWELVE MILLION DOLLARS of somebody else’s money.’96 As a result of these tweets, the defense is now seeking to overturn the judgment against their client.97

E. Anonymous Accusations

The anonymity the Internet provides is yet another problem for the jury system. In a recent homicide case in Suffolk County, New York, defense counsel read anonymous postings on a local blog that stated that jurors wanted to convict the defendant before the trial even started.98 The judge in this case, however, was not moved to investigate further.99 Defense counsel wanted to interview the jurors and obtain a subpoena to search the company that owned the blog, but the judge refused, stating, “I’m not going to start a fishing expedition based on some blog.”100 Even though it cannot be proven that a juror posted these rumors,101 the anonymity the Internet provides allows jurors and others to wreak potential havoc on jury trials by making such accusations.

Thus, it is clear that Internet-related juror misconduct can take a number of different forms and is becoming increasingly common. From these few examples, the severity of the problem truly comes to light. As use of the Internet at home and on portable devices becomes more prevalent, these types of problems will become even more frequent.

III. THE TOOLS COURTS USE TO DEAL WITH JUROR MISCONDUCT

Although juror misconduct often taints trials with prejudice, it has not led to a significant number of mistrials or new trials.102 The frequency of a mistrial or new trial being granted due to juror misconduct has decreased over the last two centuries as judges and legislatures have taken steps to limit the damage resulting from juror misconduct.103 Pre-trial jury instructions and admonitions are generally the first lines of defense to prevent juror delinquency.104 Limiting the damage of juror misconduct has primarily been accomplished in two

96. Id.
97. Id.
99. Id.
100. Id.
101. This is true considering the fact that the posts were made anonymously. Id.
102. King, supra note 51, at 2722.
103. Id.
104. See id. at 2728-29.
ways: First, attempts are made to salvage verdicts once the misconduct has occurred, and second, courts have to be proactive to prevent juror misconduct from happening in the first place. However, in the Internet age, the temptation to ignore the remedial steps taken by the courts and legislatures may be even greater than before. Additionally, these remedial measures are somewhat limited in dealing with Internet-related juror misconduct. Because these rules are designed to encourage finality and limited inquiry into jury verdicts, they are of little help in solving the Internet-related juror misconduct problem.

When faced with a possible instance of juror misconduct, the courts must consider a number of factors. For example, several such factors have been put forth by the Ninth Circuit to be used when evaluating a potential occurrence of juror misconduct:

1. whether the extrinsic material was actually received, and if so, how;
2. the length of time it was available to the jury;
3. the extent to which the jury discussed and considered it;
4. whether the extrinsic material was introduced before a verdict was reached, and if so, at what point in the deliberations it was introduced; and
5. any other matters which may bear on the issue of the reasonable possibility of whether the introduction of extrinsic material affected the verdict.

Even if some evidence of outside influence is shown, the information must truly be extrinsic to support an investigation into it. In United States v. Winternute, a juror made a statement to the other jurors during deliberations about what type of message it would send to the victim company's shareholders if they returned with a conviction. The court ruled that this statement was intrinsic, and the defendant failed to "raise a colorable claim of outside influence," even though defendant's attorney theorized that the juror had probably accessed information on the Internet. The court stated that "[s]peculation and unsubstantiated allegations do not present a colorable claim of outside influence of a juror." As a result, the court found that the juror's
statement alone was not extraneous, and the court denied the defendant’s motion for an evidentiary hearing.\textsuperscript{116}

In another case, the court also denied the defendant’s motion for a mistrial because his allegations of juror misconduct were speculative in nature.\textsuperscript{117} The court ruled that, absent evidence otherwise, the mere fact that a juror brought a laptop into deliberations and used it at some point did not mean that the jurors used it to access information regarding his criminal background; the fact that they merely \textit{could} have was not enough.\textsuperscript{118} These examples demonstrate just how difficult it can be for the proponent to argue that Internet-related misconduct should result in a mistrial. The burden that must be met by the aggrieved party is purposely high to preserve finality,\textsuperscript{119} and the prejudice caused by Internet-related juror misconduct does not always meet this.\textsuperscript{120} This is why other steps must be taken to curb the problem.

Federal Rule of Evidence 606 also takes into account the timing of the discovery of potential juror misconduct.\textsuperscript{121} Time is an important aspect of several factors such as when the misconduct occurred, the options for dealing with it, and the remedies available to the parties may be different at various points throughout trial.\textsuperscript{122} The most important element within the timing of discovery of juror misconduct is whether it was discovered before the verdict or after the verdict.\textsuperscript{123}

If juror misconduct is discovered before a verdict is reached, there are a number of possible courses of action that courts can take to avoid declaring a mistrial. One of the most important devices that courts can use today is the alternate juror, who attends the trial with the jury and can be substituted should an errant juror need to be removed.\textsuperscript{124} Also, Federal Rule of Criminal Procedure 23(b)(3) allows trials to continue with eleven jurors should the court find good cause to excuse a juror.\textsuperscript{125}

If an allegation of juror misconduct is discovered before the verdict, one federal circuit stated that courts should ideally follow a “textbook” example of how to proceed.\textsuperscript{126} The court should respond quickly, ask jurors pointed questions regarding their potential exposure to prejudicial

\begin{thebibliography}{126}
\bibitem{116} Id.
\bibitem{117} See United States v. Wheaton, 517 F.3d 350, 362 (6th Cir. 2008).
\bibitem{118} See id.
\bibitem{119} See FED. R. EVID. 606(b) advisory committee’s note.
\bibitem{120} See Wheaton, 517 F.3d at 362.
\bibitem{121} See FED. R. EVID. 606(b).
\bibitem{122} See Bayramoglu v. Estelle, 806 F.2d 880, 887 (9th Cir. 1986).
\bibitem{123} See id.
\bibitem{124} See FED. R. CRIM. P. 24(c); accord King, supra note 51, at 2726.
\bibitem{125} See FED. R. CRIM. P. 23(b)(3).
\bibitem{126} United States v. Sampson, 486 F.3d 13, 42 (1st Cir. 2007).
\end{thebibliography}
information, and look for any possibility that prejudice has indeed occurred. The court should also make “a face-to-face assessment of the juror’s sincerity and of the possibility that other jurors had been contaminated.” Armed with this information, the court can decide the proper course of action going forward.

