

ENSURING AN IMPARTIAL JURY IN THE AGE OF SOCIAL MEDIA

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ABSTRACT

The explosive growth of social networking has placed enormous pressure on one of the most fundamental of American institutions—the impartial jury. Through social networking services like Facebook and Twitter, jurors have committed significant and often high-profile acts of misconduct. Just recently, the Arkansas Supreme Court reversed a death sentence because a juror Tweeted about the case during deliberations. In light of the significant risks to a fair trial that arise when jurors communicate through social media during trial, judges must be vigilant in monitoring for potential outside influences and in deterring misconduct.

In this Article, we present informal survey data from actual jurors on their use of social networking during trial. We discuss the rise of web-based social networks like Facebook and Twitter, and the concerns that arise when jurors communicate about a case through social media before returning a verdict. After surveying how courts have responded to jurors' social media use, we describe the results of the informal survey. The results support a growing consensus in the legal profession that courts should frequently, as a matter of course, instruct jurors not to use social media to communicate about trial. Although others have stressed the importance of jury instructions in this area, we hope that the informal survey data will further the dialogue by providing an important perspective—that of actual jurors.

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INTRODUCTION

The explosive growth of social networking has placed enormous pressure on one of the most fundamental of American institutions—the impartial jury. In recent years, social networking services like Facebook and Twitter have become frequent vehicles through which jurors commit misconduct.¹ Just months ago, the Arkansas Supreme Court reversed a death sentence because a juror Tweeted during deliberations.² In light of the significant risks to a fair trial that arise when jurors communicate through social media,³ judges must be vigilant in monitoring for potential outside influences and in deterring misconduct.⁴

¹ See, e.g., *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 739 F. Supp. 2d 576, 609 n.215 (S.D.N.Y. 2010) (stating that juror misconduct on the Internet has “become a recurring problem”). We use the phrases “social networking” and “social media” interchangeably throughout our discussion.

² *Dimas-Martinez v. State*, No. CR 11-5, 2011 WL 6091330, at *1 (Ark. Dec. 8, 2011); see also Jeannie Nuss, *Death Row Inmate Gets New Trial After Juror Tweet*, USA TODAY, Dec. 8, 2011, <http://www.usatoday.com/tech/news/story/2011-12-08/juror-tweet-death-row/51741370/1> (“The Arkansas Supreme Court . . . tossed out a death row inmate’s murder conviction and said he deserves a new trial because one juror slept and another tweeted during court proceedings.”).

³ See U.S. Const. amend. VI (“[T]he accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State”); *United States v. Fumo*, 655 F.3d 288, 303–08 (3d Cir. 2011) (summarizing defendant’s argument that “comments on Facebook and Twitter brought widespread public attention to the

In this Article, we present informal survey data from actual jurors on their use of social networking during trial. Section I discusses the rise of web-based social networks like Facebook and Twitter. Section II addresses the concerns that arise when jurors communicate about a case through social media before returning a verdict. After surveying how courts have responded to jurors' social media use, Section III describes the results of the informal survey. The results—which we stress are not scientific—support a growing consensus in the legal profession that courts should frequently, as a matter of course, instruct jurors not to use social media to communicate about trial. Although others have stressed the importance of jury instructions in this area, we hope that the informal survey data will further the dialogue by providing an important perspective—that of actual jurors.

I. THE RISE OF SOCIAL MEDIA

With more than two billion users, 240 million of whom are in the United States,⁵ the Internet has enabled global communication, connectedness and access to information on a scale never before seen in human history.⁶ The Internet provides access to vast amounts of information in mere seconds, and most recently, has allowed users to broadcast their thoughts to millions while receiving near instantaneous

jury's deliberations, creating a 'cloud of intense and widespread media coverage . . . and [the] public expectation that a verdict [wa]s imminent[.]' thereby violating his Sixth Amendment right to a fair and impartial trial").

⁴ See, e.g., *United States v. Juror No. One*, No. 10-703, 2011 WL 6412039, at *6 (E.D. Pa. Dec. 21, 2011) ("Courts must continually adapt to the potential effects of emerging technologies on the integrity of the trial and must be vigilant in anticipating and deterring jurors' continued use of these mediums during their service to the judicial system.").

⁵ WORLD BANK, WORLD DEVELOPMENT INDICATORS, INTERNET USERS (2009), available at <http://data.worldbank.org/indicator/IT.NET.USER.P2>.

⁶ See John N. Greer, *Square Legal Pegs in Round Cyber Holes: The NSA, Lawfulness, and the Protection of Privacy Rights and Civil Liberties in Cyber Space*, 4 J. NAT'L SEC. L. & POL'Y 139, 140 & nn.2-3 (2010) ("The World Wide Web . . . has made us more interconnected than any time in human history.") (internal quotation marks omitted). The Internet has even changed modern language. See 'Google,' 'Unibrow' Added to Dictionary, USA TODAY, July 6, 2006, available at http://www.usatoday.com/news/offbeat/2006-07-06-new-words_x.htm ("Merriam-Webster's lexicographers have been largely preoccupied with technology and computers . . . [and] have given formal definition to . . . the Internet's most recognizable names."); Barry Schwartz, *Google Now a Verb in the Oxford English Dictionary*, SEARCH ENGINE WATCH, June 29, 2006, <http://searchenginewatch.com/article/2058373/Google-Now-A-Verb-In-The-Oxford-English-Dictionary>.

responses through web-based “social networking” or “social media” services.⁷

These services, which include well known social networks like Facebook and Twitter, refer broadly to web-based platforms that allow individuals “to create a ‘profile’ of themselves and connect or link to others based upon overlapping interests, employment, schools or contacts.”⁸ The defining feature of social networking, for our purposes, is that it enables users to communicate with almost anyone, at any time, from anywhere.

This extraordinary ability to broadcast oneself and connect with others has transformed the utility of the Internet for many Americans.⁹ Nielson recently reported that social networking websites have begun to “dominate Americans’ time online,” accounting for “nearly a quarter of total time spent on the Internet.”¹⁰ The exponential growth of social networking—in terms of both number of users and services—has prompted some to declare the makings of a “social media revolution.”¹¹

⁷ See, e.g., Jason H. Casell, *To Tweet or Not to Tweet: Juror Use of Electronic Communications and Social Networking Tools*, 15 No. 5 J. INTERNET L. 1, 1 (2011) (“[A]s we enter the next decade of the 21st century, the ubiquity of instant electronic communication and mobile applications for social networking sites such as Facebook, Twitter, MySpace, and LinkedIn allow jurors to research the issues in the cases for which they serve, as well as to immediately interact with others.”).

⁸ Christopher B. Hopkins, *Internet Social Networking Sites for Lawyers*, 28 TRIAL ADVOC. Q. 12, 12 (2009). Some have offered more technical definitions. See, e.g., Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMP.-MEDIATED COMM. 1 (2007), <http://jcmc.indiana.edu/vol13/issue1/boyd.ellison.html> (defining social networking as a web-based tool that permits a user to “(1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system”).

⁹ See, e.g., Lisa Hoover, *How Social Media Has Changed Society*, PC WORLD, Apr. 7, 2009, http://www.pcworld.com/article/162719/how_social_networking_has_changed_society.html.

¹⁰ STATE OF THE MEDIA: THE SOCIAL MEDIA REPORT, THE NIELSEN CO. 1 (2011) [hereinafter NIELSEN REPORT] (further reporting that nearly 80% of all Internet users access social media websites).

¹¹ Karen North, *Steve Jobs and the Rise of Social Media*, CNN OPINION, Oct. 7, 2011, available at <http://www.cnn.com/2011/10/07/opinion/jobs-social-media/index.html>.

