

## A PRACTICAL FRAMEWORK FOR PREVENTING “MISTRIAL BY TWITTER”♦

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## INTRODUCTION

This Note examines the ways the social networking application Twitter has recently presented a particular problem in our jury system. Twitter is a relatively new techno-social phenomenon that pushes the boundaries of traditional rules concerning juror misconduct and technology in the courtrooms; it has been implicated as a means of undermining the systemic goal of fair trials by impartial jury. Because Twitter (or rather, a juror using Twitter to disclose or receive information about her case) could interfere with a verdict at any time from voir dire to post-judgment, “mistrial by Twitter” could potentially cause a tremendous waste of judicial resources.<sup>1</sup> Part I of this Note provides a summary of recent events involving Twitter in the news and in the jury box, and an explanation of why Twitter presents a special problem regarding juries and the administration of justice. Part II examines how Twitter implicates juror misconduct and evaluates new rules that judicial, legislative, and administrative bodies across the country have implemented in response to cases of tweeting jurors. Part III then outlines a framework for mitigating the possibility of “mistrial by Twitter.”

The judiciary must be trained to evaluate possible harmful effects of social media and new consumer technologies in the courtroom and jury box. Through this, judges may incorporate such knowledge into existing jurisdictional doctrine regarding juror misconduct and may properly exercise the broad discretion with which they are vested in resolving juror misconduct disputes. Additionally, jurors must be properly informed and instructed during jury selection and during trial in order to preserve their oath to uphold the constitutional rights of the parties and to render a fair verdict. Lastly, court systems must examine the roles of social media and consumer technology during the “life cycle” of jurors in order to implement proper policies regarding electronic devices in the courtroom.

## I. BACKGROUND

### *A. Description of Twitter and Its Users*

The online application known as Twitter is commonly described as a “social networking and micro-blogging tool.”<sup>2</sup> Twitter bills itself as “a free service that lets you keep in touch with people through the exchange of quick, frequent answers to one simple question: What’s

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<sup>1</sup> See, e.g., John Schwartz, *As Jurors Turn to Google and Twitter, Mistrials Are Popping Up*, N.Y. TIMES, Mar. 18, 2009, at A1, available at 2009 WLNR 5102471.

<sup>2</sup> See, e.g., Revou.com, *Twitter Clone Software*, <http://www.revou.com/> (last visited Aug. 21, 2010); Andrew Knowles, *Uses For Twitter Social Network Tool: Micro-blogging Platform Offers New Solutions* (Oct. 1, 2009), [http://social-networking-tagging.suite101.com/article.cfm/uses\\_for\\_twitter\\_social\\_network\\_tool](http://social-networking-tagging.suite101.com/article.cfm/uses_for_twitter_social_network_tool).

happening?”<sup>3</sup> Twitter allows members (also called Tweeters) to send and read 140-character text messages known as “tweets.”<sup>4</sup> The service publishes each author’s tweet in real time on an individual Twitter profile page and/or the author’s blog, and notifies other members who subscribe to, or in Twitter lingo, “follow” the author’s tweet feed.<sup>5</sup> Users can send and read tweets using the Twitter web site, mobile device software applications, mobile phone text messaging services, or other third-party applications such as blogging software.<sup>6</sup> Thus, members can instantly transmit their immediate thoughts, status, or whereabouts to any number of followers.<sup>7</sup> Members and non-members can visit the Twitter home page and search for tweets that mention particular topics or keywords.

Since any person, business, or organization can create a Twitter account by choosing a user name and completing a simple online form,<sup>8</sup> the Twitter universe of content is vast and ever-changing. Although Twitter, Inc., does not report the number of Twitter users, several reports and other evidence corroborate the finding that Twitter usage has grown tremendously since its inception in 2006 and now has a member base numbering in the millions.<sup>9</sup> As of September 1, 2010, a ranking of the 100 most-followed Tweeters included entertainment celebrities, news organizations and media outlets, businesses, politicians, writers, Twitter associates, the White House, and 10 Downing Street.<sup>10</sup> Twitter, Inc., does not publish demographic data on

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<sup>3</sup> This message is displayed on every user’s profile page. See, e.g., Benjamin N. Cardozo (cardozolaw) on Twitter, <http://twitter.com/cardozolaw> (last visited Aug. 21, 2010). Note that the “one simple question” was “[w]hat are you doing?” until November 2009. See Twitter Blog: What’s Happening? (Nov. 19, 2009), <http://blog.twitter.com/2009/11/whats-happening.html>.

<sup>4</sup> See, e.g., Methodshop.com, News, Reviews, and How-To’s, How to Explain Twitter to Your Grandma, <http://www.methodshop.com/gadgets/tutorials/twitter-explained/index.shtml> (last visited Aug. 21, 2010).

<sup>5</sup> *Id.*

<sup>6</sup> Twitter.com, What Twitter Does, <http://twitter.com/about> (last visited Aug. 21, 2010).

<sup>7</sup> Users can manage and limit who follows their tweets using third-party applications or Twitter functions. See Twitter Support: Following Limits and Best Practices, <http://help.twitter.com/forums/10711/entries/68916> (last visited Aug. 21, 2010); Dainis Graveris, 27 Twitter Tools To Help You Find And Manage Followers (May 10, 2009), <http://www.1stwebdesigner.com/development/27-twitter-tools-to-help-you-find-and-manage-followers/>.

<sup>8</sup> Twitter.com, Create an Account, <https://twitter.com/signup> (last visited Aug. 21, 2010).