This “textbook example” is used to discover the degree of possible prejudice in the jury. In one federal case, at the trial court level, the errant juror had done Internet research into the earnings of the defendant company. After being reported by another juror, he was removed, and the trial court determined that this remedy was sufficient to avoid a mistrial. The Eighth Circuit affirmed this decision, finding that since the juror did not share prejudicial information with the other jurors, his removal alone could allow the trial to continue. By determining that the juror did not share his information with others on the jury, the court properly followed the First Circuit’s example for dealing with an instance of juror misconduct and evaluating the possible damage that occurred before deciding on a remedy to move forward. The court has many possible remedies at its disposal before a verdict has been reached, including declaring a mistrial, dismissing the offending juror and replacing him with an alternate, or in some jurisdictions, allowing the parties to stipulate to a jury of less than twelve individuals.

The pre-verdict discovery of juror misconduct is advantageous to all parties involved, as it is more difficult to deal with juror misconduct after a verdict has been reached, since fewer options are available at this point. If misconduct is discovered after a verdict, different procedures must be followed, and Federal Rule of Evidence 606(b) controls in Federal Courts. Rule 606(b) reads:

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

127. Id.
128. Id.
129. State courts encourage a similar procedure as well. New York, for example, entitles the party alleging misconduct to a hearing during which a fact-specific inquiry is made into the possible act of misconduct. See People v. Irizarry, 634 N.E.2d 179, 182 (N.Y. 1994).
130. See Sampson, 486 F.3d at 42.
132. See id.
133. See id.
134. See Sampson, 486 F.3d at 42. Gershaman, supra note 7, at 338-39 (describing several of the options available specifically in the case of juror bias, a particular type of juror misconduct, but these options can be expanded to encompass other type of juror misconduct as well).
135. See King, supra note 51, at 2748-49.
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 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, or (3) whether there was a mistake in entering the verdict onto the verdict form. A juror’s affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.138

Thus, the inquiry into potential juror misconduct post-verdict is somewhat limited in scope and generally insulates jury deliberations from scrutiny.139 The rule reflects the desire to balance the need to have open and uninhibited jury deliberations with the equally important need that the outcome of jury deliberations be fair,140 and offers a middle ground between the competing interests of finality and justice.141 Thus, this rule only provides three windows into deliberations: first, it allows the detection of misconduct prior to the time the verdict was reached; second, it allows proof of juror misconduct by means independent of juror testimony; and third, it permits, even by jury testimony, inquiry as to whether extraneous information was brought to the attention of the jury, or if outside influence was involved.142 This limitation is very strict, however, and courts have stated that Rule 606(b) “generally prohibits a juror from impeaching his or her verdict. However, a juror may testify to extraneous information or improper influence in the jury room.”143 It is also worth noting that this rule deals only with the competency of jurors to testify about irregularities such as juror misconduct, not substantive grounds for setting aside verdicts.144

The Supreme Court has defended this limited scope of inquiry, stating, “[i]t is not at all clear, however, that the jury system could survive such efforts to perfect it. Allegations of juror misconduct, incompetency, or inattentiveness, raised for the first time days, weeks, or

138. FED. R. EVID. 606(b).
139. See MARDER, supra note 19, at 218.
140. See Hardwick, supra note 137, at 35.
141. See FED. R. EVID. 606(b) advisory committee’s note.
142. See Hardwick, supra note 137, at 35.
143. United States v. Krall, 835 F.2d 711, 715-16 (8th Cir. 1987).
144. See FED. R. EVID. 606(b) advisory committee’s note.
months after the verdict, seriously disrupt the finality of the process.”

As the Court has stated:

But let it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict.146

Thus, the Supreme Court’s interpretation of the rationale behind Rule 606 leaves little leeway for post-verdict inquiry.147 Finality is the Court’s main concern here.148 This rationale justifies the existence of only limited post-verdict inquiry into the jury’s deliberations.149 As the Court notes, unlimited inquiry would surely undermine the finality of the process and lead to harassment.150 For these reasons, Rule 606(b) provides only limited tools for dealing with juror misconduct discovered after the verdict.

For the purposes of Rule 606(b), extraneous information includes, “publicity received and discussed in the jury room, matters considered by the jury but not admitted into evidence, and communications or other contact between jurors and outside persons.”151 The courts have distinguished this from intrinsic influences, stating, “[i]ntrinsic influences include discussions and even intimidation or harassment among jurors. Intrinsic influences on a jury’s verdict are not competent to impeach a verdict.”152 Thus solely intrinsic influences will not justify a Rule 606(b) inquiry.153 It is important to recognize this distinction when evaluating a potential instance of juror misconduct.

145. Tanner v. United States, 483 U.S. 107, 120 (1987) (holding that post-verdict inquiry is only permissible if there is substantial, if not conclusive, evidence of incompetency by jurors).
147. See id.
148. See id. at 267-68.
149. See id.
150. See id. (“Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation—to the destruction of all frankness and freedom of discussion and conference.”).
152. Id.
153. Id.
Moreover, courts do not hold evidentiary hearings for every allegation of outside influence.\textsuperscript{154} The Supreme Court has stated that, "[t]he safeguards of juror impartiality, such as \textit{voir dire} and protective instructions from the trial judge, are not infallible; it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote."\textsuperscript{155} As such, the Supreme Court recognizes the general reluctance of courts to conduct post-verdict hearings on juror misconduct.\textsuperscript{156} Additionally, the Supreme Court has recognized that no two instances of juror misconduct are alike, and thus, each must be evaluated on its specific facts and circumstances.\textsuperscript{157}

While this Note has primarily dealt with federal law, it is also worth noting that state law provides its own guidelines for dealing with juror misconduct. For example, in New York, a motion to set aside a verdict\textsuperscript{158} may be made upon any of three grounds presented by § 330.30 of the Criminal Procedure Law.\textsuperscript{159} One of these grounds states that the verdict may be set aside if there was "improper conduct by a juror, or improper conduct by another person in relation to a juror, which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of the verdict . . ."\textsuperscript{160} The New York Court of Appeals has stated that the burden is on the defendant to make a showing that the misconduct is inherently prejudicial to his substantial rights in order to qualify for relief under § 330.30(2),\textsuperscript{161} but has cautioned that not every mistake by a juror rises to the level where this burden is met.\textsuperscript{162} The court has further held, similarly to the federal courts, that the substance of the jury's deliberations cannot be examined; only instances of outside influence can be examined.\textsuperscript{163}

In light of the general procedures by which juror misconduct is handled by the courts upon discovery both before and after verdict, it is worth noting how the courts have reacted to several instances of

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\textsuperscript{154} United States v. Moses, 15 F.3d 774, 778 (8th Cir. 1994); \textit{see also} United States v. Caldwell, 776 F.2d 989, 998 (11th Cir. 1985) ("The more speculative or unsubstantiated the allegation of misconduct, the less the burden to investigate.").


