

The Iphone and Blackberry Mistrials: The Factors Courts Consider and Proposed Solutions

BY ARSEN KOURINIAN

JURY TRIALS play a pivotal role in our form of government and judicial system. In 1789, Thomas Jefferson expressed these sentiments when he stated “I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution.”¹ Jury trials are important to the judicial system because they prevent the arbitrary exercise of power and provide “the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over-conditioned or biased response of a judge.”²

One of the core tenets for a fair jury trial is to have an impartial jury. While the Constitution does not provide a test to help determine impartiality, an important element of this concept is for a jury to reach a verdict based on the evidence admitted in court.³ Case law and jury instructions explicitly forbid jurors from conducting an independent investigation of the facts in a case.⁴ Despite safeguards and laws against jurors seeking outside information during a trial, the development of cell phones that can text and access the Internet are making it easier for jurors to violate these laws.

The article will explain how jurors who use the Internet and cell phones during a trial threaten a defendant’s right to an impartial jury. It will analyze the three factors that

courts have held to be significant when determining whether to grant a mistrial because of Internet or cell phone use. Additionally, the article will propose solutions that courts can adopt to prevent jurors from using their cell phones and the Internet to obtain extraneous information about a case.

THE SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY IS BEING JEOPARDIZED

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to a trial by an impartial jury.⁵ To protect this right, due process requires “a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences when they happen.”⁶ In other words, the defendant’s guilt must be determined based on the evidence presented at trial and the court’s instructions about the law.⁷

Prior to the Internet era, the judicial system sought to preserve impartiality by preventing jurors from accessing inadmissible evidence through the media.⁸ Trial courts had the discretion to use their sequestration powers to isolate jurors from the rest of society to accomplish this objective.⁹ Sequestration powers were most often used in high-profile

Arsen Kourinian is a judicial law clerk for the Honorable Gary Allen Fees in the Central District of California and a magna cum laude graduate of the Loyola Law School, Los Angeles. He may be reached at arsen.kourinian@gmail.com

cases that received widespread media coverage, such as the Charles Manson, Patty Hearst, and O.J. Simpson trials.¹⁰ Outdated jury instructions and sequestration powers, however, are no longer adequate to prevent juror misconduct because jurors can use their cell phones and the Internet during trial and in the jury deliberation room.¹¹

In fact, not only are jurors capable of accessing the Internet during a trial—but now more than ever—they are more likely to do so. Today, nearly half of all Americans have reported using the Internet for more than one hour per day.¹² This number has doubled from 2002 when only 26 percent of the American public used the Internet with such frequency.¹³ Additionally, with cell phones such as the Blackberry and iPhone, the public can access the Internet at any location. Furthermore, more Americans have a desire to stay connected online because of the recent proliferation of social networking Web sites such as Facebook, Twitter, and MySpace.¹⁴

Jurors in this new technologically sophisticated era are also extremely attached to their cell phones and the Internet.¹⁵ Many have developed a habit of informing others about what they are doing at any given moment by text messaging and updating their statuses on social networking Web sites and blogs.¹⁶ Because jurors can text, update their statuses online, and search for information on the Internet more readily, their techno-savvy skills are giving them access to inadmissible evidence during trial.

Jurisdictions across the United States have revealed jurors who text message;¹⁷ post messages on blogs;¹⁸ and research information about trials on the Internet.¹⁹ Jurors do not just text message and access the Internet for social reasons. Empirical studies have shown that jurors have difficulty understanding jury instructions.²⁰ Because of this confusion, jurors are taking matters into their own hands and researching information about cases on Web sites such as Google and Wikipeida.²¹ While their actions are sparked by benign motives, they run contrary to our system of jurisprudence.

FACTORS THAT LEAD TO A MISTRIAL

The United States Supreme Court has established a clear test to preserve juror impartiality and prevent rogue jurors from conducting independent research about a case. The Court has held that a presumption of prejudice arises when a juror is directly or indirectly exposed to extraneous infor-

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mation. When this presumption arises, the burden shifts to the government to show “that such contact with the juror was harmless to the defendant.”²³ If the government is unable to rebut this presumption, the defendant is entitled to a new trial.²⁴

Judges have consistently looked to several key factors when applying the presumption shifting test to cases where jurors have accessed extraneous information through the Internet, text messaging, or phone calls. Judicial opinions have overwhelmingly discussed the following three factors as the crux to their decision:

- whether the juror *posted* or *obtained* the information relating to a case;
- whether the juror who received extraneous information communicated it to the other jurors; and
- whether a verdict was already rendered when the juror received the extraneous information.