<sup>9</sup> Twittercounter.com tracks well over 4,600,000 unique Twitter accounts to compile its daily rankings of the most-watched Twitter feeds. See Twittercounter.com, Top Twitter Users, <http://twittercounter.com/pages/100> (last visited Aug. 21, 2010). See also Nielsen Wire, Twitter’s Tweet Smell Of Success (Mar. 19, 2009), [http://blog.nielsen.com/nielsenwire/online\\_mobile/twitters-tweet-smell-of-success/](http://blog.nielsen.com/nielsenwire/online_mobile/twitters-tweet-smell-of-success/); Nielsen Wire, Twitter Grows 1,444% Over Last Year; Time on Site Up 175% (June 22, 2009), <http://blog.nielsen.com/nielsenwire/nielsen-news/twitter-grows-1444-over-last-year-time-on-site-up-175/>; Nielsen Wire, Social Media Stats: Myspace Music Growing, Twitter’s Big Move (July 17, 2009), [http://blog.nielsen.com/nielsenwire/online\\_mobile/social-media-stats-myspace-music-growing-twitters-big-move/](http://blog.nielsen.com/nielsenwire/online_mobile/social-media-stats-myspace-music-growing-twitters-big-move/).

<sup>10</sup> Twittercounter.com, *supra* note 9. See entertainment celebrities (to name a few, Britney Spears, Lady Gaga, Oprah Winfrey, and Ashton Kutcher, each of whom have from four million to nearly six million followers as of September 1, 2010), news organizations and media outlets (The New York Times, CNN, Time Magazine), businesses (Whole Foods Market, Zappos.com,

Tweeters, but recent search shows that Tweeters (or at least, their online personas) can be grandmothers,<sup>11</sup> math teachers,<sup>12</sup> small businesses,<sup>13</sup> sheriff departments,<sup>14</sup> and Joe Sixpacks.<sup>15</sup> While it is difficult to define a typical Tweeter, in general, Tweeters tend to value feeling connected to many people, exchanging information in a timely manner, and learning new things from and about other people.<sup>16</sup>

### B. *Twitter in the News*

Since its launch in 2006, the Twitter universe has become more diverse, pervasive, and closely examined. A consulting firm recently conducted a study of Twitter content, and found that 78% of public tweets could be categorized as “[p]ointless [b]abble” or “[c]onversational.”<sup>17</sup> While the same study found that “[n]ews” occupied just 3.6% of the sample tweet pool, Twitter has emerged as an important technology in journalism.<sup>18</sup> Though most Twitter content on any given day is likely to be inane, inconsequential chatter, Twitter occasionally makes headlines as Tweeters grapple with how to appropriately navigate this new technology. The most familiar situation seems to be a Tweeter in a position of relative prominence who

JetBlue), politicians (George Stephanopoulos, Al Gore, Senator John McCain), writers (Heather Armstrong of dooce.com, Ana Marie Cox of anamariex.typepad.com), Twitter associates (co-founders Jack Dorsey and Biz Stone), the White House, and 10 Downing Street.

<sup>11</sup> See Posting of Lavina Johnson (lavinajohnson) to Twitter, <http://twitter.com/lavinajohnson/status/4034865666> (Sep. 16, 2009, 15:22 EST) (“My greatest loves are my children and grandchildren. They are the reason I fight so hard to be here. God is the Alpha and the Omega!!”).

<sup>12</sup> See Posting of Lara Wilhelm (dhsmathgoddess) to Twitter, <http://twitter.com/dhsmathgoddess/status/22651309977>, (Aug. 31, 2010, 17:42 EST) (“Algebra I Block – No Homework; Algebra I – 7th & 8th need to complete the coordinate plane diagram by labeling the parts. See you tomorrow!”).

<sup>13</sup> See Posting of “CyclingCloseout” to Twitter, <http://twitter.com/CyclingCloseout/status/4689269904> (Oct. 7, 2009, 15:00 EST) (“Fyxation Tires just came into stock- best fixed gear tires- get a free Cog Magazine #7 with every tire purchased.”).

<sup>14</sup> See Posting of “santafesheriff” to Twitter, <http://twitter.com/santafesheriff/status/10005757813> (Mar. 4, 2010; 22:11 EST) (“Wht 2006 Mits. Lancer 4 door w/tinted windows NM JJW 077 stolen from Madison Rd. If seen call SF Co. Sheriff 428-3720.”).

<sup>15</sup> See Posting of “JoeSixpackSays” to Twitter, <http://twitter.com/JoeSixpackSays/status/10846493191> (Mar. 21, 2009; 20:43 EST) (“The Baby Boomers are getting their just desserts, for allowing this to happen. Now we will get paid back by a SLOW DEATH! OBAMACARE!”).

<sup>16</sup> See, e.g., MarketingCharts.com, *Tweeters Motivated by Learning, Immediacy* (Apr. 24, 2009), <http://www.marketingcharts.com/interactive/tweeters-motivated-by-learning-immediacy-8864/>; Gavin O’Malley, *Online Media Daily, Study: Twitter Users = Information Junkies* (Apr. 27, 2009), [http://www.mediapost.com/publications/?fa=Articles.showArticle&art\\_aid=104808](http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=104808).

<sup>17</sup> Pear Analytics, *Twitter Study – August 2009* (Aug. 12, 2009), <http://www.pearanalytics.com/wp-content/uploads/2009/08/Twitter-Study-August-2009.pdf>. See also Pear Analytics, *Twitter Study Part 2 – Continuing the Conversation* (Aug. 24, 2009), <http://www.pearanalytics.com/blog/2009/twitter-study-continuing-the-conversation/>.