\textsuperscript{156} \textit{See}, e.g., United States v. Fumo, 639 F. Supp. 2d 544, 551 (E.D. Pa. 2009).

\textsuperscript{157} \textit{See} Marshall v. United States, 360 U.S. 310, 312 (1959).

\textsuperscript{158} \textit{See}, e.g., People v. Rios, No. 1200/06, slip op. at 3 (N.Y. Sup. Ct. Bronx County Feb. 23, 2010). The ruling in this case was made on a § 330.30 motion by the defense, although the part of the motion based on juror misconduct was denied. \textit{Id}.

\textsuperscript{159} \textit{See} N.Y. CRIM. PROC. LAW § 330.30 (McKinney 2005).

\textsuperscript{160} \textit{Id}. § 330.30(2).

\textsuperscript{161} \textit{See} People v. Clark, 613 N.E.2d 552, 553 (N.Y. 1993).

\textsuperscript{162} \textit{See} \textit{id}.

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Internet-related juror misconduct and how the misconduct has affected trial outcomes. Upon an accusation of Internet-related juror misconduct, an inquiry is necessary for the court to determine exactly what information was obtained, who obtained it, and if it was communicated to other jurors.\(^\text{164}\) For example, in United States v. Bristol-Martir,\(^\text{165}\) the jury foreman notified the court during deliberations that one juror had looked up federal statutes and definitions on the Internet.\(^\text{166}\) On appeal, the defendant argued that the court had failed to conduct a proper investigation into this instance of misconduct.\(^\text{167}\) The court agreed, noting that the trial court should have questioned the other jurors concerning the extent to which the information obtained by the errant juror had influenced them.\(^\text{168}\) Determining whether the other jurors can remain impartial in light of their exposure to extrinsic evidence is an important part of the inquiry, and the lack of this type of questioning led the court in this case to vacate the defendant's conviction.\(^\text{169}\) However, it is worth noting that the error here was the court's, and the juror misconduct itself was not the cause for the appellant's success.

Courts also look at the substance of the extrinsic information to which the juror was exposed.\(^\text{170}\) In United States v. Fumo,\(^\text{171}\) where a juror had posted information about the trial on Facebook, Twitter, and his personal website, the court evaluated the substance of the information that he shared.\(^\text{172}\) In this case, the court found the juror's comments "innocuous," providing "no indication about the trial of which he was a part, much less his thoughts on that trial."\(^\text{173}\) Thus, the court found that the defendant's argument that the jurors had been biased was merely speculative, and the court therefore refused to continue further investigation into the matter.\(^\text{174}\)

If, after investigation, the court determines that the trial may continue, curative instructions must be given to admonish the jury or instruct them to disregard extraneous information they may be now

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164. See, e.g., United States v. Bristol-Martir, 570 F.3d 29, 42 (1st Cir. 2009).
165. 570 F.3d 29 (1st Cir. 2009).
166. Id. at 36.
167. Id. at 43.
168. Id. ("The district court's failure to question all jury members regarding their ability to remain impartial in light of the errant juror's misconduct was especially important given the challenges in ascertaining what went on in the jury room.").
169. See id. at 43-44.
172. Id.
173. Id.
174. See id. at 556.
aware of. In United States v. Wheaton, the court determined the case could continue since there was no indication that any extrinsic information influenced the jury. A curative instruction was given in Wheaton and the court reminded jurors that their verdict was to be based solely on the evidence presented to them at trial. The trial continued, and the defendant was convicted. Curative instructions have been upheld as an appropriate remedy in the case of juror misconduct and it is within the trial court’s discretion to use curative instructions to avoid having to declare a mistrial.

In light of examining the standards and procedures for dealing with juror misconduct, it is apparent that jury verdicts are almost always final and are rarely overturned on account of juror misconduct alone. This is because there must be a presumption toward finality in our judicial system; otherwise it would become slow and inefficient. Because of the likely finality of the verdict, fixing the juror misconduct problem should not focus on remedies after the fact, but instead focus on assisting the jury in reaching a just and fair verdict the first time. Improvements must be made in the quality of information, guidance, supervision, and instruction provided to our jurors. To prevent juror misconduct, the first step must be to better inform the jurors about their role in the judicial system and the rules by which they must abide. This means that a solution must focus on educating jurors before trial, as remedial measures after the fact are designed to preserve the finality of the verdict. Jurors must be given comprehensive pre-trial instructions that will inform them of the ways in which they may commit misconduct that may affect a trial. While all jurisdictions have such pre-trial instructions, many of them must improve their language and detail to reflect the challenges presented by twenty-first-century technology.
IV. Creating a Standard: Improving Preliminary Jury Instructions in General and for the Future

Although juror misconduct in general is not a new problem, the Internet has made old methods and procedures for dealing with it obsolete. A number of jurisdictions have begun to address it; and so far, the main remedies have been mostly through the use of slightly updated jury instructions or admonitions that, by themselves, will not be enough to deter this new category of misconduct.\(^{185}\) However, jurisdictions should undertake efforts to revise their instructions and change them to reflect the realities of the twenty-first century.