Perhaps the most popular online social network is Facebook, a web-based “social utility that helps people communicate more efficiently with their friends, family and coworkers.”¹² Facebook connects users by allowing them to “friend” each other, comment on other users’ “walls,” and post images and other media for the world to see.¹³ Founded in 2004, Facebook currently has more than 800 million active users.¹⁴ Its growth statistics are staggering:¹⁵

<u>Date</u>	<u>Number of Active Users</u>	<u>Rate of Annual Growth</u>
December 2004	1,000,000	- -
December 2005	6,000,000	600.00%
December 2006	12,000,000	200.00%
December 2007	58,000,000	483.33%
December 2008	145,000,000	250.00%
December 2009	360,000,000	248.28%
December 2010	608,000,000	168.89%
December 2011	845,000,000	138.98%

According to Facebook, each of its active users has an average of 130 “Facebook friends,” and maintains an average of 80 connections to “community pages, groups, and events.”¹⁶ More than half of Facebook users access the service in any given day,¹⁷ and as of December of 2011, more than “425 million monthly active users accessed Facebook on a mobile device” such as an iPhone.¹⁸ Americans spend more time on Facebook than any other website.¹⁹

Despite its popularity, Facebook is far from the only significant social networking service available to the public. Another example is Twitter.²⁰ Launched in 2006, Twitter “is a social networking and micro-blogging service” that, as one court described,

¹² *Factsheet*, FACEBOOK, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=22> (last visited Jan. 25, 2012).

¹³ *Id.*

¹⁴ *Timeline*, FACEBOOK, <http://newsroom.fb.com/content/default.aspx?NewsAreaId=20> (last visited Mar. 5, 2012).

¹⁵ *Id.*

¹⁶ *Statistics*, FACEBOOK, <https://www.facebook.com/press/info.php> (last visited Jan. 12, 2012).

¹⁷ *Id.*

¹⁸ Marguerite Reardon, *Does Facebook Have a Mobile Problem?*, CNET, Feb. 2, 2012, http://news.cnet.com/8301-30686_3-57370105-266/does-facebook-have-a-mobile-problem/.

¹⁹ See NIELSEN REPORT, *supra* note 10, at 1.

²⁰ See Ebony Nicolas, *A Practical Framework for Preventing “Mistrial by Twitter,”* 28 CARDOZO ARTS & ENT. L.J. 385, 386 (2010) (“Twitter is a

invites its users to answer the question: “What are you doing?” Twitter’s users can send and read electronic messages known as “tweets.” A tweet is a short text post (up to 140 characters) delivered through Internet or phone-based text systems to the author’s subscribers. Users can send and receive tweets in several ways, including via the Twitter website.²¹

A user’s “Tweets” are public Internet postings for all to see (unless the user activates certain privacy settings).²² Although Twitter does not publish specific demographic data about its users, it appears that Twitter users, as a general group, “tend to value feeling connected to many people, exchanging information in a timely manner, and learning new things from and about other people.”²³

Twitter, like Facebook, is growing at an astonishing rate. In April of 2010, Twitter representatives reported at “Chirp,” the official Twitter developer conference, that new users were accessing Twitter at a rate of 300,000 per day.²⁴ By March of 2011, Twitter had approximately 200 million users.²⁵ According to recent reports, Twitter users send 350 billion Tweets each day,²⁶ and the Twitter network has a “long-term goal of exceeding 1 billion active users.”²⁷

Beyond Facebook and Twitter, still other social networking services command hundreds of millions of users. A relatively new

relatively new techno-social phenomenon that pushes the boundaries of traditional rules concerning juror misconduct and technology in the courtrooms[.]”.

²¹ *United States v. Shelnett*, No. 09-CR-14, 2009 WL 3681827, at *1 n.1 (M.D. Ga. Nov. 2, 2009).

²² *About Twitter*, TWITTER, <http://www.twitter.com/about> (last visited Jan. 25, 2012).

²³ Nicolas, *supra* note 20, at 378.

²⁴ Jason Kincaid, *Twitter has 105,779,710 Registered Users, Adding 300K A Day*, TECHCRUNCH, Apr. 14, 2010, <http://techcrunch.com/2010/04/14/twitter-has-105779710-registered-users-adding-300k-a-day>; *see also Twitter User Statistics REVEALED*, THE HUFFINGTON POST, Mar. 23, 2011, http://www.huffingtonpost.com/2010/04/14/twitter-user-statistics-r_n_537992.html.

²⁵ Charlie White, *Reaching 200 Million Accounts: Twitter’s Explosive Growth*, MASHABLE, July 17, 2011, <http://mashable.com/2011/07/16/twitter-accounts-200-million>.

²⁶ *Id.*

²⁷ Michael Liedtke, *Twitter Simplifies in Bid to Engage More Users*, WASH. TIMES, Dec. 8, 2011, *available at* <http://www.washingtontimes.com/news/2011/dec/8/twitter-simplifies-in-bid-to-engage-more-users/?page=all>.

service, Google Plus, markets itself as a “real life sharing” platform, commanding more than 90 million users²⁸ and counting.²⁹ Tumblr, a blogging site that allows users to “effortlessly share anything,” contains over 40 million individual blogs, which have generated nearly 16 billion total posts.³⁰ The professional networking website LinkedIn has approximately 135 million active users,³¹ and a rapidly growing community of users who “check in” and share their location with others via Foursquare, now numbers over 15 million.³²

II. SOCIAL MEDIA USE BY JURORS

A. Social Media and the Legal Profession

The legal profession is no stranger to social media.³³ As one article recently observed, “jurors, judges, witnesses, clients and opponents all use social media, and so too must the savvy litigator, both to research and prepare their case[.]”³⁴ Indeed, for better or worse, lawyers are frequently using social media to discover information about potential jurors,³⁵ opposing counsel, and (less frequently) the judge

²⁸ Mark Milian, *Google Says Social Network Has 90M Users*, CNN, Jan. 19, 2012, <http://www.cnn.com/2012/01/19/tech/social-media/google-plususers/index.html?c=tech>.

²⁹ See Ted Thornhill, *Google Plus “Will Have More Than 400m Users by the End of 2012” – Will it Overtake Facebook?*, MAIL ONLINE (U.K), Dec. 30, 2011, available at <http://www.dailymail.co.uk/sciencetech/article-2080207/Google-Plus-hit-400m-users--overtake-Facebook.html> (noting that, with “625,000 members” joining each day, Google Plus “will have more than 400 million users by the end of 2012”).

³⁰ See *About*, TUMBLR, <http://www.tumblr.com/about> (last visited Feb. 26, 2012) (indicating that 16,484,811,994 total posts existed as of January 25, 2012).

³¹ Jeff Weiner, *100 Million Members and Counting . . .*, LINKEDIN BLOG, Mar. 22, 2011, <http://blog.linkedin.com/2011/03/22/linkedin-100-million>.

³² *About Foursquare*, FOURSQUARE, <https://foursquare.com/about> (last visited Jan. 25, 2012).

³³ See Helen W. Gunnarsson, *Friending Your Enemies, Tweeting Your Trials; Using Social Media Ethically*, 99 ILL. B.J. 500, 500–04 (2011) (discussing the rise of social media and its implications for the practice of law).

³⁴ Nicole D. Galli et al., *Litigation Considerations Involving Social Media*, 81 PA. B.A. Q. 59, 59 (2010).

³⁵ See, e.g., *Carino v. Muenzen*, No. L-0028-07, 2010 WL 3448071, at *10 (N.J. Super. Ct. App. Div. Aug. 30, 2010) (per curiam) (holding that trial court erred in barring the parties from using the Internet during voir dire); Jamila A. Johnson, *Voir Dire: To Google or Not to Google*, ABA LAW TRENDS & NEWS (2008), available at http://www.americanbar.org/newsletter/publications/law_trends_news_practice_area_e_newsletter_home/litigation_johnson.html (“[I]t

herself.³⁶ Reporters have used services like Twitter to “live Tweet” from the courtroom,³⁷ and federal and state courts are beginning to develop a social media presence.³⁸

B. Risks of Jurors’ Use of Social Media

Despite its potential benefits to the legal profession,³⁹ the rise of web-based social networking services has “wreak[ed] havoc” in the jury box.⁴⁰ This is particularly true where jurors have Tweeted, Facebook posted, blogged, or otherwise communicated about their jury service through social networking services during trial.⁴¹ The problem has not

is apparent that the decision to Google or not to Google is not clear-cut.”). Research by Reuters Legal found that the practice of conducting extensive online searches about members of the prospective jury pool is becoming more commonplace, yet “lawyers are skittish about discussing the practice, in part because court rules on the subject are murky or nonexistent in most jurisdictions.” Brian Grow, *Internet v. Courts: Googling for the Perfect Juror*, REUTERS, Feb. 17, 2011, <http://www.reuters.com/article/2011/02/17/us-courts-voirdire-idUSTRE71G4VW20110217> (reporting that many law firms and jury consultants were reluctant to discuss their process of juror vetting because they “weren’t sure judges would approve”).