Whether the juror posted or obtained the information relating to a case.

Courts have held that when jurors merely text message, call, or post information online about a case to nonjurors, these are insufficient grounds for a mistrial. However, if a juror receives outside information by using the Internet or a cell phone, courts are more likely to grant a mistrial.

In *People v. McNeely*,²⁵ the court denied the defendant’s motion for a mistrial because the juror had merely posted about the case online rather than receiving outside information. In *McNeely*, the jury convicted the defendant on numerous charges of theft and burglary.²⁶ The defendant appealed the conviction on the ground that the trial court erred in denying him a new trial based on juror misconduct.²⁷ The juror accused of committing the misconduct was a licensed California attorney.²⁸ During the trial, the

juror posted detailed information about the case on an Internet blog.²⁹ In the blog, the juror described the trial and his experience as a juror in great detail and in a very derogatory manner.³⁰ For example, the juror referred to the defendant as “Donald the Duck” and one of the other jurors as “skinhead Brad.”³¹

While the juror committed misconduct by sharing information on the Internet, the court ultimately denied the motion for a new trial because the People rebutted the presumption of prejudice.³² The court evaluated the juror’s act of posting on the blog as a factor under the totality of the circumstances and concluded that the evidence did not “raise a ‘substantial likelihood’ that Juror No. 8 (or any other juror) was actually biased against McNeely [the defendant].”³³

Similar to *McNeely*, the court in *State v. Goupil* also denied the defendant’s motion for a mistrial because he had merely posted information on the Internet.³⁴ In *Goupil*, prior to jury selection, one of the jurors wrote the following blog entry online: “Lucky me, I have Jury Duty! Like my life doesn’t already have enough civic participation in it, now I get to listen to the local riff-raff try and convince me of their innocence.”³⁵ After the juror was seated for the trial, he also wrote “After sitting through 2 days of jury questioning, I was surprised to find that I was not booted due to any strong beliefs I had about police, God, etc.”³⁶ The juror had also posted in the blog his views on a recent United States Supreme Court decision and a “photograph depicting a woman’s deformed face after she was hit by a drunk driver. . . .”³⁷

Consistent with *McNeely*, the court denied the defendant’s motion for a new trial.³⁸ The court found it significant that the defendant had merely posted information on the Internet rather than obtaining outside information about the case.³⁹ The court also emphasized in the opinion that the juror had not received any responses to the statements he had posted on his blog that was related to the defendant’s case.⁴⁰ By focusing on the responses to the blog, this further indicates that the court’s decision to grant a mistrial hinged on whether the juror actually received outside information.

Unlike *McNeely* and *Goupil*, however, courts have consistently granted a mistrial when jurors used the Internet to research information related to a case rather than merely posting messages online. For example, in *Wardlaw v. State*,⁴¹ the appellate court found that the defendant’s motion for a mistrial should have been granted when a juror obtained extraneous information through the Internet.⁴²

In *Wardlaw*, the defendant Zarzine Wardlaw was charged with having raped his 17-year-old daughter Michelle.⁴³

During the trial, Michelle testified that Wardlaw had raped her on several occasions and that she had informed Cynthia Hodge—a therapeutic behavioral specialist—about these incidents.⁴⁴ When Ms. Hodge was on stand, she testified that Michelle had been diagnosed with oppositional defiant disorder (ODD).⁴⁵ Ms. Hodge, however, neither testified what ODD was nor the effects of this disorder.⁴⁶

During jury deliberations, one of the jurors researched ODD on the Internet and found that lying was a part of the illness.⁴⁷ After learning about this misconduct, the defendant filed a motion for a mistrial.⁴⁸ The trial court denied the defendant’s request.⁴⁹ On appeal, however, the court held that the trial court abused its discretion when it denied the appellant’s motion for a mistrial.⁵⁰ The court explained that

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“the juror’s Internet research of ODD, and her subsequent reporting of her finding, rightly or wrongly, that lying is associated with the disorder, constituted egregious misconduct.”⁵¹