Jury instructions are a fairly modern invention.\(^{186}\) Today, most jurisdictions employ committees of lawyers and judges that write pattern jury instructions to be used throughout their jurisdictions.\(^ {187}\) However, this is not the best way to ensure that jury instructions are accessible to the lay juror. Lay persons should be contributing to these committees as well to ensure that instructions are clear and understandable to the average juror, and new instructions should be tested on potential jurors before they are put into general use.\(^ {188}\)

In the past, jury instructions prior to trial were fairly straightforward.\(^ {189}\) The judge told the jurors not to read newspaper articles on the case, or listen to television or radio news reports that may expose them to extrinsic information.\(^ {190}\) This instruction was easy to follow, as most trials received little or no media coverage, and a juror would have to actively try to find information about a case to violate the instruction.\(^ {191}\) However, the Internet has made avoiding news of the trial much more difficult.\(^ {192}\) As a result, pre-trial jury instructions need to be modernized to reflect the challenges presented by today’s technology. Even the best instructions, however, will not prevent a determined juror from disregarding a judge’s admonitions and committing misconduct.

\(^{185}\) See Ross, supra note 16.

\(^{186}\) See Peter Tiersma, The Rocky Road to Legal Reform: Improving the Language of Jury Instructions, 66 BROOK. L. REV. 1081, 1083 (2001). Hundreds of years ago, in the courts of England, it was once prohibited for judges to give instructions to jurors, and they were only allowed to answer jurors’ questions. Id. at 1082. Fortunately, this changed and judges began to instruct juries on the law. Id. at 1083.

\(^{187}\) Id. at 1099.

\(^{188}\) See JONAKAIT, supra note 181, at 210.

\(^{189}\) See Brickman et al., supra note 15, at 291.

\(^{190}\) Id.

\(^{191}\) See id.

\(^{192}\) See id. at 291-92 ("In cases that generate moderate to high levels of publicity, it is almost impossible for jurors not to see news headlines pop up every time they turn on their computers and connect to their web browsers.").
like discussing the case in inappropriate venues.  

Instructions alone will never be able to quench the thirst of curiosity or general disregard for the rules that some jurors might have.  

Regardless, revised instructions are an important first step, and several jurisdictions have begun to update their preliminary instructions for the twenty-first century.  

Proposed changes in pattern jury instructions in any jurisdiction need to be evaluated for effectiveness. The overall goal is to provide jurors with the necessary knowledge as early as possible.  

The education of a juror must begin as soon as they are contacted for jury service, and continue once they arrive at the courthouse.  

Even more information must be provided if they are empanelled for voir dire.  

The more instruction and education that is given, the better equipped jurors will be.  

Once jurors are selected to serve on a trial, they are given instructions by the judge as to the rules by which they must abide.  

Proposed instructions must meet several important criteria to be effective. First and foremost, pre-trial instructions must reflect the fact that the court will exercise some control over jurors' communications during trial, specifically communication over the Internet.  

Efforts to ensure this can range from admonitions, to, in rare cases, sequestration, in order to serve the ultimate goal of insulating juries from information that may affect their impartiality.  

Pre-trial instructions must also specifically address proper communications between jurors and parties in a case.  

Jurors need to be aware that parties are allowed to communicate with jurors only in the courtroom, and all communications must be official and on the record.  

Thus, jurors will be aware that using the Internet to communicate with
others about the trial is inappropriate.\textsuperscript{205} Additionally, any group tasked with writing new instructions should go to great lengths to ensure that these instructions are in plain language.\textsuperscript{206} If jurors are faced with a set of admonitions filled with legalese, it follows that they will not be able to understand the rules well enough to fully abide by them.\textsuperscript{207}

Furthermore, instructions should be extremely specific about the types of issues presented by the Internet. Judges should initially convey an understanding that seeking out information on the Internet is a tempting but inappropriate prospect, and should explain to the jurors why it is so important to resist that temptation.\textsuperscript{208} Acknowledging the temptation the Internet presents will go a long way in getting jurors to comport with the rules.\textsuperscript{209} Preliminary jury instructions should also be comprehensive and should specifically warn jurors about the types of Internet services that can be especially problematic.\textsuperscript{210} Several jurisdictions have begun specifically naming the types of Internet services that may cause a problem, like Google, Twitter, and Facebook, within the instructions themselves.\textsuperscript{211} Being clear and specific will help jurors follow the rules closely.\textsuperscript{212}

Additionally, jury instructions are often long.\textsuperscript{213} Jurors are forced to listen to long lectures by the judge, and most realistic judges are aware that at some point, the jurors are likely to stop listening.\textsuperscript{214} Thus, providing jurors with an individual written copy of the instructions given throughout trial would help them understand and remember the many important instructions they have been given throughout the trial.\textsuperscript{215}

Therefore, preliminary jury instructions must meet several important criteria. In sum, they must be specific, yet not so long as to induce boredom or inattentiveness. Also, they should specifically address the Internet, how tempting it is to use, and why the improper use of the Internet during trial is a problem. Finally, they should encourage jurors to supervise themselves and report any improper conduct.

\textsuperscript{205} See id.
\textsuperscript{206} Id. at 21.
\textsuperscript{207} Id.
\textsuperscript{208} See Brickman et al., supra note 15, at 297.
\textsuperscript{209} See id.
\textsuperscript{210} See Ross, supra note 16.
\textsuperscript{211} See Brickman et al., supra note 15, at 297.
\textsuperscript{212} See id.; see also COMM. ON CRIMINAL JURY INSTRUCTION, OFFICE OF COURT ADMIN., CRIMINAL JURY INSTRUCTIONS 2D: JURY ADMONITIONS IN PRELIMINARY INSTRUCTIONS (2009), http://www.nycourts.gov/cji/1-General/CJI2d.Jury_Admonitions.pdf.
\textsuperscript{213} See id.
\textsuperscript{214} See Ross, supra note 16.
\textsuperscript{215} See Nancy S. Marder, Bringing Jury Instructions Into the Twenty-First Century, 81 NOTRE DAME L. REV. 449, 496 (2006).
V. EVALUATING CURRENT JURY INSTRUCTIONS MEANT TO ADDRESS
INTERNET-RELATED JUROR MISCONDUCT

Recently, a number of jurisdictions have instituted new rules that mandate new jury instructions regarding the unique pitfalls posed by the Internet and portable electronic communication devices; however, changes have yet to be made in every jurisdiction. Some jurisdictions have taken steps to revise pattern jury instructions to better reflect the challenges presented by modern technology. The pattern jury instructions that follow meet several of the goals set forth in the above criteria, but still come up short in some areas.