³⁶ See Galli, *supra* note 34, at 60–61 (noting that at least four federal appellate judges maintain social networking profiles, and suggesting that “[l]itigants should vet a judge’s social networking profile in advance of trial”) (citing Deborah Cassens Weiss, *Dozens of Judges are Getting LinkedIn*, *Blogger Notes*, ABA J., Aug. 20, 2009, available at http://www.abajournal.com/news/article/blogger_finds_dozens_of_judges_with_linkedin_profiles/).

³⁷ See, e.g., Michael Lindenberger, *Twitter Moves to Federal Court*, CITIZEN MEDIA LAW PROJECT BLOG, Mar. 2, 2009, <http://www.citmedialaw.org/blog/2009/twitter-moves-federal-court>.

³⁸ Examples of courts on Twitter include the Illinois Supreme Court, the District of Columbia Courts, and the Indiana judiciary, to name just a few. See *DC Courts PIO*, TWITTER, <https://twitter.com/#!/dccourtsinfo> (last visited Feb. 26, 2012); *IL Supreme Court*, TWITTER, <https://twitter.com/#!/illinoiscourts> (last visited Feb. 26, 2012); *Indiana Courts*, TWITTER, <https://twitter.com/#!/incourts> (last visited Feb. 26, 2012).

³⁹ See *Technology Brings Headaches, Help to Wash. Courtrooms*, SEATTLE TIMES, Dec. 4, 2011, http://seattletimes.nwsourc.com/html/localnews/2016935842_apwajurortechnology1stldwritethru.html (noting the use of iPads to track juror attendance and communication).

⁴⁰ John Schwartz, *As Jurors Turn to Web, Mistrials are Popping Up*, N.Y. TIMES, Mar. 18, 2009, at A1.

⁴¹ Many will recall the 2009 incident in which television personality Al Roker Tweeted pictures of his jury service to his more than 20,000 followers on Twitter. After being confronted by the court, and subjected to a barrage of criticism, Roker apologized, but clarified that he did not Tweet pictures of the

gone unnoticed. In December of 2010, Reuters reported that the “explosion of blogging, tweeting and other online diversions has reached into U.S. jury boxes, raising serious questions about juror impartiality and the ability of judges to control courtrooms.”⁴² One year earlier, the *New York Times* similarly reported that the “use of BlackBerrys and iPhones by jurors gathering and sending out information about cases is . . . upending deliberations and infuriating judges.”⁴³

As these news reports suggest, social networking by jurors during trial (whether at the courthouse or at home) carries with it a dangerous potential to undermine the fundamental fairness of trial proceedings.⁴⁴ Our jury system rests on the principle that “conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.”⁴⁵ This means, among other things, that jurors may discuss

courtroom. *See, e.g.*, Debra Cassens Weiss, *Media Atwitter Over Al Roker's Twitter Photos from Jury Duty Wait*, ABA J., May 29, 2009, http://www.abajournal.com/news/article/media_atwitter_over_al_rokers_twitter_photos_from_jury_duty_wait/ (describing Al Roker's tweet of the jury lounge and negative reaction); Dareh Gregorian, *Oh What a Twit! Tweeting Roker Sorry for Taking Juror Pix*, N.Y. DAILY NEWS, May 29, 2009, available at http://www.nypost.com/p/news/regional/item_orPeW3RKHabFGbsbXOYCXI.

⁴² Brian Grow, *As Jurors Go Online, U.S. Trials Go Off Track*, REUTERS, Dec. 9, 2010, <http://www.reuters.com/article/2010/12/08/us-internet-jurorsidUSTRE6B74Z820101208> [hereinafter Grow].

⁴³ Schwartz, *supra* note 40.

⁴⁴ *See, e.g.*, *United States v. Fumo*, 655 F.3d 288, 305 (3d Cir. 2011) (discussing prejudice that may arise from jurors' use of the Internet during trial); Caren Myers Morrison, *Jury 2.0*, 62 HASTINGS L.J. 1579, 1590 (2011) (quoting statement of state supreme court justice that the Internet is “one of the biggest concerns that we have about fair trials in the future”) (quoting Laura A. Bischoff, *Courthouse Tweets Not So Sweet, Say Judges*, DAYTON DAILY NEWS, Feb. 12, 2010, <http://allbusiness.com/legal/trial-procedure-judges/13916591-1.html>); Hon. Dennis Sweeney, *Social Media and Jurors*, 43 MD. B.J., 44, 46 (Nov./Dec. 2010) (“While these new social media phenomena are very recent—for example Facebook was created in 2005 [sic] and Twitter in 2006—they along with the older processes of e-mail messages and texting have already generated troubling issues for trial courts trying to assure fair trials for the parties before them.”); Steve Eder, *Jurors' Tweets Upend Trials*, WALL ST. J. L. BLOG, Mar. 5, 2012, <http://blogs.wsj.com/law/2012/03/06/how-do-you-take-to-social-out-of-media-in-jury-trials/?mod=WSJBlog> (“Courts are concerned about what users might say online, because it could be construed as having a bias about the case or reveal information about a trial or deliberations before they becomes public.”).

⁴⁵ *Patterson v. Colorado ex rel. Att'y Gen.*, 205 U.S. 454, 462 (1907); *see also Remmer v. United States*, 347 U.S. 227, 229 (1954) (“[A]ny private

the case only with each other—and even then, only during deliberations⁴⁶—and that jurors must be “capable and willing to decide the case solely on the evidence” presented at trial, free from any external influences.⁴⁷

Judges have long confronted juror misconduct,⁴⁸ but “the widespread use of social networking sites, such as Twitter and Facebook, [has] exponentially increased the risk of prejudicial communication amongst jurors and opportunity to exercise persuasion and influence upon jurors.”⁴⁹ Social media allows jurors to communicate with an audience larger than ever before, and from the convenience of their iPhone, iPad, Blackberry, Android, or other mobile devices.⁵⁰ As the Third Circuit has explained, “the risk of [a] prejudicial communication may be greater when a juror comments on a blog or social media website than when she has a discussion about the case in person, given that the universe of individuals who are able to see and respond to a comment on

communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is . . . deemed presumptively prejudicial, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties.”)

⁴⁶ See, e.g., *United States v. Cox*, 324 F.3d 77, 86 (2d Cir. 2003) (“Where the district court instructs a jury to refrain from premature deliberations . . . and the jury nonetheless discusses the case before the close of trial, that premature deliberation may constitute juror misconduct.”).

⁴⁷ *United States v. Olano*, 507 U.S. 725, 738 (1993) (quoting *Smith v. Phillips*, 455 U.S. 209, 217 (1982)).

⁴⁸ See, e.g., Caren Myers Morrison, *Can the Jury Survive Google*, 25 CRIM. JUST. 4, 8 (2011) (discussing instances of jurors visiting a crime scene, conducting experiments, and seeking additional information).

⁴⁹ *United States v. Juror No. One*, No. 10-703, 2011 WL 6412039, at *6 (E.D. Pa. Dec. 21, 2011) (citing *Fumo*, 655 F.3d at 305); see also Morrison, *supra* note 48, at 11 (“The more people are linked through a complex of contacts, listservs, dating databases, and friend pages, the more these chance encounters become likely, causing not only the embarrassment of seeing trial participants in unexpected contexts, but also possible prejudice to the parties.”); Amanda McGee, *Juror Misconduct in the Twenty-First Century: The Prevalence of the Internet and Its Effect on American Courtrooms*, 30 LOY. L.A. ENT. L. REV. 301, 307–08 (2010) (noting the evolution from traditional instances of investigating the crime scene or talking about the case with one’s spouse to more sophisticated means of Internet-based misconduct).

⁵⁰ Making mobile social media communications even more convenient, Apple recently integrated Twitter and other networking applications into its iPhone operating system, iOS 5. See *iOS 5: Features that Go Further*, APPLE, <http://www.apple.com/ios/features.html> (last visited Feb. 26, 2012).