<sup>18</sup> See, e.g., Joyce E. Cutler, *Judges, Lawyers Say Twitter, Blogs Raise Issues in Defining Courtroom ‘Journalists,’* 14 BNA ECLR 1627 (Nov. 11, 2009). Twitter also played a pivotal role in alerting the world of the sociopolitical atmosphere in Iran during the 2009 national elections. See, e.g., Lev Grossman, *Why Twitter is the Medium of the Moment*, TIME, Jun. 17, 2009, <http://www.time.com/time/world/article/0,8599,1905125,00.html>.

unthinkingly dashes off an observation that later (sometimes only a few seconds) turns out to be an inappropriate disclosure.<sup>19</sup>

For example, on September 14, 2009, “Nightline” co-anchor Terry Moran tweeted that President Obama, during pre-interview banter with CNBC anchor John Harwood, had just “called Kanye West a ‘jackass’ for interrupting Taylor Swift’s acceptance speech” for the Best Female Video award.<sup>20</sup> Moran was able to overhear the remark because “ABC News” Washington bureau shares a network fiber line with CNBC, and producers monitoring CNBC’s feed heard the exchange.”<sup>21</sup> Problematically, CNBC had made an explicit agreement with the White House that the president’s remarks outside of the taped interview were to be off the record.<sup>22</sup> Before ABC executives could determine whether the material was appropriate for publication, Moran’s tweet (and the tweets of several other network employees) had already reached over one million followers.<sup>23</sup> ABC ordered the tweets deleted and issued an apology within an hour of Moran’s tweet, but by then the story was out; celebrity gossip outlet TMZ.com posted the audio recording of the conversation the next day.<sup>24</sup>

In April 2009, Professor Steve Molyneux, sixteen-year veteran of the magistrate bench in the United Kingdom resigned after one of his colleagues reported him to bench administration for tweeting about matters before the court.<sup>25</sup> Some of the tweets were quite detailed, including “one that was prejudicial about considerations for bail.”<sup>26</sup>

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<sup>19</sup> See a summary of Twitter defamation suits: Karen Sloan, *Twitter Libel Liability Gets Early Test* (Jan. 27, 2010), [http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202439525970&Twitter\\_Libel\\_Liability\\_Gets\\_Early\\_Test](http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1202439525970&Twitter_Libel_Liability_Gets_Early_Test). See also the case of Dallas Mavericks owner Mark Cuban, who was fined by the NBA for offensive tweets: ESPN.com, *Dallas Mavericks Owner Mark Cuban Fined \$25,000 for Ref Comments* (Aug. 21, 2009), <http://sports.espn.go.com/nba/news/story?id=4025741>.

<sup>20</sup> Matea Gold, *Obama, Kanye West and Trouble with Twitter*, L.A. TIMES, Sept. 16, 2009, at 15, available at [latimes.com/news/nationworld/nation/la-et-abctwitter16-2009sep16,0,3179288.story](http://latimes.com/news/nationworld/nation/la-et-abctwitter16-2009sep16,0,3179288.story). Moran’s tweet read “Pres. Obama just called Kanye West a ‘jackass’ for his outburst at VMAs when Taylor Swift won. Now THAT’S presidential.” See L.A. Times Top of the Ticket Blog, *Obama calls Kanye West a ‘Jackass,’ but Not Officially* (Sept. 14, 2009), <http://latimesblogs.latimes.com/washington/2009/09/obama-calls-kanye-west-jackass.html>.

<sup>21</sup> Gold, *supra* note 20.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> TMZ.com, *Obama Calls Kanye a ‘Jackass’ – The Audio* (Sept. 15, 2009), <http://www.tMZ.com/2009/09/15/obama-calls-kanye-a-jackass/>.

<sup>25</sup> Richard Ashmore, *Magistrate Quits After Posting Updates About Ongoing Cases on Twitter ‘While in Court,’ Mail on Sunday*, Apr. 26, 2009, available at 2009 WLNR 7877035; Simon Hardy, *Shropshire Star Online, Magistrate Quits in Twitter Row* (Apr. 25, 2009), <http://www.shropshirestar.com/2009/04/25/magistrate-put-case-thoughts-on-internet/>.

<sup>26</sup> Nigel Morgan, *Morgan PR Blog, Disorder in Court – Twitter Magistrate Wrong to Resign* (Apr. 26, 2009), [http://www.morganpr.co.uk/Disorder\\_in\\_court\\_Twitter\\_magistrate\\_wrong\\_to\\_resign](http://www.morganpr.co.uk/Disorder_in_court_Twitter_magistrate_wrong_to_resign). According to the Shropshire Star, the tweet “which landed him in hot water . . . concerned a bail application . . . for three men accused of robbing Lloyds TSB in Dawley. Prof. Molyneux . . . wrote: ‘First defendant. Conspiracy to rob TSB of £500,000. Good start – wrong previous convictions presented.’ He added later: ‘Finished hearing bail. Three refused for planning robbery of £480,000 from TSB in Dawley.’” Hardy, *supra* note 25.

Molyneaux claimed that he had not done anything wrong, but had merely repeated what was “in the public domain already.”<sup>27</sup> Molyneaux said he intended to draw younger (presumably hipper) magistrates to the bench with his online musings: “I thought . . . that by reporting certain things I would help get younger magistrates . . . The powers that be have totally overreacted – they probably don’t even understand the technology. The legal system is still stuck in the Dark Ages.”<sup>28</sup>