One of the most important criteria is specificity. New York's pattern preliminary instructions satisfy this requirement quite well. There are numerous instances of specific Internet-related topics throughout, formally recognizing the changes brought by the Internet and wireless communication. After the usual admonitions about not discussing the case with others and doing outside research, New York's pattern instructions call for the judge to state the following:

In this age of instant electronic communication and research, I want to emphasize that in addition to not conversing face to face with anyone about the case, you must not communicate with anyone about the case by any other means, including by telephone, text messages, email, internet chat or chat rooms, blogs, or social websites, such as Facebook, MySpace or Twitter.

The pattern instructions go on to mention the problems created by posting information to blogs, chat rooms, and running Google searches:

You must not provide any information about the case to anyone by any means whatsoever, and that includes the posting of information about the case, or what you are doing in the case, on any device, or internet site, including blogs, chat rooms, social websites or any other means.

216. See Ross, supra note 16. For example, New Jersey's model instructions mention the Internet only tangentially, referencing it only as a possible avenue for outside research, but not going into specifics. See COMM. ON MODEL CIVIL JURY CHARGES, N.J. MODEL CIVIL JURY CHARGES § 1.11C (2007), http://www.judiciary.state.nj.us/civil/charges/1.11C.pdf.
217. See Ross, supra note 16.
218. See id.
219. See, e.g., COMM. ON CRIMINAL JURY INSTRUCTION, supra note 211. Throughout New York's preliminary instructions, Internet services such as Facebook, MySpace, and Twitter are mentioned specifically by name, providing a clear example of the kinds of Internet services that jurors are likely to be familiar with and use themselves. Id.
220. Id.
You must also not Google or otherwise search for any information about the case, or the law which applies to the case, or the people involved in the case, including the defendant, the witnesses, the lawyers, or the judge.221

Mentioning these services by name goes a long way to meet the goal of comprehensiveness and specificity that is necessary to convey to jurors what they can and cannot do.222 In using the names of specific Internet services that jurors are likely to be familiar with, these instructions more effectively inform jurors that using these services to communicate about their trials is off limits as well. Communicating with jurors in terms that they understand will increase their ability to relate to and follow these important rules.223

Revised jury instructions should not only tell jurors what rules they should abide by, but also explain why their Internet-related misconduct is harmful.224 The language in these instructions furthers this goal as well, but only to a certain point. The New York pattern instruction continues, “Now, ladies and gentlemen, I want you to understand why these rules are so important.”225 However, the reasoning given here only covers, in general, why these admonitions are important and the Internet-related issues are not mentioned any further. The instructions state, “Our law does not permit jurors to converse with anyone else about the case, or to permit anyone to talk to them about the case, because only jurors are authorized to render a verdict.”226

Giving jurors reasons to avoid the temptations of the Internet specifically are a very important element of their effectiveness.227 New York should consider going into more detail concerning the specific reasons why Internet communications can be a problem, such as explaining to jurors that outside research and communication undermine the fairness of the trial and taint their decision making with evidence not admitted through the proper channels. Jurisdictions should not simply generalize the justification of the rules for both traditional and electronic communication together.

221. Id.
222. See Ross, supra note 16.
223. See JONAKAIT, supra note 181, at 210.
224. See Brickman et al., supra note 15, at 297.
225. COMM. ON CRIMINAL JURY INSTRUCTION, supra note 211. The pattern instructions give only general reasons as to why all the rules against communication should be followed, and do not give any specific reasons why following the Internet-related rules are particularly important. Id.
226. Id.
227. See Brickman et al., supra note 15, at 297.
New York's pattern instructions also provide for the repetition of many key admonitions each time the jury breaks for the day during deliberations and reiterates detailed instructions at this point. The instructions state the following: "You must not provide any information about the case to anyone by any means whatsoever, and that includes the posting of information about the case, or what you are doing in the case, on any device, or internet site, including blogs, chat rooms, social websites or any other means." Again, the specific examples given in this instruction are important as they help the jury understand their restrictions better. Additionally, the fact that these are repeated during breaks in the deliberation process is an excellent way to constantly remind jurors of their duties, reducing the likelihood that one or more will give in to temptation.

This set of pattern jury instructions is not without shortcomings, however. One important standard that these rules seem to ignore is that instructions should convey to jurors that they should report any suspected incident of juror misconduct to an appropriate authority, such as the judge. Currently, both the pattern preliminary instructions and the admonitions for jury breaks only state that the juror should "report directly to [the judge] any incident within [his] knowledge involving an attempt by any person improperly to influence [him] or any member of the jury." Encouraging jurors to police themselves can serve as an important deterrent, and thus this instruction should be revised to more clearly ask the jury to report to the judge possible misconduct by the jurors themselves as well.

The pattern preliminary instructions also state somewhat vaguely: "[O]ur law accordingly sets forth serious consequences if the rules are not followed." What are these serious consequences? Jury instructions need to be specific and leaving out the specifics of these "serious consequences" makes the admonitions less persuasive in general. The
instructions should briefly explain the types of penalties jurors could face if they choose not to abide by the rules.\textsuperscript{238} This way, jurors will be further deterred from committing acts of misconduct if they are aware of the possible penalties facing them for non-compliance.\textsuperscript{239}

For example, there is a law in New York that specifically allows the court to hold jurors in contempt for juror misconduct. New York Judiciary Law § 753 grants courts the power to punish errant jurors.\textsuperscript{240} The statute states that the courts may hold in contempt:

>A person duly notified to attend as a juror, at a term of the court, for improperly conversing with a party to an action or special proceeding, to be tried at that term, or with any other person, in relation to the merits of that action or special proceeding; or for receiving a communication from any person, in relation to the merits of such an action or special proceeding, without immediately disclosing the same to the court; or a person who attends and acts or attempts to act as a juror in the place and stead of a person who has been duly notified to attend.\textsuperscript{241}

Obviously, this statute does not cover the modern problems that the Internet can create, but it is still in effect, and thus, the court should make jurors aware of its contempt power in the course of preliminary instructions in order to deter possible misconduct.