Facebook or a blog is significantly larger.”⁵¹ Knowing this risk, one can understand the multitude of problems that resulted from the juror who conducted a Facebook poll about how she should vote during deliberations.⁵²

Given the nature of social networking, juror communication about a trial through social media involves a substantial risk that other users will respond, whether or not the juror intended others do so. Because these services allow users to respond to each other’s communications, even one-sided communications can become “very much public discussions”⁵³—depending on “how others in the ‘Twittersphere’ respond.”⁵⁴ The Third Circuit recently addressed this concern:

Not unlike a juror who speaks with friends or family members about a trial before the verdict is returned, a juror who comments about a case on the internet or social media may engender responses that include extraneous information about the case, or attempts to exercise persuasion and influence.⁵⁵

In the Third Circuit case, discussed in greater detail below, a juror on the eve of deliberations wrote a comment on Facebook stating that the juror was “not sure about tomorrow.”⁵⁶ A Facebook friend of the juror responded, without invitation, by asking “why?” to which the juror responded, “think of the last five months dear.”⁵⁷

Jurors’ social media communications additionally risk “chill[ing] robust discussion” in the jury room.⁵⁸ If members of a jury become

⁵¹ *Fumo*, 655 F.3d at 305.

⁵² See, e.g., Guy Patrick, *Juror Axed for Verdict Poll on Net*, THE SUN (U.K.), Nov. 24, 2008, <http://www.thesun.co.uk/sol/homepage/news/article1963544.ece> (reporting that a court dismissed a juror who polled Facebook friends on a child sexual assault case).

⁵³ *Dimas-Martinez v. State*, No. CR 11-5, 2011 WL 6091330, at *15 (Ark. Dec. 8, 2011).

⁵⁴ Nicolas, *supra* note 20, at 396.

⁵⁵ *Fumo*, 655 F.3d at 305.

⁵⁶ *Id.* at 298.

⁵⁷ *Id.* at 298 n.3.

⁵⁸ Morrison, *supra* note 48, at 9 (discussing the risk of “chill[ing] robust discussion inside the jury room” due to jurors’ fearing that their statements might end up on the Internet). Cf. *id.* at 10 (“If the linchpin of the jury’s legitimacy is that its verdicts are opaque, so all mistakes are hidden from sight, the facts that increasing numbers of jurors are blogging, revealing the petty rivalries, potential misapprehension of evidence, and irrelevant matter they

aware that one of their own is publicly communicating about the trial, those jurors may question the secrecy of the deliberative process and the protections afforded their discussions. As Justice Carzodo once wrote, “[f]reedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world.”⁵⁹

Finally, apart from the significant potential for actual prejudice to the parties, juror communications about the trial through social media may undermine the public integrity of the judicial system.⁶⁰ Our system of justice “depends upon public confidence in the jury’s verdict,”⁶¹ and the unseemliness of jurors using Facebook or Twitter to discuss their jury service may spawn public doubt about the capacity of the modern jury system to achieve justice.

C. Examples of Juror Misconduct

Recent events demonstrate the reality and severity of these risks.⁶² Consider the case of the Tweeting juror who sat on a capital jury

actually considered may change the calculus that keeps jury decision making hidden.”).

⁵⁹ *Clark v. United States*, 289 U.S. 1, 13 (1933).

⁶⁰ *See, e.g., United States v. Thomas*, 116 F.3d 606, 618 (2d Cir. 1997) (“It is well understood, for example, that disclosure of the substance of jury deliberations may undermine public confidence in the jury system[.]”) (citing Note, *Public Disclosures of Jury Deliberations*, 96 HARV. L. REV. 886, 889 (1983)). *Cf. Johnson v. Duckworth*, 650 F.2d 122, 125 (7th Cir. 1981) (“[I]f an intrusion into the jury’s privacy has, or is likely to have, the effect of stifling such debate, the defendant’s right to trial by jury may well have been violated.”).

⁶¹ *United States v. Siegelman*, 640 F.3d 1159, 1186 (11th Cir. 2011); *see also United States v. Young*, 470 U.S. 1, 21 (1985) (Brennan, J., concurring in part and dissenting in part) (noting that plain error occurs when an error seriously affects “the integrity of public reputation of the judicial proceedings”) (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)); *Turner v. Louisiana*, 379 U.S. 466, 472 (1965) (discussing and emphasizing the “fundamental integrity of all that is embraced in the constitutional concept of trial by jury”).

⁶² *See, e.g., Eder, supra* note 44 (reporting a specific example of juror misconduct on Twitter to “show how the use of social media is disrupting the jury trial”); Jeannie Nuss, *Death Row Inmate Gets New Trial Because of Tweet*, HOUSTON CHRON., Dec. 9, 2011, available at <http://www.chron.com/news/article/Death-row-inmate-gets-new-trial-because-of-tweet-2388661.php> (reporting that the state high court ordered a new trial in a capital case after a juror tweeted about deliberations); *Tweets Cause US Death Tow Conviction to be Overturned*, BBC (U.K.), Dec. 9, 2011, <http://www.bbc.co.uk/news/technology-16108000>.

in Arkansas. In *Dimas-Martinez v. State*,⁶³ the Arkansas Supreme Court considered the effect of a juror's mid-trial Tweets in a criminal case that resulted in a death sentence. The juror's Tweets included comments such as "Choices to be made. Hearts to be broken. We each define the great line."⁶⁴ Counsel alerted the trial judge to the Tweets, and the juror admitted to his misconduct. The trial judge admonished the juror to stop Tweeting, but did not remove the juror, who subsequently continued to Tweet.

The jury returned a verdict of guilty, upon which the trial court imposed a sentence of death.⁶⁵ The trial court denied the defendant's motion for a new trial. On appeal, the Arkansas Supreme Court reversed, explaining:

[T]his court has recognized the importance that jurors not be allowed to post musings, thoughts, or any other information about trials on any online forums. The possibility for prejudice is simply too high. Such a fact is underscored in this case . . . because one of the juror's Twitter followers was a reporter. Thus, the media had advance notice that the jury had completed its sentencing deliberations before an official announcement was made to the court. This is simply unacceptable, and the circuit court's failure to acknowledge this juror's inability to follow the court's directions was an abuse of discretion.⁶⁶

Similar examples abound. Jurors have used Facebook to "friend" parties, including criminal defendants,⁶⁷ witnesses, lawyers, and even each other during trial.⁶⁸ Others have broadcasted disparaging

⁶³ *Dimas-Martinez v. State*, No. CR 11-5, 2011 WL 6091330, at *12 (Ark. Dec. 8, 2011).

⁶⁴ *Id.*

⁶⁵ *Id.* at *1.

⁶⁶ *Id.* at *16–17.

⁶⁷ See Ben Zimmer, *Juror Could Face Jail Time for 'Friending' Defendant*, USA TODAY, Feb. 8, 2012, <http://www.usatoday.com/news/nation/story/2012-02-07/juror-facebook-friend-defendant/53000186/1> (reporting on a contempt-of-court hearing for a juror who asked to be Facebook friends with the defendant).

⁶⁸ MEGHAN DUNN, JURORS USE OF SOCIAL MEDIA DURING TRIALS AND DELIBERATIONS: A REPORT TO THE JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT 3–4 (Fed. Judicial Ctr., ed., Nov. 22, 2011) [hereinafter FJC REPORT]; see also *Facebook Request Gets Man Kicked off Jury*, HERALD-TRIBUNE (Sarasota, Fla.), Dec. 30, 2011, <http://www.thejuryexpert.com/2009/11/online-and-wired-for-justice-why-jurors-turn-to-the-internet-the-google-mistrial>; Douglas L. Keene & Rita R. Handrich, *Online and Wired for Justice: Why Jurors Turn to the Internet*, THE JURY

comments about other jurors—like the California juror who posted on Facebook that she “want[ed] to punch” a fellow juror for cracking her knuckles.⁶⁹ Still other jurors have offered their opinions relating to guilt or innocence,⁷⁰ including the juror who posted on Facebook that the defendant was “presumed guilty,”⁷¹ and the prospective juror in the Chandra Levy murder trial who Tweeted, “[g]uilty, guilty . . . I will not be swayed. Practicing for jury duty.”⁷² The juror’s conduct in the Levy case is particularly disconcerting because, as the juror later explained, he had “merely tweeted out of habit.”⁷³