Similar to *Wardlaw*, the appellate court in *State v. Scott*⁵² also held that the defendant’s motion for a mistrial should have been granted when a juror obtained extraneous information from the Internet. In *Scott*, several defendants were charged with murder, possession of weapons, and robbery.⁵³ During trial, one of the witnesses “went on the Internet and looked up defendants’ and the victim’s names and what defendants’ sentence would be if they were convicted.”⁵⁴ Instead of declaring a mistrial, however, the trial judge replaced the juror that had committed the misconduct.⁵⁵

On appeal, the court explained that the juror committed “misconduct in using the Internet to research and obtain extraneous information . . . related to the case. . . .”⁵⁶ Because the juror obtained information rather than merely posting about the case on a blog, the court held that the trial court should have declared a mistrial and ordered a new trial.⁵⁷

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As seen from the cases above, a judge hinges his or her decision to declare a mistrial based on whether a juror sent or obtained information from the Internet. Jurors who post blogs online do not taint the ultimate outcome of a case. When jurors obtain information from the Internet that is inadmissible at trial, however, there is a risk that the verdict will not be based on admissible evidence.

While in the common law jurors were selected because of their knowledge about the events and the people involved, the law today neither requires nor desires jurors with outside knowledge about a case.⁵⁸ The law, in fact, values jurors who are completely ignorant of the circumstances surrounding a case.⁵⁹ This ensures that the final verdict will be based solely on the evidence presented at trial.⁶⁰ Therefore, courts are less concerned if a juror posted or text messaged information about a case and more worried about jurors using the Internet or their cell phones to obtain inadmissible evidence pertaining to a case.⁶¹

Whether a juror who receives extraneous information communicates it to other jurors.

Another factor courts consider significant is whether a juror who commits misconduct by obtaining extraneous information communicates his or her findings to other jurors. In the article, *As Jurors Turn to Google and Twitter, Mistrials Are Popping Up*, John Schwartz reported about a federal drug trial in Florida where nine jurors had used the Internet to research information about the case.⁶² During the trial, one of the jurors admitted to the judge that he had gone online to research about the case.⁶³ Upon further inquiry, the judge learned that eight other jurors had used Google to research information about the defendant and the lawyers, look up news articles about the case, search for evidence, and research definitions on Wikipedia.⁶⁴ The federal judge, William J. Zloch, had no choice but to declare a mistrial.⁶⁵

In that case, the defendant's attorney, Peter Rabin, recalled "thinking that if the juror had not broadly communicated his information with the rest of the jury, the trial could continue and the eight weeks would not be wasted."⁶⁶ Mr. Rabin further explained, "We can just kick this juror off and go. . . ."⁶⁷

Mr. Rabin's evaluation was correct. Courts have consistently held that if a juror researches extraneous information, a mistrial will not be granted as long as the juror did not share the information with other jurors and the judge removes the juror from the trial. For example, in *Scott*, when one of the jurors went online and researched information about the case, the judge tried to remedy this misconduct by removing the juror from the trial.⁶⁸ The appellate court, however, held that the defendant's motion for a mistrial

should have been granted by the trial court because the entire jury was eventually exposed to the extraneous information and hence tainted.⁶⁹

In contrast to *Scott*, the court in *State v. Newman*⁷⁰ held that there were no grounds for a mistrial because the juror who obtained the extraneous information was removed from the trial and did not communicate the information to the other jurors.⁷¹ In *Newman*, one of the jurors had sent a text message to one friend and made a phone call to another friend.⁷² The trial court denied the defendant's motion for a mistrial.⁷³ On appeal, the court agreed with the lower

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court's decision.⁷⁴ The appellate court explained that the contents of the text message and phone call were not important because the juror who committed the misconduct was excluded from the trial and there was no indication that the other jurors had "heard or received any information about the case other than what was presented to them in the courtroom."⁷⁵

Similar to *Newman*, the judge in *Commonwealth v. Guisti*⁷⁶ also denied the defendant's motion for a mistrial.⁷⁷ In *Guisti*, one of the jurors had sent several e-mails to attorneys that were not related to the trial.⁷⁸ The attorneys had responded back to the juror's e-mails by warning him against consulting outside sources.⁷⁹ Unlike *Newman*, however, the trial court did not find it necessary to remove the juror because the juror was not exposed to extraneous influences from the e-mail responses.⁸⁰ Further, the court considered it important that "the juror who sent the e-mails did not share with the other jurors any of the responses she had received."⁸¹ As a result, because the juror was neither exposed to extraneous influences nor communicated the information to the other jurors, the appellate court upheld the trial court's decision.⁸²