In contrast to the pattern instructions just discussed, other jurisdictions have left out many key elements that would make them more effective, such as specificity and detail about improper Internet usage.\textsuperscript{242} New York’s pattern instructions named specific Internet services and enumerated a number of ways that they could be used improperly within the context of a trial.\textsuperscript{243} Oklahoma’s instructions, however, mention the Internet exactly once. They state:

>Do not read newspaper reports or obtain information from the internet or any other source about this trial or the issues, parties or witnesses involved in this case, and do not watch or listen to television or radio reports about it. Do not attempt to visit the scene or investigate this

\textsuperscript{238} See Munsell v. Court of Oyer & Terminer, 4 N.E. 259, 264 (1886). In this New York Court of Appeals case, the petitioner was held in contempt, jailed, and fined for visiting the scene of the crime for a trial on which he was serving as a juror. \textit{Id.} Interestingly, the Court of Appeals upheld the reversal of his contempt charge, agreeing with the lower court that there was not contempt because there was no court order prohibiting visiting the crime scene or provision within the state’s criminal contempt statute that would prohibit such an action. \textit{Id.}

\textsuperscript{239} See Brickman et al., \textit{supra} note 15, at 297.

\textsuperscript{240} N.Y. JUD. LAW § 753(A)(6) (McKinney 2003).

\textsuperscript{241} \textit{Id.}

\textsuperscript{242} See Ross, \textit{supra} note 16.

\textsuperscript{243} COMM. ON CRIMINAL JURY INSTRUCTION, \textit{supra} note 211.
case on your own. This case must be decided solely upon the evidence presented to you in this court, free from any outside influence.244

These instructions miss several key factors that could make them more effective at combating Internet-related juror misconduct. This excerpt of the instructions shows that they are extremely general: while the instructions mention the fact that one should not obtain information about the case from the Internet, it does not cover the wide range of ways in which jurors can directly communicate with other parties in the trial or divulge information they know about the trial to others.245 It seems that Oklahoma’s attempt to include the Internet in its instructions does not go far enough towards specificity and comprehensiveness, especially when viewed in light of the instructions of other jurisdictions that have included more detail.246

Some jurisdictions are even further behind the curve with up-to-date jury instructions.247 In reading Florida’s instructions, the language appears to be similar to other jurisdictions in advising jurors to avoid any extrinsic information about the case, but when you might expect to hear something about the Internet specifically, it never happens. These instructions state:

Accordingly, you must not visit any of the places described in the evidence, and you must not read nor 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 defendant about any subject until your deliberations are finished.248

These pattern instructions fail to mention the fact that the Internet even exists, perhaps because that this instruction was adopted and has been unrevised since 1981.249 Jurisdictions that have not revised their preliminary instructions recently, like Florida, must do so in order to prevent juror misconduct. If the jurors hearing these instructions are unaware that sharing information about their trial is improper, they may inadvertently do so.

Some other jurisdictions, however, have gone a step further and recently adopted revisions including specific information about the use

245. Id.
246. See supra text accompanying notes 222-23; see also infra text accompanying note 252.
248. Id.
249. Id.
of portable electronic devices that almost everyone seems to carry these days. For example, Michigan’s new instructions state:

The court shall instruct the jurors that until their jury service is concluded, they shall not use a computer, cellular phone, or other electronic device with communication capabilities while in attendance at trial or during deliberation. These devices may be used during breaks or recesses but may not be used to obtain or disclose information...

Specifics about the use of portable electronic devices while jurors are in court go a step further to help explain when the use of such devices is proper. Comprehensive and specific instructions are key, and this jurisdiction’s ability to recognize that jurors frequently carry devices on their person, capable of doing the same tasks as their computer at home, goes a step further to educate and inform jurors about what types of actions are improper. Additionally, keeping these devices out of the hands of jurors during trial will remove the very opportunity that jurors may have to disclose information about the trial or deliberations while it is happening, as some jurors have done on Facebook, Twitter, and personal blogs.

Some have also criticized the revision of jury instructions. In particular, critics have pointed out that mentioning the use of specific devices and Internet services may put the idea of using them into jurors’ heads in the first place. Psychologists who study the mind of the juror have called this the “reactance effect,” in which the juror, denied the freedom to obtain all of the information he desires, increases his effort to obtain such forbidden extrinsic information. However, the fact is that many jurors are using these services daily already and are not likely to need to be influenced into doing so.

Additionally, some critics say that rules naming specific services may become obsolete rather quickly, as technology tends to change rapidly. However, the committees that draft pattern jury instructions could make an effort to convene more frequently to keep instructions up-to-date.

251. See id.
252. See Ross, supra note 16.
254. See Schwartz, supra note 65.
255. See Ross, supra note 16.
257. See Facebook Press Room Statistics, supra note 37. Facebook, for example has over 400 million users, fifty percent of whom use the site at least once per day. Id.
258. See Ross, supra note 16.
to date. There has also been some resistance to providing jurors with written versions of the instructions, as it may provoke additional questions and may lengthen the trial process.\(^{259}\) However, this criticism is mostly concerned with instructions as to matters of law.\(^{260}\) Despite these criticisms, prudent action must be taken to reform the jury system to prevent Internet-related juror misconduct from undermining trials. Ignoring the issue and doing nothing, as some critics would prefer,\(^ {261}\) is no longer an option.

VI. A NEW APPROACH: THE BEST SOLUTION FOR COMBATING JUROR MISCONDUCT IN THE INTERNET AGE

The steps jurisdictions have taken to combat juror misconduct have generally focused on revising preliminary pattern jury instructions.\(^ {262}\) Some jurisdictions have been more successful at this than others, and some still do not mention the Internet specifically at all.\(^ {263}\) Revising instructions, while an integral part of finding a solution to the Internet juror misconduct problem, is not the only action that jurisdictions should take in addressing this growing trend, and it remains to be seen whether revised instructions alone will be viable in the long term.

Revised and comprehensive instructions are a major piece to the puzzle. While providing a laundry list of things that jurors should and should not do on the Internet is a step in the right direction, jurisdictions must go a step further in their instructions and explain to jurors why all of the rules and regulations are important.\(^ {264}\) Jurors may feel their research or communication is harmless and will not bias them, but this is untrue.\(^ {265}\) If instructions can adequately inform and relate to jurors as well, they will be more likely to follow rules that they do not feel are simply arbitrary.\(^ {266}\)

\(^{259}\) See JONAKAIT, supra note 181, at 212.