In another California case, a juror commented on her Facebook page that “the case just keeps getting weirder” after the defendant was temporarily quarantined in jail due to a swine flu outbreak.⁷⁴ A Connecticut juror wrote on Facebook that jury duty was “boring,” and pleaded for “[s]omebody [to] get me outta here.”⁷⁵ That same juror announced “Guilty :)” on her Facebook page on the day of the verdict.⁷⁶

In a widely reported and particularly egregious case in Illinois, a juror frequently, after leaving the courtroom, “logged into her blog and

EXPERT, Nov. 1, 2009, <http://www.thejuryexpert.com/2009/11/online-and-wired-for-justice-why-jurors-turn-to-the-internet-the-google-mistrial>. For cases related to this issue, see *Juror No. One v. California*, No. CIV. 2:11-397 WBS JFM, 2011 WL 567356, at *1 (E.D. Cal. Feb. 14, 2011) (communication between jurors through Facebook during trial); *People v. Rios*, No. 1200/06, 2010 WL 625221, at *2 (N.Y. Sup. Ct. Feb. 23, 2010) (communication between jurors and witnesses); *Wilgus v. F/V Sirius, Inc.*, 665 F. Supp. 2d 23, 26 (D. Me. 2009) (juror emailed counsel). *Cf.* *United States v. Forde*, 407 Fed. App’x 740, 747 (4th Cir. 2011) (considering allegation of juror misconduct on account of social media activity by a friend of the juror’s spouse).

⁶⁹ *Facebooking Juror Kicked Off Murder Trial*, THE ORANGE COUNTY REG., Dec. 2, 2011, <http://www.oregister.com/articles/juror-329708-trial-judge.html>. Even a prosecutor’s Facebook posts have been called into question. *See State v. Usee*, 800 N.W.2d 192, 200 (Minn. Ct. App. 2011) (questioning a prosecutor’s decision to post publicly on his Facebook account regarding trial-related issues).

⁷⁰ FJC REPORT, *supra* note 68, at 4 (noting that one juror contacted the plaintiff’s former employee to reveal the likely verdict).

⁷¹ *Facebooking Juror Kicked Off Murder Trial*, *supra* note 69.

⁷² *Prospective Juror Tweets Self Out of Levy Murder Trial*, NBC WASHINGTON, Oct. 22, 2010, <http://www.nbcwashington.com/news/local/Prospective-Juror-Tweets-Self-Out-of-Levy-Murder-Trial-105553253.html>.

⁷³ *Id.*

⁷⁴ *People v. Turner*, No. G042598, 2011 WL 579210, at *6 (Cal. App. 4 Dist. Feb. 18, 2011).

⁷⁵ *United States v. Ganas*, No. 08-CR-224, 2011 WL 4738684, at *3 (D. Conn. Oct. 5, 2011).

⁷⁶ *Id.*

wrote an entry describing the dialogue that took place in the jury room that day.”⁷⁷ Her blog posts included information about the demographics of the jury,⁷⁸ the identity of the witnesses at trial,⁷⁹ and the weight of the evidence at trial.⁸⁰

The high-profile federal corruption trial of former Pennsylvania State Senator, Vincent Fumo, sheds further light on the problems surrounding jurors’ use of social media during federal trials. In *United States v. Fumo*,⁸¹ prosecutors charged Fumo with numerous counts of mail and wire fraud, tax evasion, and obstruction of justice, arising out of Fumo’s activities while in public office.⁸² Jury selection took place between September 8 and October 20, 2008, and the ensuing trial “lasted an additional five months.”⁸³ On March 16, 2009, “after four days of deliberation,” the jury returned verdicts of guilty against Fumo on all counts.⁸⁴

During deliberations, on March 15, 2009, “a local television station reported that one of the jurors [“Juror 1”] had made postings on both his Facebook and Twitter pages related to the trial.”⁸⁵ The comment reported by the media was the juror’s “single comment or ‘tweet’ on March 13, stating[,] ‘This is it . . . no looking back now!’”⁸⁶ When Juror 1 heard the television report that night, he “panicked and deleted the comments from his Facebook page.”⁸⁷ The parties subsequently learned that “Juror 1’s Facebook comments appeared over the many months of

⁷⁷ Keith Ecker, *Juror Use of Social Media, Blogs Compromises Cases*, LAWYERS.COM, Dec. 2, 2011, <http://blogs.lawyers.com/2011/12/juror-use-of-social-media-blogs-compromises-cases>.

⁷⁸ *Id.* (“So our jury consists of a fireman, a dressmaker, a bar manager, a guy who just finished college, two office managers, a special education teacher, a trade, a freelance writer (me!), and five others, including two alternatives We have ten woman and four men; ten white and four black.”).

⁷⁹ *Id.* (“The last witness for the plaintiff was the plaintiff herself, the widow of the allegedly wrongfully dead guy.”).

⁸⁰ *Id.* (“At times during [the plaintiff’s] testimony, there were tears rolling down the face of the juror sitting in front of me, and I don’t think she was alone. Sympathy won’t win their case—but it sure doesn’t hurt.”).

⁸¹ *United States v. Fumo*, 655 F.3d 288 (3d Cir. 2011).

⁸² *Id.* at 296–97.

⁸³ *Id.*

⁸⁴ *Id.* at 297.

⁸⁵ *Id.* at 298.

⁸⁶ *Id.*

⁸⁷ *Id.*

the trial,”⁸⁸ and included the following, as summarized by the Third Circuit:

Sept. 18: (apparently upon a continuance of the trial due to judge’s illness): “[Juror 1] is glad he got a 5 week reprieve, but still could use the money”

Jan. 11: (apparently referring to the end of the government’s case): “[Juror 1] is wondering if this could be the week to end Part 1?”

Jan. 21: “[Juror 1] wonders if today will really be the end of Part 1? ?”

Mar. 4: (conclusion of closing arguments): “[Juror 1] can’t believe tomorrow may actually be the end!!!” A friend responded to the March 4 Facebook post by asking “of what?” Juror 1 responded: “Can’t say till tomorrow! LOL.”

Mar. 8: (Sunday evening before second day of deliberations): “[Juror 1] is not sure about tomorrow” A friend responded to the March 8 Facebook post by asking “Why?” Juror 1 responded: “think of the last 5 months dear.”

Mar. 9: (end of second day of deliberations): “[Juror 1] says today was much better than expected and tomorrow looks promising too!”

Mar. 13: (Friday after completion of first week of deliberations): “Stay tuned for the big announcement on Monday everyone!”⁸⁹

Upon learning of these comments, the district court questioned the juror “about his activities on these two websites and his general media consumption.”⁹⁰ Juror 1 responded that he “had avoided television news during the entire trial[, and] had not discussed the substance of the case with anyone.”⁹¹ Crediting the juror’s responses, the district court “determined that there was no evidence that Juror 1 received outside influence due to his Facebook or Twitter postings and concluded” that the postings “were ‘nothing more than harmless ramblings having no prejudicial effect. They were so vague as to be

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 299 (“Juror 1 further stated that he had made the comments ‘for my benefit to just get it out of my head, similar to a blog posting or somebody journaling something.’”) (internal record citation omitted).

virtually meaningless.”⁹² The trial court subsequently denied Fumo’s request for a new trial, and Fumo appealed on the basis of juror misconduct.⁹³

The Third Circuit affirmed.⁹⁴ The court began by acknowledging the specific risks that arise when jurors communicate about a trial through social media,⁹⁵ and in that regard, “enthusiastically endorse[d]” the model social media instructions proposed by the United States Judicial Conference Committee on Court Administration and Case Management (“CACM”).⁹⁶ In reviewing the decision below, however, the Third Circuit found no abuse of discretion in the district court’s refusal to grant a new trial.⁹⁷ The court “largely agreed” with the district court’s characterization of Juror 1’s communications as “meaningless,” and explained that Fumo failed to advance any plausible argument that the comments “have led to substantial prejudice against him.”⁹⁸

III. MINIMIZING THE RISKS OF SOCIAL MEDIA

A. Response from the Bench

Courts have responded to the challenges of social media use by jurors in a variety of ways.⁹⁹ In October of 2011, the Federal Judicial Center (“FJC”) sent a questionnaire to all active and senior federal district court judges in order to “assess the frequency with which jurors use social media to communicate about cases during trial and

⁹² *Id.* Although less instructive for our purposes, Fumo later filed a second motion for a new trial, presenting evidence that, on the day of the verdict, “all of the jurors had heard media reports about Juror 1’s use of Facebook and Twitter.” *Id.* The district court rejected this argument without a hearing, and the Third Circuit found no error in declining to investigate this alleged misconduct. *Id.* at 299, 304–08.