Perhaps most relevant for this Note is the incident involving television weatherman Al Roker, who found himself in hot water after tweeting photos of his jury duty experience to his 20,000-plus followers in May 2009.<sup>29</sup> Roker used his iPhone to post pictures of the jury lounge at the New York State Supreme Court in Manhattan County, which included shots of his fellow jurors.<sup>30</sup> The photos quickly made their way to TMZ.com and other news outlets, and within a couple of hours, David Bookstaver, a spokesman for the court system, discovered the incident and reached out to the chief jury clerk.<sup>31</sup> The chief jury clerk then asked Roker to stop posting pictures. Roker, while apologetic, tweeted “So everyone is clear, I am NOT taking pictures in the courtroom. So folks need to lighten up. I am in the jury lounge.”<sup>32</sup> Bookstaver noted that Roker’s actions were “‘ill-advised’ but not illegal – despite a sign which says in no uncertain terms that taking photographs ‘anywhere in the courthouse is strictly prohibited.’”<sup>33</sup> Bookstaver remarked that news photographers were often allowed to take photographs in or around the courthouse, and that the sign expressed a general policy for preventing “people running amok.”<sup>34</sup> Roker tweeted as he was about to re-enter the courtroom after a break “Whew. Learned a lesson. No, I repeat, no court personnel told me it was ok. Going back into the courtroom, iPhone buried deep in my bag.”<sup>35</sup> The next morning: “Well, citizens of the United States of Twitterville, it was a fun day yesterday, with jury duty and twitpicking when I shouldn’t. Now onward.”<sup>36</sup>

### C. *Twitter in the Jury Box*

Roker was not seated on a jury when he sent his controversial tweets, and the tweets did not concern any particular case. In several

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<sup>27</sup> Hardy, *supra* note 25.

<sup>28</sup> Ashmore, *supra* note 25.

<sup>29</sup> Corky Siemaszko, *Al’s All A-Twitter: ‘Today’ Weatherman Creates Storm Posting Pics from Jury Duty on Web*, N.Y. DAILY NEWS, May 29, 2009, at 4, available at 2009 WLNR 10227284.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> Jeff Richardson, *iPhoneJD.com – Lawyers Using iPhones, Al Roker’s iPhone Jury Duty Experience* (Jun. 1, 2009), [http://www.iphonejd.com/iphone\\_jd/2009/06/al-rokers-iphone-jury-duty-experience.html](http://www.iphonejd.com/iphone_jd/2009/06/al-rokers-iphone-jury-duty-experience.html).

<sup>36</sup> *Id.*

cases, however, parties have challenged a sitting juror's use of Twitter, arguing that it is a form of – or evidence of – jury misconduct.<sup>37</sup>

On February 26, 2009, an Arkansas jury entered a \$12.6 million dollar verdict against building materials company Stoam Holdings and its owner, Russell Wright.<sup>38</sup> Two investors accused Wright of defrauding them, describing the company as “nothing more than a Ponzi scheme.”<sup>39</sup> Shortly after the verdict, Wright's attorneys discovered that juror Johnathan Powell had tweeted eight messages about the case.<sup>40</sup> Throughout the day of trial, Powell tweeted using his cell phone's text messaging function; Powell said that he published posts but did not see posts or replies from other users.<sup>41</sup> The judge forbade jurors from researching trial-related information on the Internet, but did allow cell phone use on breaks.<sup>42</sup> Powell said he sent his tweets during these breaks.<sup>43</sup> The tweets at issue on appeal were ““So, Johnathan, what did you do today?” Oh, nothing really. I just gave away TWELVE MILLION DOLLARS of somebody else's money!” and “Oh, and nobody buy Stoam. It's bad mojo, and they'll probably cease to exist, now that their wallet is \$12M lighter. <http://www.stoam.com/>.”<sup>44</sup> Wright's lawyers argued on appeal that the messages demonstrated not only that Powell was not impartial and had conducted outside research, but also that Powell “was predisposed toward giving a verdict that would impress his audience.”<sup>45</sup> Powell said that ““all Stoam-related tweets were made after the verdict had been handed down,” which was sometime around 3:45 PM.”<sup>46</sup> While the jury may have finished deliberating, Powell actually sent his tweets shortly before the verdict was formally announced.<sup>47</sup>

Noting that Arkansas law requires defendants to prove that outside

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<sup>37</sup> See *infra* pp. 17-23.

<sup>38</sup> See Schwartz, *supra* note 1 at A1; Jon Gambrell, Appeal Claims Juror Bias in “Tweets” Sent During \$12 Million Case (Mar. 16, 2009), <http://www.law.com/jsp/article.jsp?id=1202429071686>.

<sup>39</sup> John G. Browning, In Chambers – Summer 2009, The Dangers of the Online Juror, [http://www.yourhonor.com/IC-Online/IC\\_Summer09/OnlineDanger2.html](http://www.yourhonor.com/IC-Online/IC_Summer09/OnlineDanger2.html) (last visited Aug. 21, 2010).

<sup>40</sup> David Chartier, Juror's Twitter Posts Cited in Motion for Mistrial (Mar. 15, 2009), <http://arstechnica.com/web/news/2009/03/jurors-twitter-posts-cited-in-motion-for-mistrial.ars>.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> Peter Mychalcewycz, Man's Improper Tweeting Could Cause Mistrial (Mar. 18, 2009), <http://www.switched.com/2009/03/18/mans-improper-tweeting-could-cause-mistrial/>. The tweets at issue are still available as of this writing: ““So, Johnathan, what did you do today?” Oh, nothing really. I just gave away TWELVE MILLION DOLLARS of somebody else's money!” Posting of Johnathan Powell (johnathan) to Twitter, <http://twitter.com/johnathan/status/1255565946> (Feb. 26, 2009; 17:09 EST); “Oh, and nobody buy Stoam. It's bad mojo, and they'll probably cease to exist, now that their wallet is \$12M lighter. <http://www.stoam.com/>” Posting of Johnathan Powell (johnathan) to Twitter, <http://twitter.com/johnathan/status/1255697916> (Feb. 26, 2009; 17:43 EST).

<sup>45</sup> See, e.g., Browning, *supra* note 39.

<sup>46</sup> Chartier, *supra* note 40.