The holdings in *Newman*, *Guisti* and *Scott* demonstrate how significant it is whether a juror communicated the information that he or she learned to other jurors. As seen

in *Newman*, if the juror is removed from the trial prior to sharing the information with the remaining jurors, the court is unlikely to declare a mistrial.

Whether a verdict is already rendered when a juror receives extraneous information.

Courts also consider the stage of the trial that the juror committed the misconduct when determining whether to grant a mistrial. In *State v. Goehring*,⁸³ for example, the defendant's motion for a mistrial was denied because the verdict was already decided when the juror obtained the extraneous information.⁸⁴ In *Goehring*, a juror had posted a blog *after* the jury had returned its guilty verdict discussing "the evidence in the case and how the evidence adduced on the second day of trial convinced the juror/blogger that appellant was guilty."⁸⁵ The appellate court agreed with the trial court's denial of the motion for a mistrial.⁸⁶ The court held that it was pertinent to the case that the juror's blogging was done *after* the verdict was rendered and not *before*.⁸⁷

The court in *People v. Giarletta*⁸⁸ also concluded that the stage of the trial was crucial to its holding. In *Giarletta*, after the jury rendered a partial verdict, one of the jurors received a text message from her sister.⁸⁹ The text message stated that one of the witnesses in the case was telling the truth.⁹⁰ The court explained that the juror's text message constituted misconduct that created a risk of prejudice to the defendant.⁹¹ Nevertheless, because "the text message did not occur until *after* the rendition of the partial verdict,"⁹² this negated "any allegation that such misconduct could have created a substantial risk of prejudice that is not otherwise academic."⁹³

The courts in *Goehring* and *Giarletta* both held that the extraneous information received by the jurors did not need to be scrutinized to determine prejudice because it was received after the verdict was rendered. In essence, while contents of a text message or blog could jeopardize a defendant's right to an impartial jury—if a juror does not obtain outside information until after a verdict is rendered—there are no harmful consequences to a defendant.

SOLUTIONS TO THE PROBLEM

Jurors who access the Internet, use their cell phones, and text message during trial are causing mistrials and wasting judicial resources. To reduce the number of mistrials from such misconduct, courts should take preemptive action by regulating wireless communication devices and revising jury instructions to reflect this recent trend.

Regulating wireless communication devices

Wireless communication devices are the main media that

give jurors access to extraneous information during trial. Judges can reduce the number of mistrials by effectively regulating these devices. One approach courts have taken is to impose a complete ban on jurors carrying wireless communication devices in the courthouse.⁹⁴

This approach, however, is too burdensome on jurors and is unlikely to work. First, jurors rely on their cell phones to access their voicemail and important messages from family members and employers. The court could risk angering a jury by imposing a complete ban on jurors carrying cell phones in the courthouse. Second, while imposing a complete ban on cell phones would prevent jurors from obtaining extraneous information during a trial, jurors can always access the Internet and make phone calls when they return home for the evening.⁹⁵

Another approach some courts have taken is to request the jury to turn off their phones during a trial and jury deliberations. Nonetheless, similar to the prior example, this approach will not prevent jurors from researching information about the case at home.

An approach that is most likely to deter juror misconduct is to require jurors to sign a declaration that they will not (1) use any wireless communication devices during the trial and (2) research information about the case when they

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return home for the evening. A court in San Diego has adopted this approach and even threatens jurors with criminal punishment if they lie on the declaration.⁹⁷ While the San Diego court finds it necessary to impose criminal sanctions, this threat may be too harsh.

Instead of threatening the jury with criminal exposure, however, a court can sanction a modest monetary fine for a juror's misconduct. Both the signature and penalty aspect of this approach could significantly deter jurors from using wireless communication devices to obtain extraneous information. By having the jury sign a declaration and threatening juror misconduct with a monetary fine, jurors will be impressed with the importance of the jury instructions and are less likely to research information about a case both during a trial and at home.