\(^{260}\) Id. In context, this criticism is clearly focused on jurors reading and re-reading the instructions on the law that the judge provides at the end of trial once they get into the jury room. Providing written versions of the preliminary admonitions would most likely not create the same type of problem, as they would only remind jurors of the rules they should be following throughout the trial.

\(^{261}\) See supra text accompanying notes 257-61.

\(^{262}\) See supra text accompanying notes 222-23, 252.

\(^{263}\) See supra text accompanying notes 250-51.

\(^{264}\) Brickman et al., supra note 15, at 297 ("Judges can acknowledge the temptations of Internet research, but then can explain to jurors why their cooperation in refraining from extrinsic research is so vitally important to the fairness of the judicial system.").

\(^{265}\) See id.

\(^{266}\) Id.
The process of educating jurors and instructing them on the rules of conduct they must follow could benefit from borrowing a page from the methods of trial attorneys themselves. Research has shown that narrative plays an important role throughout the trial process.\textsuperscript{267} When jurors hear evidence at trial, they are constantly trying to fit it into a narrative, as it helps them absorb, understand, and relate to the information presented to them.\textsuperscript{268} Story structure also helps jurors avoid the problem of information overload.\textsuperscript{269} As a result, narrative lawyering attempts to take advantage of the role stories play in the cognitive processes of jurors trying to make sense out of what they are hearing at trial.\textsuperscript{270} Those tasked with educating jurors about proper conduct should borrow from this method. If stories and examples were given to help explain to jurors the reasons why certain types of behavior are improper, they would be more likely to understand it.\textsuperscript{271} Just like showing a film about the consequences of drunk driving to a driver's education class may stop young people from making irresponsible decisions while driving, information about the consequences of juror misconduct given to jurors in the form of real life stories and examples may help them understand and follow the rules more closely.

In their pre-trial instructions, judges should also require that jurors be their own supervisors. Jurors should be actively encouraged to report another juror they suspect of seeking or sharing extrinsic information.\textsuperscript{272} This rule would discourage jurors from seeking extrinsic information for fear of being caught, and additionally, jurors who do seek extrinsic information will be less likely to share it with other jurors because they may be reported.\textsuperscript{273} Not only would such a rule prevent juror misconduct in the first place, it would also limit the damage of one juror's transgressions if they are less likely to share any information they gained with others on the jury.\textsuperscript{274}

Going to great lengths to get jurors to understand and adhere to the rules, however, will not be enough to ensure universal compliance.\textsuperscript{275} Several additional steps must be taken by jurisdictions to ensure that the

\textsuperscript{267} See John H. Blume et al., Every Juror Wants a Story: Narrative Relevance, Third Party Guilt and the Right to Present a Defense, 44 AM. CRIM. L. REV. 1069, 1088 (2007).
\textsuperscript{268} Id.
\textsuperscript{269} Id.
\textsuperscript{270} Paul Holland, Sharing Stories: Narrative Lawyering in Bench Trials, 16 CLINICAL L. REV. 195, 199 (2009).
\textsuperscript{271} See id.
\textsuperscript{272} Brickman et al., supra note 15, at 298.
\textsuperscript{273} Id.
\textsuperscript{274} Id.
\textsuperscript{275} See Ross, supra note 16.
Internet-related juror misconduct problem is adequately contained. The first of these steps is increased supervision. While the American jury system has traditionally been a closed one, it has been argued by some that it is too closed.\footnote{{276} See Clifford Holt Ruprecht, Comment, Are Verdicts, Too, Like Sausages?: Lifting the Cloak of Jury Secrecy, 146 U. PA. L. REV. 217, 242 (1997).} If jury deliberations could be observed by a neutral party that would serve only to ensure that the proper rules and procedures are being followed, improper activities are not taking place, and extrinsic information is not being introduced into the deliberative process, more juror misconduct could be detected and deterred.\footnote{{277} See id. at 243 ("Once the jury has retired, however, the jury’s conduct is completely out of the court’s control. If a drunken and inattentive jury convicts a man of a crime, that decision is unreviewable—at least, the jurors may not be summoned to answer for their conduct and verdict.").} However, the cost of this sort of transparency is probably too great. Jurors would be more likely to censor themselves, avoid taking unpopular positions, and would be able to be specifically identified as taking such a position.\footnote{{278} See Abraham Abramovsky & Jonathan I. Edelstein, Cameras in the Jury Room: An Unnecessary and Dangerous Precedent, 28 ARIZ. ST. L.J. 865, 883 (1996).} Direct supervision, then, must stop at the jury room door, and we must trust the jurors to police themselves and report improper conduct during deliberations. However, with proper education and instruction before deliberations, self-supervision is a viable option that would maintain the sanctity of the jury room from outside scrutiny.

Supervision in the courthouse is one thing, but what about when jurors go home for the day? Once home, jurors are only prevented from using the Internet improperly by their promise to follow the rules.\footnote{{279} See Ross, supra note 16.} This is where the idea of sequestration comes into play. Sequestration involves keeping jurors isolated from the outside world during trial or deliberations only, and often involves overnight stays in motels at the court’s expense.\footnote{{280} See James P. Levine, The Impact of Sequestration on Juries, 79 JUDICATURE 266, 266 (1996).} In theory, this practice could seriously curtail Internet-related juror misconduct if jurors stayed in a motel without access to a computer or Internet-capable mobile device.\footnote{{281} See Mark Hansen, Sequestration Little Used, Little Liked, A.B.A.J., Oct. 1995, at 16, 17.} For obvious reasons, however, this practice has fallen out of favor in many jurisdictions\footnote{{282} See id.} due to its cost\footnote{{283} Seeid.} and unpopularity.\footnote{{284} Due to the vast

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number of ways that people can communicate these days, it would also be difficult to cut off all avenues of communication with sequestration alone, as a juror could simply call a friend to Google something for them.285

While sequestration may no longer be a popular or practical idea, it is still worth mentioning to newly empanelled jurors in preliminary instructions for its deterrent effect alone. When jurors receive preliminary instructions, sequestration should be explained to them.286 The judge should then explain that instead of sequestration, however, he will be relying on the jurors themselves to refrain from committing juror misconduct.287 Giving jurors this alternative will hopefully inspire them to take responsibility for their actions and take their duties seriously, while at the same time reminding them of the less pleasant alternative.288