<sup>47</sup> Note the time-stamps on each tweet cited in *supra* note 44.

information entered the jury room and influenced the verdict, not that information from the jury leaked out, the court held that Powell's actions did not violate any rules, and that the Twitter messages did not demonstrate any evidence of Powell being biased.<sup>48</sup> After the appeal proceedings, Powell remarked, "[t]he courts are just going to have to catch up with the technology."<sup>49</sup>

Around the same time as the Stoam appeal, a federal court in Pennsylvania addressed a similar situation involving a tweeting juror. On March 16, 2009, a federal jury found former Pennsylvania state senator Vincent J. Fumo guilty on 137 federal corruption charges.<sup>50</sup> Following the conviction, Fumo moved for acquittal or a new trial; one of the grounds set forth in the motion was that the trial court abused its discretion in refusing to remove juror Eric Wuest after it was revealed that Wuest viewed a news report about the trial and made public postings on Facebook, Twitter, and his blog during trial.<sup>51</sup>

The Twitter message at issue, posted during the jury's deliberations stated, "This is it . . . no looking back now!"<sup>52</sup> At the hearing in response to defendants' motion to halt deliberations and remove Wuest, Wuest testified that he used Twitter as "a brief, stream-of-consciousness diary of his thoughts."<sup>53</sup> Wuest also testified that,

<sup>48</sup> Browning, *supra* note 39.

<sup>49</sup> *Id.*

<sup>50</sup> Fumo was found guilty of defrauding the state Senate by getting workers to do personal and political-campaign work on state time, and defrauding two nonprofits, Citizens' Alliance for Better Neighborhoods and the Independence Seaport Museum. See, e.g., Emilie Lounsberry and Craig R. McCoy, *Fumo's Bid for New Trial Rejected*, PHILA. INQUIRER, Jul. 10, 2009, at B1, available at 2009 WLNR 13154629.

<sup>51</sup> *United States v. Fumo*, 639 F. Supp.2d 544, 555 (E.D. Pa. 2009). During deliberations, the defense moved for an immediate halt in deliberations and for Wuest's removal, stating that the juror had "violated admonitions not to disclose the status of deliberations." Emilie Lounsberry, *Fumo Lawyers Target Juror, Deliberations*, PHILA. INQUIRER, Mar. 15, 2009, available at [http://www.philly.com/inquirer/special/fumo/20090315\\_Fumo\\_lawyers\\_target\\_juror\\_deliberations.html](http://www.philly.com/inquirer/special/fumo/20090315_Fumo_lawyers_target_juror_deliberations.html). The defense requested that the judge question the juror and other members of the panel. The petition requested "[a]n immediate suspension of deliberations and a delicate but probing judicial inquiry." *Id.* Defense's lawyers posited that "[d]epending on the results of that inquiry, it seems that one or more jurors ought to be removed and possibly replaced . . . or that a mistrial will be required." *Id.* The court ultimately held that a hearing was not warranted. *Fumo*, 639 F. Supp.2d at 553. Note that this Note discusses only the portion of defendant's motion that relates to Twitter. Regarding the news report: "[a]fter questioning Wuest, the Court was – and still remains – convinced that he was never subject to any outside influence from the news media, that his impartiality remained untainted, and that he tried to carry out his jury duties with diligence and propriety." *United States v. Fumo*, No. 06-319, 2009 WL 1896028, at \*116 (E.D. Pa. June 17, 2009). Incidentally, the news report in question informed Wuest that his postings on Facebook and Twitter "were receiving media scrutiny." *Id.* The court found that the Facebook status updates at issue "failed to show any outside influence or prejudice, or even that Wuest was communicating about the substance of trial." *Id.* at \*122, n.30. An audio recording of the chambers conference regarding Wuest is available in two files at the Philadelphia Inquirer web site: <http://www.philly.com/inquirer/special/41331127.html> (or <http://media.philly.com/storage/inquirer/BigFumoMp3/thejuror1.mp3>) and <http://www.philly.com/inquirer/special/41331457.html> (or <http://media.philly.com/storage/inquirer/BigFumoMp3/thejuror2.mp3>) (last visited Aug. 21, 2010).

<sup>52</sup> *Fumo*, No. 06-319, 2009 WL 1896028, at \*117.

<sup>53</sup> *Id.*



while it is possible to respond to Twitter postings and to read other users' responses to tweets, he did not use such functions during the trial.<sup>54</sup> The court found that Wuest's comment "could not serve as a source of outside influence because, even if another user had responded to Wuest's Twitter postings (of which there was no evidence), his sole message suggested that the jury's decision had been made and that it was too late to influence him."<sup>55</sup> The court also found that Wuest's comment caused no discernible prejudice because "it was so vague as to be unclear. Wuest raised no specific facts dealing with the trial, and nothing in his comment directly referred to the trial or indicated any disposition toward anyone involved in this suit. Finally, there is no evidence that he discussed any of these matters with any of his fellow jurors."<sup>56</sup> Hence, the court declined to grant Fumo's motion on this basis.<sup>57</sup> Here, as in the Arkansas case, the court found unavailing the defense's argument that the juror in question revealed bias in tweets.<sup>58</sup>

## II. TWITTER AND JURORS

As illustrated by the foregoing examples, Twitter has made a problematic debut in our legal system. Both cases, together with Al Roker's incident, illustrate that those who are in the habit of tweeting could continue to tweet during jury service,<sup>59</sup> raising difficult questions about possible misconduct and prejudice.<sup>60</sup> While the *Stoam* and *Fumo* cases focused on Twitter as a means for revealing juror misconduct – both bias and exposure to outside evidence or influence – Twitter can also be a form of misconduct itself.<sup>61</sup> For example, courts typically instruct jurors not to discuss the case with anyone during the course of the trial.<sup>62</sup> But do tweets constitute a "conversation"? Roker's experience also raises important questions about timing, as Roker was not serving on a jury when he tweeted the pictures. At what point in the "life cycle" of a juror can tweets be considered juror misconduct? This Note addresses these questions and provides a framework for court systems and judges to understand Twitter in the context of today's courtroom, address problems Twitter causes in the administration of

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<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *See id.*, at \*122; Browning, *supra* note 39.