Reforming jury instructions

The second step towards preventing jurors from using their cell phones and the Internet to commit misconduct is clear, specific, and explanatory jury instructions. Social networking Web sites, blogs, and text messaging have become a vital part of people's lives.⁹⁸ Jurors can access these media without even realizing the repercussions of their actions. Standard jury instructions that contain general prohibitions against communicating or discussing a case with others could be inadequate to prevent jurors from committing misconduct.⁹⁹

Strong jury instructions should include specific examples so that jurors understand what constitutes a prohibited act. Most jury instructions already include language that prohibits jurors from researching about a case on the Internet. Jury instructions, however, can be more helpful if they specifically list examples of the prohibited activities.

For example, the following is the Judicial Council of California's pretrial instructions for criminal cases:

*Do not share information about this case in writing, by email, or on the Internet. You must not talk about these things with the other jurors either, until the time comes for you to begin your deliberations... Do not do any research on your own or as a group. Do not use a dictionary, the Internet, or other reference materials.*¹⁰¹

A positive aspect about this jury instruction is that it specifically directs jurors to not do research over the Internet. This jury instruction, however, can be substantially improved by listing examples of the forbidden activities. For example, the jury instruction above could include the following additional sentence: "The prohibition against sharing information includes, but is not limited to: e-mailing, text messaging, Tweeting, blogging on Facebook,

MySpace, or accessing any other social networking and Internet Web sites."

Additionally, besides simply instructing jurors to not use the Internet for research, the jury instructions can illustrate what this includes by listing commonly used online research engines. For example, the following additional sentence can be added to the instructions above: "Research over the Internet includes, but is not limited to, the following research engines and Web sites: Google, Yahoo, Bing, Ask and Wikipedia."

With more precise jury instructions, jurors will be reminded that accessing social networking Web sites and research engines fall under the court's umbrella prohibition.

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Numerous reports of jurors posting blogs, Tweets, and researching about a case online have already caused many jurisdictions to implement some of the suggestions proposed above.¹⁰² These jurisdictions have realized the significance of reminding jurors that commonly used communication media are in fact prohibited during trial. If jury instructions include examples of the prohibited acts, jurors are less likely to misunderstand the court's prohibitions.

Finally, Web sites such as Facebook and Google could be replaced by new and more popular media in the future. Therefore, the judge should ultimately be responsible for listing examples of media that are forbidden on the jury instructions. It is not uncommon for jury instructions to leave parts of the instructions blank and provide directions to the judge to fill in certain information. For example, in the Judicial Council of California's Criminal Jury Instructions, there are numerous sections that instruct the judge to fill in the name of the defendant, the languages that a testimony could be given in, or examples of impermissible basis for bias—just to name a few.¹⁰³ By adopting this method, jury instructions can keep pace with new develop-

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ments in technology, social networking Web sites, and research engines.

Along with specific examples of prohibited acts, jury instructions should also explain why jurors are restricted from researching extraneous information about a case. Many judges have discovered that when they explain why they prohibit an act, jurors respond better and understand why the instructions have been given.¹⁰⁴ If jurors comprehend the repercussions of their actions to the trial process, they are less likely to intentionally or negligently violate a court's instructions.

Lastly, jury instructions should impose an obligation on jurors to report misconduct. As discussed in the factors above, if a juror's misconduct is discovered early in the trial, the judge can remove the juror before the entire jury pool has been tainted.¹⁰⁵ This, in effect, could prevent a mistrial and a waste of judicial resources.

Model jury instruction to prevent juror misconduct

Based on the guidelines discussed above, the following would be an effective jury instruction to reduce juror misconduct:

Introduction

You must obey the following rules as a juror. These rules have been developed and are used by this judicial system to ensure that the defendant receives a fair trial. If you fail to follow these rules, the decision in this case could be based on irrelevant and non-legal issues, incorrect information, or prejudicial facts. In sum, the defendant could be convicted or held not guilty based on inaccurate grounds.

Furthermore, if you observe any juror disobeying these rules, REPORT THE MISCONDUCT IMMEDIATELY TO THIS COURT.

Rules

First, DO NOT talk to ANYBODY about this case. This includes, but is not limited to, your family, friends, spiritual advisors, therapists, doctors, or lawyers.