⁹³ *Id.* at 302. Fumo appealed on other grounds as well, but we limit our discussion to the issue of the Facebooking juror.

⁹⁴ *Id.* at 294.

⁹⁵ *Id.* at 304–05.

⁹⁶ *Id.* For a discussion of the CACM model instruction, see *infra* notes 104-107 and accompanying text.

⁹⁷ *Id.* at 307.

⁹⁸ *Id.* at 306.

⁹⁹ The challenges of social media communications do not present themselves only to courts in the United States. Courts in other countries are grappling with these same issues. See, e.g., *Juror Faces Contempt Proceedings Over ‘Case Research,’* BBC (U.K.), Nov. 29, 2011, <http://www.bbc.co.uk/news/uk-15939922> (discussing jurors in the United Kingdom conducting trial-related research on the Internet).

deliberation,”¹⁰⁰ and “to identify strategies judges have found to be effective and appropriate in curbing this behavior.”¹⁰¹ More than 500 judges responded, and according to the FJC, “most judges have taken steps to ensure that jurors do not use social media in the courtroom.”¹⁰² Only 6% of respondents, or 30 judges, reported that “they have not specifically addressed jurors’ use of social media.”¹⁰³

The “great majority of judges” reported having taken affirmative steps toward risk reduction. These steps differed depending on the judge, but most of the judges reported that they employ a social media jury instruction.¹⁰⁴ Sixty percent of these judges use the CACM model instruction, which reads as follows:

[Before Trial:] Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end. I hope that for all of you this case is interesting and noteworthy. I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, through any internet chat room, or by way of any other social networking websites, including Facebook, My Space, LinkedIn, and YouTube.

¹⁰⁰ FJC REPORT, *supra* note 68, at 1.

¹⁰¹ *Id.*

¹⁰² *Id.* The judiciary is not the only stakeholder that has responded to the risks of social media use by jurors to trials. Some members of the bar, like Texas attorney Jason Casell, suggest that trial attorneys, in addition to requesting that the court take action, employ “passive online monitoring,” through searchable databases, to detect juror misconduct on the Internet. *See* Casell, *supra* note 7, at 18 (“It is recommended that attorneys monitor social networking activity throughout the trial and up to the verdict by searching sites such as Facebook, Twitter, and MySpace; conducting general Internet searches; and establishing email alerts for key search terms.”).

¹⁰³ FJC REPORT, *supra* note 68, at 5.

¹⁰⁴ *See id.* at 6 (noting that 60% of judges surveyed in a study reported that they “have actually used the model [social media] jury instructions during a trial”); Nicolas, *supra* note 20, at 387–93 (discussing various forms of a social media instruction).

[At the Close of the Case:] During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as a telephone, cell phone, smart phone, iPhone, Blackberry or computer; the internet, any internet service, or any text or instant messaging service; or any internet chat room, blog, or website such as Facebook, My Space, LinkedIn, YouTube or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict.¹⁰⁵

CACM transmitted these model instructions to every federal district court judge.¹⁰⁶ As described above, the Third Circuit recently “enthusiastically endorse[d]” these instructions, and “strongly encourage[d] district courts to routinely incorporate them or similar language into their own instructions.”¹⁰⁷

Beyond jury instructions, some courts have taken “additional measures . . . to prevent jurors from using social media during trials and deliberations.”¹⁰⁸ These less common methods include courthouse technology bans,¹⁰⁹ threats of contempt,¹¹⁰ and requiring jurors to sign written pledges not to communicate about the case through social

¹⁰⁵ *United States v. Fumo*, 655 F.3d 288, 305 (quoting JUDICIAL CONFERENCE COMMITTEE ON COURT ADMINISTRATION AND CASE MANAGEMENT, PROPOSED MODEL JURY INSTRUCTIONS: THE USE OF ELECTRONIC TECHNOLOGY TO CONDUCT RESEARCH ON OR COMMUNICATE ABOUT A CASE (Dec. 2009), available at <http://www.uscourts.gov/uscourts/News/2010/docs/DIR10-018-Attachment.pdf> (last visited Mar. 2, 2012) [hereinafter CACM MODEL INSTRUCTION]).

¹⁰⁶ Memorandum from Judge Julie A. Robinson, Chair of the Judicial Conference Comm. on Court Admin. and Case Mgmt. to the Judges of the United States District Courts (Jan. 29, 2010), available at <http://www.uscourts.gov/uscourts/News/2010/docs/DIR10-018.pdf>.

¹⁰⁷ *Fumo*, 655 F.3d at 305.

¹⁰⁸ See FJC REPORT, *supra* note 68, at 7–8 (listing eleven measures judges have taken to ensure that jurors do not use social media to communicate about a case).

¹⁰⁹ *Dimas-Martinez v. State*, No. CR 11-5, 2011 WL 6091330, at *17 (Ark. Dec. 8, 2011) (observing “the wide array of possible juror misconduct that might result when jurors have unrestricted access to their mobile phones during a trial. Most mobile phones now allow instant access to a [sic] myriad of information.”).

¹¹⁰ For at least some judges, contempt is not an empty threat. See *United States v. Juror No. One*, No. 10-703, 2011 WL 6412039, at *5 (E.D. Pa. Dec. 21, 2011) (finding juror guilty of criminal contempt for violation of court’s instructions regarding email communications).

media.¹¹¹ With regard to written pledges, the American College of Trial Lawyers has proposed the following “Statement of Compliance” for jurors to sign:¹¹²

I agree that during the duration of the trial in _____,
I will not conduct any independent research into any of the issues or
parties involved in this trial. I will not communicate with anyone
about the issues or parties in this trial, and I will not permit anyone
to communicate with me. I further agree that I will report any
violations of the court’s instructions immediately.

JUROR No. _____

B. Informal Survey Results

Against this background, we set out to learn more about jurors’ use of social networking during trial. Over the past sixteen months, actual jurors were asked to complete a short survey at the conclusion of their jury service. The survey asked the following questions regarding the use of social media:

Were you tempted to communicate about the case through any social networks, such as Facebook, My Space, LinkedIn, YouTube or Twitter?

*If so, what prevented you from doing so?*¹¹³

¹¹¹ FJC REPORT, *supra* note 68, at 8. This was U.S. District Court Judge Shira Scheindlin’s approach in an arms trafficking prosecution of a former Soviet military officer. *NY Judge: No Web for Jurors at Society Arms Trial*, YAHOO NEWS, Oct. 5, 2011, <http://news.yahoo.com/ny-judge-no-jurors-soviet-arms-trial-025047790.html>. The pledge stated, in relevant part: “I agree to follow all of the Court’s preliminary instructions, including the Court’s specific instructions relating to Internet use and communication with others about the case. . . . I agree not to communicate with anyone about the issues or parties in this trial, and I will not permit anyone to communicate with me.” Jeffrey T. Frederick, *What is it About ‘Don’t Twitter’ You Do Not Understand?*, JURY RESEARCH BLOG, Dec. 14, 2011, <http://www.nlrg.com/blogs/jury-research/bid/72541/What-Is-It-About-Don-t-Twitter-You-Do-Not-Understand>.

¹¹² JURY COMMITTEE, AMERICAN COLLEGE OF TRIAL LAWYERS, JURY INSTRUCTIONS CAUTIONING AGAINST USE OF THE INTERNET AND SOCIAL NETWORKING 1, 6 (Sept. 2010) [hereinafter ACTL MODEL INSTRUCTION].

¹¹³ Jury Questionnaire (2010–12) (unpublished research) (on file with the *Duke Law and Technology Review*).

Approximately 140 jurors participated, representing jurors from sixteen criminal and civil trials in the United States District Court for the Northern District of Illinois. All of the jurors sat in cases over which either Judge Amy J. St. Eve or Judge Matthew F. Kennelly presided. In each of these cases, the District Judge employed a model social media instruction during opening and closing instructions. Additionally, in many of the longer trials, the District Judge admonished the jury daily not to communicate about the case through social media.