<sup>59</sup> *See, e.g.*, Jason Cato, *Burgeoning Social Networking System Has Legal Community in a Twitter*, PITTSBURGH TRIB. REV., Feb. 8, 2010, available at 2010 WLNR 2656842.

<sup>60</sup> *See infra*, Part I.A.

<sup>61</sup> *See generally Fumo*, No. 06-319, 2009 WL 1896028; Browning, *supra* note 39.

<sup>62</sup> *See, e.g.*, 21 CA. JUR. CRIM. LAW TRIAL § 280 (2010) (jurors' receipt of information not presented in court); 90 OHIO JUR. 3D TRIAL § 420 (2010) (effect on verdict of juror misconduct); 34A NY JUR. CRIM. LAW PROC. § 2827 (2009) (jury verdict may be overturned on showing of improper influence, indicating jury conduct which tends to put jurors in possession of evidence not introduced at trial).

justice, and develop ways to avoid and/or mitigate these problems.<sup>63</sup>

### A. *Twitter and Juror Misconduct*

Juror misconduct typically takes the following forms: (1) contact between third parties and jurors; (2) “exposure by jurors to extrajudicial non-evidentiary materials;” (3) conduct by jurors that evinces bias and prejudice; (4) efforts by jurors to conduct experiments and reenactments to test the evidence; (5) untruthful statements by jurors during the voir dire; (6) physical and mental impairment of jurors; (7) “pre-deliberation discussions by jurors;” and (8) “efforts by jurors to repudiate the trial court’s instructions on the law.”<sup>64</sup> The first three forms are most likely to implicate Twitter.

#### 1. Contact Between Third Parties and Jurors

Generally, jurors are instructed to avoid communicating about the case with third parties. Conversations about the jury’s deliberations, particularly those without the court’s permission or without the knowledge of counsel, undermine the integrity of the deliberation process. In criminal cases, such conversations are prohibited in order to protect the defendant’s constitutional rights to confrontation and an impartial jury.<sup>65</sup>

It may be useful to distinguish between two types of Twitter use. First, jurors might themselves post tweets. Second, jurors might follow others’ tweets, or see responses from others to their own tweets. Twitter blurs the line between active versus passive participation; traditionally, following someone is not considered “active.” But is someone who purposefully follows (in the Twitter sense of the word) a status update feed an active participant in a conversation, or a passive observer, or somewhere in-between? Tweets start out as one-way communiqués – from a Tweeter to the internet. However, tweets can potentially reach millions of people, most of whom (depending on the original Tweeter’s privacy settings) have the ability to tweet back, and then tweet amongst themselves. So what may begin as an outgoing “beacon” from a single source has the potential to become a virtual cacophony of tweets. Thus, the line between sending and receiving information is not so clear. Furthermore, it is not clear whether tweet-following can constitute the type of “seeking outside information” that

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<sup>63</sup> Rules governing jury service and juror conduct can vary among states, between state and federal court systems, and among individual judges. Furthermore, standards for proving juror misconduct and jury tainting vary among jurisdictions. Accordingly, this Note does not posit a blanket recommendation for all courtrooms.

<sup>64</sup> Bennett L. Gershman, *Contaminating the Verdict: The Problem of Juror Misconduct*, 50 S.D. L. REV. 322, 324 (2005), available at <http://ssrn.com/abstract=1292890>. Note that the Gershman article examines the implications of juror misconduct in criminal trials, while this Note does not place a particular focus on either civil or criminal trials.

<sup>65</sup> See 75B AM. JUR. 2D *Trial* § 1326 (2010).

often constitutes juror misconduct.<sup>66</sup>

In theory, jurors are permitted to discuss the case only with one another, only after summation, and only during the time of deliberation.<sup>67</sup> Thus, it seems obvious that polling one's Facebook friends on the guilt of the accused, for example, could constitute a violation of the juror's oath to render a fair verdict, as such behavior amounts to starting up a conversation about the case among one's friends.<sup>68</sup> But it doesn't seem so obvious with Twitter; one might bar jurors from tweeting not just because the outgoing tweets are problematic themselves, but because they may begin a conversation that will become problematic, depending on how others in the "Twittersphere" respond.

## 2. Exposure by Jurors to Extra-judicial, Non-evidentiary Materials

Jurors are to consider only the evidence put before them at trial. When a jury considers facts that have not been introduced into evidence, parties (particularly, criminal defendants) effectively lose the rights of confrontation, cross-examination, and the assistance of counsel with regard to that matter.<sup>69</sup> Since materials not properly introduced into evidence are not vetted by the parties nor the judge, juror exposure to such "extra-judicial" evidence undermines the adversarial process and the judge's authority.

A juror could perform a search at Twitter.com using terms relevant to the juror's case; this would be analogous to "googling" the parties or other issues presented in court and could thus be impermissible if the juror came across facts not presented in court.<sup>70</sup> Twitter could also deliver outside information to a juror even if the juror did not actively search for it: another tweeter in the juror's network could share some relevant material with the juror, either in response to the juror's tweets

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<sup>66</sup> See sources cited *supra* note 62.

<sup>67</sup> See 75B AM. JUR. 2D *Trial* § 1301, 1305 (2010).

<sup>68</sup> See the case of a UK juror who was kicked off the jury for posting the details of the child abduction and sex assault case on her Facebook profile and polling readers: "I don't know which way to go, so I'm holding a poll." Guy Patrick, Juror Axed for Verdict Poll on Facebook, Times Online (Nov. 24, 2008), <http://www.thesun.co.uk/sol/homepage/news/article1963544.ece> (last visited Aug. 21, 2010). She reportedly did not apply any privacy settings to the poll, meaning that any Facebook user could read the post and vote; some people did indeed vote. *Id.* See generally 75B AM. JUR. 2D *Trial* § 1305.