Second, DO NOT share information about this case through writing or electronic devices. The prohibition against sharing information includes, but is not limited to: _____ <list specific examples of electronic devices and Web sites used for sharing information>.¹⁰⁶

Third, you may only discuss this case with other jurors if ALL of the following conditions are met: (A) all of the evidence has been introduced; (B) the attorneys have completed their arguments; (C) I have instructed you on the law; (D) I instruct you to discuss the case; (E) you are in the jury deliberation room; and (F) all of the jurors are present in the jury deliberation room with you.

Fourth, you MUST NOT allow anything outside of the courtroom to affect your decision. During the trial, do not read, listen, or watch anything outside of this courtroom about the case. Outside information does not accurately reflect the findings of this judicial system. As a result, the defendant could be convicted or held not guilty based on incorrect information.

Fifth, DO NOT DO ANY independent or group research about this case. DO NOT conduct research using a book, dictionary, or the Internet. Research over the Internet includes, but is not limited to, the following research engines and Web sites: _____ <list specific examples of commonly used research engines>.¹⁰⁷ Outside information has neither been tested for accuracy nor reflects the true circumstances of THIS CASE. While certain books and Internet sources may seem reliable, they were neither written nor created to address the circumstances of THIS CASE. Therefore, the defendant could be convicted or held not guilty based on incorrect information if you conduct independent research.

Sixth, DO NOT conduct experiments, tests, or visit the scene of this case.

Seventh, if you have a cell phone or any other electronic communication device, turn the device off and DO NOT use the device while in court. If you use a cell phone or any other electronic communication device while you are in the courtroom or research information about this trial when you return home for the evening, you **WILL HAVE TO PAY** a \$200 fine to this court pursuant to the signed declaration you submitted to this court.

CONCLUSION

Courts nationwide have been forced to declare mistrials because of jurors using the Internet and cell phones during trials and jury deliberations.¹⁰⁸ Jurors use their cell phones and the Internet to commit misconduct based on varying motives. Some are genuinely confused about the legal terms used at trial¹⁰⁹ and seek answers to their questions on Google, Wikipedia, and other research engines.¹¹⁰ Others seek fame and notoriety in the Internet community by boasting about their jury service on blogs.¹¹¹ Whether a

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juror's motives are selfish or benign, a juror who accesses extraneous information deprives a defendant of his or her right to an impartial trial.¹¹²

Judges need to stay vigilant against such misconduct by taking preemptive action. First, judges must take a hard stance against such misconduct by having jurors sign a declaration that they will not use wireless communication devices during trial and jury deliberations. Second, courts should threaten monetary fines if a juror commits misconduct. Third, courts need to revise their jury instructions to include illustrations of Internet and cell phone activities that are prohibited by jury instructions. Fourth, besides merely prohibiting an act, jury instructions should also explain why accessing extraneous information is prohibited by a court. Lastly, jury instructions should obligate jurors to immediately report any juror misconduct. By implementing these measures, our judicial system will thwart juror misconduct and take a crucial step forward to help preserve a defendant's Sixth Amendment right to an impartial jury.

¹ Thomas Jefferson (1789), <http://www.levelers.org/jrp/orig/jrp.jurquotes.htm> (last visited Mar. 26, 2010).

² *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975).

³ *Irwin v. Dowd*, 366 U.S. 717, 723 (1961).

⁴ See *infra*.

⁵ See U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed. . . .").

⁶ *Smith v. Phillips*, 455 U.S. 209, 217 (1982).

⁷ See *Turner v. Louisiana*, 379 U.S. 466, 472-73.

⁸ See Marcy Straus, *Sequestration*, 24 AM. J. CRIM. L. 63, 77-79 (1996).

⁹ *Id.*

¹⁰ *Id.*

¹¹ See *infra*.

¹² Lymari Morales, *Nearly Half of Americans Are Frequent Internet Users; Less Affluent, Non-Working, Unmarried Post Big Gains in Usage Since Last Year* *Gallup Poll News Service*, GALLOP POLL NEWS SERVICE, Jan. 2, 2009, <http://www.gallup.com/poll/113638/nearly-half-americans-frequent-internet-users.aspx#2> (last visited Mar. 26, 2010).