Before discussing the results, a brief comment on methodology. We acknowledge that the informal survey is not scientific. (We expect a *Daubert* challenge from some in the blogosphere.)¹¹⁴ We additionally acknowledge that although juror participation was voluntary and anonymous, some jurors may not have been completely candid, for any number of reasons. Limitations of this type are not unusual.¹¹⁵

Cognizant of these limitations, we believe that the responses from actual jurors will assist the judiciary and the legal profession in developing best practices to ensure a fair trial in the face of social networking. As we explain in more detail below, our key takeaway from the informal survey is that courts should routinely and frequently instruct jurors not to communicate about the case through social networking services, because jurors tend to follow the judge's social media instructions.

Of the approximately 140 jurors who participated in the informal survey, only six jurors reported any temptation to communicate about the case through social media. One juror stated that she "did want to research the case," another stated simply, "Google," and the four remaining jurors did not explain the nature of their temptation. Each of the six jurors, however, reported that he or she did not ultimately succumb.

The juror tempted to use Google did not ultimately do so, explaining that she wanted "to keep an open mind." The juror who wanted "to research the case" stated clearly that she did not do so, without additional explanation. Jury instructions appear to have had significant impact on the four other jurors. Each of these jurors referred to either the judge's instructions or the obligations of a juror as the

¹¹⁴ See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 580 (1993) (holding that a district court has discretion to exclude expert testimony that is not scientifically reliable).

¹¹⁵ See, e.g., Morrison, *supra* note 48, at 7 (noting that reports of misconduct might under-represent the problem).

reason for their refrain. Specifically, in response to the survey question about what “prevented you” from using social media, the four jurors stated, respectively:

- “the judge”
- “direct orders”
- “I morally thought I should obey the judge”
- “swore not to”

In contrast to the six jurors who were tempted by social media, the overwhelming majority of jurors—approximately 130 jurors, or 92% of the sample—reported no such temptation. Some of the jurors were emphatic about this, stating:

- “absolutely not”
- “not at all” (two responses)
- “NOT AT ALL” (was this juror yelling at us?!¹¹⁶)

Although most of the jurors responded, simply, “no,” when asked if they were tempted to use social media to communicate about the trial, numerous jurors offered further explanation, most often touching upon the judge’s social media instructions. These jurors’ explanations included:

- “the Judge’s instructions”
- “the Judge”
- “your instructions”
- “the law”
- “because the judge instructed us”
- “was instructed not to do it”
- “ordered not to look”
- “the fact that we were not supposed to”
- “stay true to my given orders”

¹¹⁶ See Mark Simpson, *Tech Etiquette is Just Common Sense*, 7 COMMON GROUND J., No. 2, 81, 85 (2010) (“TYPING IN ALL CAPS IS CONSIDERED YELLING in electronic environments”).

- “I was sworn not to say anything”
- “direct orders”
- “your instructions made it clear”
- “jury instructions”

Other jurors referenced principles of fairness, which may have related to the jury instructions, or arisen from the juror’s pre-existing notions of fairness. Either way, these jurors explained their forbearance like this:

- “it would not be fair”
- “morally”
- “didn’t want to sway my opinion”

For another juror, refraining from prohibited social media communications was a matter of personal pride, relating to her basic obligation not to discuss the case before deliberations. This juror wrote:

- “I was proud of the fact that we, as a jury, did not discuss the case until it came time for deliberations.”

The juror’s specific pride is consistent with the general pride that other jurors felt through their participation in the process as a whole:

- “made me feel like I am doing something good”
- “feeling of citizenship for participation”
- “great American experience & privilege”

Many jurors explained that they did not use or had no interest in using social networking services. Despite the growing importance of social media and the Internet, these responses are an important reminder that not every juror uses Facebook or Twitter. In the words of these jurors:

- “not big on technology”
- “don’t use any of those”
- “not on social networks”
- “I don’t use that too much”

- “I don’t ‘social network’ anyway”
- “don’t use those elect. gadgets”
- “I don’t use social networks much”
- “not on social networks”
- “do not like”
- “not interested”
- “didn’t want to”

Finally, we highlight a handful of unique responses. One juror lamented, with a smiley face, that she “came home too late” to even “think about Facebook :).” Another juror, in an apparent reference to the substance of the trial, wrote that if she had violated the judge’s instructions, she “would be no better than the police officers for not following procedures.” Although insisting she did not communicate about the case through social media, another juror stated that “nothing” could prevent her from doing so if she had wanted to. Finally, one juror wrote “jail” as the reason she did not communicate about the case, presumably in a reference to being held in contempt. While none of the jurors were advised about the risk of contempt, the contempt authority of a trial court may well be a matter of general knowledge.¹¹⁷

C. Benefits of Social Media Instructions

Taken together, these informal findings strongly suggest that social media instructions effectively mitigate the risks of juror misconduct associated with social media.¹¹⁸ The overwhelming majority of the jurors—each of whom heard numerous social media instructions—reported no temptation to communicate about the case through social media. A significant number referenced the judge or the judge’s instructions as the reason that they did not so communicate. Even as to the small minority of jurors who reported some temptation, all but one explained that the judge’s instructions or the juror’s general obligations

¹¹⁷ See, e.g., Sandy Fitzgerald, *Juror Booted for Facebook-Friending Defendant*, MOBILEMEDIA, Jan. 3, 2012, <http://www.mobilemedia.com/news/122346.html> (“judges are starting to crack down, threatening jurors with contempt of court charges if they insist on giving constant updates or contacting defendants”).

¹¹⁸ This appears to be the growing consensus among federal judges. See FJC REPORT, *supra* note 68, at 1, 5 (“[M]ost judges have taken steps to ensure jurors do not use social media in the courtroom. The most common strategy is incorporating social media use into the jury instructions[.]”).

to the court prevented them from acting on that temptation. It is also significant that jurors *remembered* the judges' social media instructions, as this suggests that the instructions made impressions on the jurors.

Consistent with these informal findings, influential entities like the Federal Judicial Center have recognized social media instructions as a non-invasive and highly effective practice.¹¹⁹ Courts have great familiarity with instructing juries, and have traditionally relied on jury instructions as the primary method of combating juror misconduct and ensuring a fair trial.¹²⁰ Employing social media instructions in this context not only treats jurors with respect,¹²¹ but also is consistent with the long-standing presumption that jurors will follow a judge's instructions.¹²²

Courts need not resort immediately to draconian solutions such as blanket technology bans¹²³ or throwing jurors in jail,¹²⁴ either of which

¹¹⁹ See *id.* at 6 (“[T]he model jury instructions appear to successfully affect jurors’ use of social media during at trial or deliberation.”).

¹²⁰ See McGee, *supra* note 49, at 310 (suggesting that the threat of social networking to the jury is an old problem with a new face).

¹²¹ In the informal survey, one juror remarked favorably in her comments that she was “treated . . . respectfully by the Judge.”

¹²² See *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (“A jury is presumed to follow its instructions.”); see also *Martin v. Royse*, No. 1:08-CV-246, 2010 WL 2521063, at *5 (N.D. Ind. June 11, 2010) (rejecting allegation of juror misconduct on account of alleged Tweets, reasoning that the court instructed the jury not to communicate about the case on Twitter, and that the juror was presumed to have followed that instruction).

¹²³ See Tresa Baldas, *For Jurors in Michigan, No Tweeting (or Texting, or Googling) Allowed*, THE NAT’L. L.J., July 1, 2009 (noting not only that Michigan courts have banned all electronic communication from the jury box, but also that courts in Ramsey County, Minnesota and Malheur County, Oregon have banned wireless handheld devices from court). In any event, case law suggests that jurors are more likely to commit misconduct on their own time, while not under the watchful eye of their fellow jurors or courthouse personnel. See *Mendoza v. Yarbrough*, No. CVF035004DLBHC, 2005 WL 1336544, at *3 (E.D. Cal. Apr. 29, 2005) (involving a juror who went home, researched the internet and used a dictionary to determine the meaning of “constructive possession” and “circumstantial evidence”). For this and other reasons, blanket bans on technology in the courthouse may have only limited utility.