<sup>69</sup> See 75B AM. JUR. 2D *Trial* § 1301, 1305 (2010).

<sup>70</sup> See *Russo v. Takata Corp.*, 774 N.W.2d 441 (S.D. 2009), where the trial court's grant of a new trial for a wrongful death action due to juror "googling" was upheld. At trial, a juror obtained, via the internet, evidence concerning prior lawsuits against a defendant seat belt manufacturer. *Russo*, 774 N.W.2d at 443. He conducted the search after he received a jury summons but prior to voir dire and being seated on the jury. *Id.* During deliberations the juror's Google search was made known to five other jurors. *Id.* After the jury returned a verdict for the defense, plaintiff moved for new trial claiming juror misconduct and that extrinsic information was revealed to the jury during a critical stage of the deliberations. *Id.* The evidence was not obtained through introduction of evidence at trial, was not knowledge or information obtained during the course of the juror's employment or life experiences and, thus, was extrinsic within the meaning of the South Dakota statute that allows inquiry into the jury's verdict upon allegation that extraneous prejudicial information was improperly brought to the jury's attention. *Id.* at 448.

or independently. This type of misconduct is linked to other forms of misconduct: a juror could encounter extrinsic evidence through an instance of improper communication with a third party, and the evidence could unduly bias or prejudice the juror.

### 3. Conduct by Jurors that Evinces Bias and Prejudgment

As the *Stoam* and *Fumo* cases indicate, parties may look to juror tweets as a means of revealing bias. The result in *Stoam* seems to imply that outgoing juror tweets are permissible.<sup>71</sup> However, every court issues slightly different standards of juror conduct, and each state has different standards for proving juror misconduct/bias. For example, the new Michigan rule specifically prohibits seeking *and* disclosing information about the case,<sup>72</sup> while other rules emphasize the jurors' receipt of outside information.<sup>73</sup> *Stoam* also raises a question of when juror tweeting is permissible; Powell said he tweeted during trial breaks and after the jury reached its verdict.<sup>74</sup> Was Powell exploiting a loophole left by "traditional" instructions, or was he simply exercising his right to discuss the case after it ends? Furthermore, exactly what content betrays a juror's bias or prejudice, and what content is innocuous? The litigants challenging verdicts from tweeting jurors seem to treat tweets as reliable indicia of jurors' thoughts.<sup>75</sup> However, the litigants themselves recognize that sometimes, people who post things for an audience may tailor the post for their audience,<sup>76</sup> thus making tweets less reliable for their truth. Thus, it's not clear (from the *Stoam* and *Fumo* cases, at least) that Twitter is truly a reliable means of testing juror bias, and it's not clear how seriously courts should treat Twitter as a threat to the administration of justice.<sup>77</sup>

A juror could communicate with third parties by sending, reading, or responding to tweets during jury service; any of these behaviors could implicate the aforementioned means of juror misconduct. For example, a Twitter search of "jury duty" reveals that people commonly

<sup>71</sup> See Browning, *supra* note 39.

<sup>72</sup> MI Rules MCR 2.511, available at <http://coa.courts.mi.gov/rules/documents/1Chapter2CivilProcedure.pdf> (last visited Oct. 2, 2010).

<sup>73</sup> See, e.g., OSBA News Detail, <http://www.ohiobar.org/Pages/OSBANewsDetail.aspx?itemID=1200> (last visited May 30, 2010). The new jury instruction is available at <http://federalevidence.com/downloads/blog/2010/OSBA.Jury.Instructions.pdf>.

<sup>74</sup> Chartier, *supra* note 40.

<sup>75</sup> *Fumo*, No. 06-319, 2009 WL 1896028, at \*108-\*121; Browning, *supra* note 39.

<sup>76</sup> *Fumo*, No. 06-319, 2009 WL 1896028, at \*121; Browning, *supra* note 39.

<sup>77</sup> See Debra Cassens Weiss, ABA Journal Internet News Blog, Possible Defense to Twitter Suits: Tweets Aren't Taken Seriously (Oct. 8, 2009, 7:48 AM CDT), [http://www.abajournal.com/news/article/possible\\_defense\\_to\\_twitter\\_suits\\_tweets\\_arent\\_taken\\_seriously/](http://www.abajournal.com/news/article/possible_defense_to_twitter_suits_tweets_arent_taken_seriously/). But at least one New York attorney believes that jurors should be allowed to tweet during trial: Gerry Oginski, The Law Office Of Gerald Oginski, LLC, Why Jurors in New York Should Be Allowed to Twitter, <http://www.oginski-law.com/video/why-jurors-in-new-york-should-be-allowed-to-twitter.cfm> (last visited Aug. 21, 2010).

tweet about being summoned or otherwise participating in jury duty.<sup>78</sup> Most of these tweets would not seem to implicate misconduct or bias, as they do not pertain to a particular case and are often sent by the tweeter when he is on his way to or from jury duty. However, these tweets could act as a notice to the tweeting juror's followers that he/she is on jury duty, and the juror may then be subject to unsolicited messages from third parties regarding the case. This situation could also expose jurors to materials not vetted in court. Finally, the tweet itself, depending on its content, could reveal a juror's personal bias regarding the case at issue. The real-time stream of information to a live audience is the primary feature that distinguishes Twitter from other, "traditional" forms of communication and suggests that Twitter (and perhaps other social media) is a form of technology that deserves special attention and treatment within the legal world. As Twitter and other forms of internet communication have become more ubiquitous and integrated into daily life, people who tweet regularly may continue the habit while serving on a jury. Thus, the nature of Twitter (fast, easy to access, and integrated into daily life) is such that a juror could unwittingly break his oath to render a fair verdict.<sup>79</sup>

#### B. *Analysis of Responses to Tweeting Jurors*

In several states, courts themselves have already begun to amend their instructions and admonitions to the jury to account for Twitter and other forms of internet communication.<sup>80</sup> The judiciary may be the best branch of government to address the problem of tweeting jurors; courts are more likely to understand the legal and practical issues specific to the administration of justice, and may be able to more quickly

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<sup>78</sup> Twitter.com Search "jury duty," <http://twitter.com/#search?q=jury%20duty> (last visited Aug. 21, 2010).