¹³ *Id.*

¹⁴ Rita R. Handrich & Douglas L. Keene, *Online and Wired for Justice: Why Jurors Turn to the Internet (the "Google Mistrial")*, THE JURY EXPERT: THE ART AND SCIENCE OF LITIGATION ADVOCACY, Nov. 2009, <http://www.astcweb.org/public/publication/article.cfm/1/21/6/Why-Jurors-Turn-to-the-Internet> (last visited Mar. 26, 2010).

¹⁵ Ralph Artigiere ET AL., *Reining in Juror Misconduct*, 84-JAN FLA. BAR J. 8, 9 (2010).

¹⁶ *Id.*

¹⁷ See *People v. Fulgham*, 2008 WL 4147562, at *6 (Cal. Ct. App. Sept. 9, 2008); see also *People v. Giarletta*, 2007 WL 4374286, at *1 (N.Y. Dec. 17, 2007).

¹⁸ See *People v. McNeely*, 2009 WL 428561, at *7 (Cal. Ct. App. Feb. 23, 2009); see also *State v. Stephen*, 154 N.H. 208, 214-15 (2006).

¹⁹ See *State v. Scott*, No. A-4147-05T4, 2009 N.J. Super. Unpub. LEXIS 1901, at *16 (N.J. Super. Ct. App. Div. July 20, 2009); see also *Wardlaw v. State*, 185 Md. App. 440, 444-45 (2009).

²⁰ See Peter M. Tiersma, *Reforming the Language of Jury Instructions*, 22 HOFSTRA L. REV. 37, 42-43 (1993) ("Much research by linguists, psychologists and others has confirmed that jurors tend to have great difficulty understanding the instructions that are supposed to guide their decisionmaking. For example, studies conducted by the team of Amiram Elwork, Bruce Sales, and James Alfini have consistently shown that jurors have difficulty understanding standard jury instructions. . . .").

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

²² *Remmer v. United States*, 347 U.S. 227, 229-30 (1954).

²³ *Id.* at 229.

²⁴ *Id.* at 230.

²⁵ *People v. McNeely*, 2009 WL 428561 (Cal. Ct. App. Feb. 23, 2009).

²⁶ *Id.* at *1.

²⁷ *Id.*

²⁸ *Id.* at *7.

²⁹ *Id.* at *1-7.

³⁰ *People v. McNeely*, 2007 WL 1723711, at *3-5 (Cal. Ct. App. June 14, 2007), *remanded to Super. Ct. No. SCD194654* (Cal. Super. Ct. 2007).

³¹ *Id.* at *3.

³² *McNeely*, 2009 WL 428561, at *7.

³³ *Id.*

³⁴ *State v. Goupil*, 154 N.H. 208 (2006).

³⁵ *Id.* at 214.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 221-22.

³⁹ *Id.* at 220-21.

⁴⁰ *Id.* at 220-22 (emphasizing that "Juror 2 denied receiving any response to statements posted on his blog that were related to the defendant's case.>").

⁴¹ *Wardlaw v. State*, 185 Md. App. 440 (2009).

⁴² *Id.* at 454.