¹²⁴ See, e.g., Grow, *Juror Could Face Charges for Online Research*, REUTERS, Jan. 19, 2011, available at <http://www.reuters.com/article/2011/01/19us-internet-juror idUSTRE70I5KI20110119> (indicating that a judge considered bringing criminal contempt charges against a juror, who had conducted online research and offered to share her research with other jurors).

may impact jurors' willingness to serve.¹²⁵ Just as judges did not force jurors to unplug their televisions or turn off their Satellite radios as those technologies developed, so should be the general attitude of judges as it relates to social networking. A social media instruction may not prevent every instance of juror misconduct on Facebook, Twitter, or otherwise, and the unique circumstances of some trials might require additional measures and protections. It has become clear, however, that a social media instruction is a necessary and often independently sufficient method for courts to minimize—if not eliminate—the risk of juror misconduct through social media.

D. Crafting Social Media Instructions

After resolving to employ a social media instruction, judges must consider when to instruct, and how to instruct. As to timing, courts should instruct juries early and often. We suggest an instruction in the judge's opening remarks to the jury, as a part of the judge's closing instructions before the jury begins deliberations, and at reasonable intervals during trial, particularly those spanning many days.

With regard to content, a good place to start is with the numerous model social media instructions advanced by entities including CACM and the American College of Trial Lawyers.¹²⁶ Many have offered extensive guidance on the appropriate content of a social media instruction, so we treat that issue only briefly.

The instruction should be specific.¹²⁷ Although standard jury instructions prohibit jurors from discussing or communicating about the

¹²⁵ See, e.g., *In re Adams*, 421 F. Supp. 1027, 1030 (E.D. Mich. 1976) (“The courts expect a lot of jurors. They are not professionals but amateurs, brought out of the security of their homes and their jobs and placed in a position that is strange to them, in an environment that is at once austere, forbidding and at times frightening. It is not always possible to give them information as to why certain things are happening because of the need to protect the decisional process. Jurors are to be forever thanked for their willingness to serve in this most important aspect of judicial administration. Judges and lawyers must make certain that jurors are protected.”).

¹²⁶ ACTL MODEL INSTRUCTION, *supra* note 112; CACM MODEL INSTRUCTION, *supra* note 105; see also FJC REPORT, *supra* note 68, at app. C-I (listing instructions from individual judges).

¹²⁷ An interesting issue arises when a court instructs jurors what not to search on the Internet. Compare *King v. Grams*, No. 05-C-928, 2006 WL 1598679, at *4 (E.D. Wis. June 2, 2006) (denying habeas corpus where petitioner argued that “by telling the jury not to do internet searches to find out background information about the defendant or the victim in the case on sites like ‘Google,’

case,¹²⁸ the magnitude of social change occasioned by social media underscores the need for additional specificity.¹²⁹ Americans have become “accustomed to their always-online lifestyle,”¹³⁰ and for some, “tweeting and blogging are simply an extension of thinking, rather than a form of written communication.”¹³¹ As the Tweeting juror in the Chandra Levy trial explained, he had “merely tweeted out of habit.”¹³²

For these reasons, an effective instruction should include more than “don’t Twitter anybody about this case”¹³³ or “[w]e don’t want any tweeting or texting.”¹³⁴ The instruction should instead specifically

the judge created the impression that [defendant-petitioner] did in fact have a criminal background to search for”), *with* *United States v. Farhane*, 634 F.3d 127, 169–70 (2d Cir. 2011) (suggesting that specific leading question into juror’s potential exposure to extrinsic information “might itself have ‘create[d] prejudice’ by implying that a broader search could yield further information” about the defendant). This issue is beyond the scope of the Article, and we simply observe that although it may be effective to provide specific examples of websites, behaviors, and devices that are prohibited, the potential risks of specifically instructing jurors what *not* to search on the Internet may outweigh the benefits of such an instruction.

¹²⁸ See, e.g., THE COMMITTEE ON PATTERN CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT, FEDERAL CIVIL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT 44 (2009 rev.) (pattern jury instruction: “you are not to discuss this case with anyone”).

¹²⁹ See *State of Vermont v. Abdi*, No. 2010-255, 2012 WL 231555, ¶ 25 (Vt. Jan. 26, 2012) (“Although Vermont trial courts routinely admonish jurors not to consult outside sources, it may well be time to consider a stronger and more technology-specific admonition We cannot ignore the realities of our ‘information age,’ where the Internet and other technologies have made information more widely and immediately accessible than ever before.”); Nicolas, *supra* note 20, at 395 (“Boilerplate instructions do not seem to go far enough anymore.”).

¹³⁰ See, e.g., Grow, *supra* note 42.

¹³¹ Paula Hannaford-Agor, *Jury News: Google Mistrials, Twittering Jurors, Juror Blogs, and Other Technological Hazards*, 24 THE COURT MANAGER, No. 2, at 43, available at http://www.ncsconline.org/D_Research/cjs/JuryNews2009Vol24No2.pdf.

¹³² *Prospective Juror Tweets Self Out of Levy Murder Trial*, *supra* note 72.

¹³³ *Dimas-Martinez v. State*, No. CR 11-5, 2011 WL 6091330, at *15 (Ark. Dec. 8, 2011).

¹³⁴ *Facebooking Juror Kicked Off Murder Trial*, *supra* note 69 (juror posted Facebook comments, even after trial judge “warned her and all of the other jurors, as he always does, that they are not to do any independent investigation, consult any reference material, such as a dictionary, or talk about the case with anyone else, until deliberations begin and the biggest evil facing the world today; the internet. Please stay off the internet . . . oh, and tweeting. We don’t want any tweeting or texting either”).

enumerate the most popular social networking services such as Facebook, Twitter, and so on, that jurors may use—and have used—to commit misconduct. Consider the model instruction by CACM:

. . . . You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, through any internet chat room, or by way of any other social networking websites, including Facebook, My Space, LinkedIn, and YouTube. . . .¹³⁵

An effective social media instruction should also explain itself. As one judge has remarked: “If jurors are going to be asked to sacrifice some of their personal freedom and forego their case-specific e-mailing, texting, blogging, instant messaging, and social networking for the duration of their service, they are entitled to a clear and thoughtful explanation of the reason.”¹³⁶ The American College of Trial Lawyers seeks to address this concern in its model instruction by explaining the need for “a fair trial based on the evidence” presented in court.¹³⁷ The instruction explains that outside information “might be inaccurate or incomplete, or for some other reason not applicable to this case, and the parties would not have a chance to explain or contradict that information because they wouldn’t know about it.”¹³⁸ The instruction further explains that “[a]ny juror who violates [the court’s social media] restrictions . . . jeopardizes the fairness of these proceedings, and a mistrial could result that would require the entire trial process to start over[, which would create a] tremendous expense and inconvenience to the parties, the court and the taxpayers.”¹³⁹

¹³⁵ CACM MODEL INSTRUCTION, *supra* note 105.

¹³⁶ Hon. Linda Giles, *Does Justice Go Off Track When Jurors Go Online?*, 55 BOSTON B.J. 7, 9 (Spring 2011).

¹³⁷ ACTL MODEL INSTRUCTION, *supra* note 112, at 2–3.

¹³⁸ *Id.*

¹³⁹ *Id.* at 3.

CONCLUSION

The challenges of social media are great, but so is the resolve of the judiciary to protect the guarantee of a fair trial. There is no perfect solution to the growing risk of jurors committing misconduct through social networking services like Facebook and Twitter. After all, the jury is a fundamentally human institution, as one of the jurors in the informal survey reminded us by stating that “nothing” could prevent her from communicating through social media during a trial.

In this Article, rather than focus on the circumstances under which courts must take corrective action on account of juror use of social media, we observe that such circumstances exist, and that courts must be proactive in discouraging such misconduct. Anticipatory judicial action is necessary not only to protect against actual prejudice at trial and avoid lengthy collateral proceedings, but also to preserve the public integrity of judicial proceedings.

Based on informal survey data from approximately 140 actual jurors, we suggest that courts should, as a matter of course, employ specialized social media instructions at frequent intervals during trial. A well-crafted social media instruction is effective because, simply put, jurors listen. In our discussion, we offer specific comments from actual jurors to elucidate this suggestion, and to provide the legal profession with a window into the jury box when it comes to social media. Although our informal survey data is far from scientific, we hope that the voices of actual jurors will add a unique perspective to the discussion, and support the growing consensus that social media instructions are a necessary and often independently sufficient tool to ensure an impartial jury in the age of social media.