Aside from the possibility of sequestration, jurors should also be made aware of the possible personal consequences that may result if they fail to follow the rules regarding proper Internet use during jury duty. This means warning jurors about the state’s ability to hold them in contempt or prosecute them criminally, based on each local municipality’s laws.289 Warning jurors about this possibility and following through on punishing those who disregard the rules that jurors must abide by will help deter others from taking similar actions.290 Many

Syndrome,” where sequestered jurors began to identify with the court officers guarding them, and the fact that sequestration serves as a strong deterrent to jury service itself. Id. See also POSEY & WRIGHTSMAN, supra note 252, at 145-46. The author identifies a phenomenon known as “sequestered-juror syndrome,” which can produce a number of ill-effects, including depression, obsessive-compulsive disorder, feelings of hopelessness, cognitive impairment, reduced self-esteem, and loneliness, among other things. Id. 283. See Hansen, supra note 282, at 17 (noting that the sequestration of jurors during the O.J. Simpson trial cost well over one million); see also POSEY & WRIGHTSMAN, supra note 256, at 145 (noting that in New York, criminal juries were required to be sequestered until the law was changed in 1993).


285. See Ralph Artigliere et al., Reining in Juror Misconduct: Practical Suggestions for Judges and Lawyers, FLA. B.J., Jan. 2010, at 9, 14 (noting that because traditional sequestration is often no longer effective or desirable, jurors should be encouraged to “sequester themselves” and take personal responsibility).

286. Id.

287. Id.

288. Id.


290. See Donald A. Blackwell & Stephanie Martinez, The Burden of Truth: Have Florida Courts Gone Far Enough in Addressing the Problem of Juror Misconduct?, FLA. B.J., May 2007, at 8, 14 (“Specifically, courts must more aggressively utilize their contempt powers and existing criminal statutes governing perjury as a means of punishing those who disregard their oath as jurors.”).
jurisdictions, like New York, already have these laws and jurors should be made aware of them.

In 2009, a juror in New Hampshire committed misconduct by revealing to other jurors, based on his own research, that the defendant was a registered sex offender; a fact that had purposely been excluded from trial. The trial judge did not take this lightly, and the errant juror was charged with contempt. If convicted, he could be required to reimburse the court for the cost of the three-day trial. Since this was a particularly extreme case, a retrial was actually granted due to the extremely prejudicial information that was revealed. Since this retrial will force a young sexual assault victim to face her attacker again, the court's tough stance against this juror who took matters into his own hands and provided extrinsic information to other jurors should serve as an example for other jurisdictions that would like to deter juror misconduct as well.

Many of these new restrictions and rules for jurors may seem draconian, especially making jurors subject to contempt charges. Critics argue that holding jurors in contempt for misconduct and violating their oath will have a chilling effect on juror participation and is an overreaction to a perceived problem that is not as great as it may seem from the attention it is receiving in the media. Although contempt charges for jurors are a harsh tactic, they should be at least mentioned for their deterrent effect, and prosecutorial discretion should be used to target only those whose actions are especially egregious. It could be argued that the jury system would not sustain the prosecution of every juror whose cell phone rings while in the courtroom.

VII. CONCLUSION

The problem of Internet-related juror misconduct is not one that is going away on its own. This Note has shown the numerous ways in which modern-day Henry Fondas can access and share information on the Internet that undermines the rules of evidence and fairness to the

291. N.Y. JUD. LAW § 753(A)(6).
293. Id.
294. Id.
295. As mentioned previously, however, most instances of juror misconduct are not prejudicial enough to warrant post-verdict relief. See supra notes 102-08 and accompanying text.
297. See id.
298. See supra text accompanying notes 292-94.
accused. The procedures of our legal system for dealing with incidents of juror misconduct are limited; and rightly so, as finality is tremendously important for preventing our legal system from being brought to its knees by an infinite number of frivolous claims of juror misconduct.299 Because of this, a proactive approach to the problem is necessary.

This solution is comprised of several key components. First, jurors must be fully informed with comprehensive and specific information regarding their duties and responsibilities before and during trial and deliberations.300 Thus, jurisdictions providing comprehensive instructions should take the further step of explaining to jurors, through narrative and storytelling, why they must abide by the rules.301 So far, some jurisdictions have taken steps to make improvements to their pattern jury instructions, while others have not.302

The solution does not begin and end with jury instructions, however. Additional steps must be taken to ensure jurors comport themselves with the rules. Some form of supervision during the trial should be considered to make sure that extrinsic information has not found its way into the courtroom.303 Additionally, jurors should be encouraged to police themselves before and especially during deliberation and to report all incidents of possible misconduct to the appropriate authority.304 Also, while sequestration should only be used when absolutely necessary, jury instructions should remind jurors that, as they are not being sequestered, they are being granted their freedom in exchange for a certain level of responsibility that they must uphold.305

The final component of the proactive approach to juror misconduct must be deterrence. Jurors should be warned that their misdeeds will not necessarily go unpunished.306 The laws of some jurisdictions, like New York307 and New Hampshire, where a juror was recently punished,308 allow for jurors to be held in contempt for cases of misconduct. While this Note does not advocate the overzealous persecution of errant jurors, punishing those who commit the most egregious cases could serve as a

299. See supra text accompanying notes 146-48.
300. See supra text accompanying notes 198-99.
301. See supra text accompanying notes 269-72.
302. See supra text accompanying notes 222-23, 250-51.
303. See supra text accompanying notes 274-75.
304. See supra text accompanying notes 274-75.
305. See supra text accompanying notes 289-90.
306. See supra text accompanying notes 291-93.
308. See Timmins, supra note 288.
useful example to others that being a juror is a serious responsibility that must be respected.309

Thus, if jurisdictions would seriously like to curb the rising tide of Internet-related juror misconduct, steps such as these would be a great place to start. However, as technology will surely continue to evolve in ways not yet imaginable, the courts and legislatures must make a concerted effort to avoid another period of complacency and commit to the constant evaluation and revision of jury instructions and the procedures that accompany them to maintain the fairness of the court system as a whole.

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309. See supra text accompanying notes 291-93.

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