- 43 *Id.* at 443.
- 44 *Id.* at 444.
- 45 *Id.*
- 46 *Id.*
- 47 *Wardlaw v. State*, 185 Md. App. 440, 444–45 (2009). The trial court received two notes from the jury. The first note stated: “One juror indicated at the beginning of our deliberations that she researched ODD on line Wednesday evening and found that lying was a part of the illness. I am concerned that her statement is an undue influence on the rest of the jurors. Was this okay?” The second note stated: “And the foreman needs to know is lying a part of the illness.”
- 48 *Id.* at 444.
- 49 *Id.*
- 50 *Id.* at 454
- 51 *Id.* at 452.
- 52 *State v. Scott*, No. A-4147-05T4, 2009 N.J. Super. Unpub. LEXIS 1901 (N.J. Super. Ct. App. Div. July 20, 2009).
- 53 *Id.* at *2–3.
- 54 *Id.* at *16.
- 55 *Id.* at *19.
- 56 *Id.* at *27.
- 57 *Id.*
- 58 See *Strauss*, *supra* note 8, at 79.
- 59 *Id.* at 79–80.
- 60 *Id.* at 80 (stating that “so long as they [the jurors] do not use outside information to decide the case, a fair trial is preserved.”).
- 61 See generally *supra*.
- 62 *Schwartz*, *supra* note 19.
- 63 *Id.*
- 64 *Id.*
- 65 *Id.* The mistrial wasted eight weeks of trial work.
- 66 *Id.*
- 67 *Id.* Mr. Rabin’s theory was correct, however, because the other jurors were also conducting independent research, the judge declared a mistrial.
- 68 *State v. Scott*, No. A-4147-05T4, 2009 N.J. Super. Unpub. LEXIS 1901 at *19 (N.J. Super. Ct. App. Div. July 20, 2009).
- 69 *Id.* at 27 (“The problem was not personal, but pervasive, i.e., juror 14’s misconduct tainted the jury as a whole. Accordingly, a mistrial should have been declared. Failure to do so constitutes reversible error. The error requires a new trial.”).
- 70 *State v. Newman*, 738 N.W.2d 887 (N.D. 2007).
- 71 *Id.* at 890.
- 72 *Id.* at 888.
- 73 *Id.* at 890.
- 74 *Id.*
- 75 *Id.* at 891 (“There is no evidence that any juror sitting on the panel which decided this case heard or received any information about the case outside the courtroom. There is no evidence this was not an impartial jury. We conclude, under these circumstances, Newman was not denied his right to a fair and impartial jury.”).
- 76 *Commonwealth v. Guisti*, 449 Mass. 1018 (2007).
- 77 *Id.* at 1019.
- 78 *Id.*
- 79 *Id.*
- 80 *Id.*
- 81 *Id.*
- 82 *Commonwealth v. Guisti*, 449 Mass. 1018, 1019 (2007).
- 83 *State v. Goehring*, 2007 WL 3227386 (Ohio Ct. App. Nov. 2, 2007).
- 84 *Id.* at *7.
- 85 *Id.* at *6.
- 86 *Id.* at *7.
- 87 *Id.* at *6 (“In any event, we would concur with the trial court in concluding that at that point the verdict was rendered and the juror was free to discuss the process by which he reached his determination that appellant was guilty.”).
- 88 *People v. Giarletta*, 2007 WL 4374286, at *1 (N.Y. Dec. 17, 2007).
- 89 *Id.* at *2.
- 90 *Id.*
- 91 *Id.*
- 92 *Id.*
- 93 *Id.* (emphasis added).
- 94 Tresa Baldas, *For Jurors in Michigan, No Tweeting (or Texting, or Googling) Allowed*, NAT’L. L. J., July 1, 2009, <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id+1202431952628&srreturn=1> (last visited Mar. 26, 2010).
- 95 Lisa C. Wood, *Social Media Use During Trials: Status Updates From the Jury Box*, 24-Fall ANTITR. A.B.A. J. 90 (2009).
- 96 *Id.*
- 97 Greg Moran, *Revised Jury Instructions: Do Not Use the Internet; Researching, discussing of cases ‘huge problem,’* THE SAN DIEGO UNION TRIB., Sept. 13, 2009, at A1.
- 98 Keene & Handrich, *supra* note 14.
- 99 See *supra*.
- 100 Wood, *supra* note 95.
- 101 Judicial Council of California Criminal Jury Instructions, CALCRIM § 101 (2009–2010) http://www.courtinfo.ca.gov/jury/criminaljuryinstructions/calcrim_juryins.pdf (last visited Mar. 26, 2010) (emphasis added).
- 102 Wood, *supra* note 95.
- 103 Judicial Council of California Criminal Jury Instructions, *supra* note 101, at §§ 100, 121, 200.
- 104 Artigliere, *supra* note 15, at 14.
- 105 See *supra*.
- 106 Based on the electronic devices and Web sites currently used for sharing information, the judge would insert the following examples: “e-mailing, text messaging, Tweeting, blogging on Facebook, MySpace, or accessing any other social networking and Internet Web sites.” When new electronic devices and social networking Web sites develop, the judge can update the instructions to reflect this change.
- 107 Based on the most recent and commonly used research engines, the judge would insert the following examples: “Google, Yahoo, Bing, Ask and Wikipedia.”
- 108 See *supra*.
- 109 See Tiersma, *supra* note 18, at 42–43.
- 110 See Schwartz, *supra* note 19.
- 111 See *id.*
- 112 See *Strauss*, *supra* note 8, at 79.