<sup>79</sup> In some ways, Twitter is like traditional forms of juror misconduct and undue influence; the violation (that is, the extent to which a juror tweet could be misconduct) depends on the instruction – what the judge and court rules prohibit – and on the violation's effect on the parties before the court – whether the behavior "substantially impairs" the due process rights of the parties, and whether it was sufficiently prejudicial according to the standard in a given jurisdiction. Much like an instance where a juror reads a news article about his case, an instance where a juror tweets during or about his trial (be it sending or receiving tweets, or sharing such tweets with fellow jurors) seems "curable" with a hearing in which the juror would testify that the communications did not influence his decision (that is, he would rebut the presumption of prejudice raised by his alleged misconduct). For example, see the discussion regarding the *Fumo* case, *supra* Part I.C. Naturally, procedures and standards will vary between civil and criminal cases – this Note, however, does not explore that distinction in detail. For a more detailed treatment of juror misconduct in the context of criminal cases, see, *e.g.*, Gershman, *supra*, note 64.

<sup>80</sup> See, *e.g.*, Tresa Baldas, The National Law Journal Online, For Jurors in Michigan, No Tweeting (or Texting, or Googling) Allowed (July 1, 2009), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202431952628&slreturn=1&hblogin=1>; Talia Buford, *New Juror Policy Accounts for New Technology*, PROVIDENCE J. BULL., May 17, 2009, at A, available at 2009 WLNR 9405485; Anita Ramasastry, FindLaw.com Legal Commentary, Why Courts Need to Ban Jurors' Electronic Communications Devices (Aug. 11, 2009), <http://writ.news.findlaw.com/ramasastry/20090811.html>.

implement an effective response.<sup>81</sup> Furthermore, a statewide solution is likely the best way to address the problem because it takes into account each state's standards for juror misconduct.<sup>82</sup>

### 1. Oregon (Multnomah County) – An Instruction to Jurors Selected to Serve

The state court in Multnomah County, Oregon, issues jurors an instruction that is clear and sensible, and plainly speaks to the conflict between the ubiquity of the internet in our personal lives and the ban on certain information in our service as jurors: “Do not discuss this case during the trial with anyone, including any of the attorneys, parties, witnesses, your friends, or members of your family. “No discussion’ also means no emailing, text messaging, tweeting, blogging or any other form of communication.”<sup>83</sup> This instruction, while acknowledging that people may not consider tweeting a “discussion,” makes it clear that tweeting is a form of communication. The instruction also cautions jurors about conducting independent internet searches: “In our daily lives we may be used to looking for information on-line and to ‘Google’ something as a matter of routine. Also, in a trial it can be very tempting for jurors to do their own research to make sure they are making the correct decision. You must resist that temptation for our system of justice to work as it should.”<sup>84</sup> The instruction makes clear that the way people use the internet every day may be contrary to what is required of jurors; recognizing this conflict is key to helping jurors avoid making the wrong choice if they are presented with such a conflict. While the technology-specific language in this instruction (and others like it) is likely to help jurors better understand what communications and technologies are off-limits, such language also runs the risk of being quickly outdated by changing trends and technology.<sup>85</sup>

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<sup>81</sup> See CONN. PUBLIC SERVICE AND TRUST COMM’N, JURY COMMITTEE REPORT AND RECOMMENDATION 18 (2009), <http://www.jud.ct.gov/Committees/pst/jury/JuryReport.pdf> [hereinafter CONN. JURY REPORT].

<sup>82</sup> See, e.g., Chartier, *supra* note 40.

<sup>83</sup> Gregory S. Hurley, National Center for State Courts Jur-E Bulletin, Cell Phone Policies/Instructions for Jurors (May 1, 2009), <http://bit.ly/cb3y3a>. Note that this source also contains sample instructions and rules from many jurisdictions across the country. Oregon is used an example herein because it touches on several points that are crucial to proper instruction, namely, that the instruction be clear in what it prohibits and when, that jurors understand the reasons behind the rules, and that the court indicates its understanding of how technology can affect jury deliberations.

<sup>84</sup> *Id.*

<sup>85</sup> The Northern District of California’s General Order No. 58 is an example of how rules regarding technology can be quickly superseded by technology itself. General Order No. 58, promulgated in 2005, is a local rule that defines “electronic device” and establishes guidelines for their use in court. Cutler, *supra* note 19. Today, the rule is described as “completely obsolete.” *Id.* “Having been written before the iPhone, Twitter and Facebook, the rule ‘has nothing to do with the world we in which we live. . . . Technology has expanded and exploded so fast that while [Order No. 58] is an interesting artifact, it really doesn’t mean anything.” *Id.* In fact, Northern District Chief Judge Vaughn Walker temporarily lifted the restriction on Tweeting and other uses of mobile devices for journalists in the courtroom during the “Olson/Boies case” challenging California’s statutory same-sex marriage ban. United States District Court, Northern District of

## 2. Michigan – A Statewide Court Rule Amendment

In July 2009, the Michigan Supreme Court became the first state court of last resort to promulgate a rule requiring “judges to instruct jurors that they are prohibited from using computers or cell phones at trial or during deliberation, and are prohibited from using a computer or other electronic device or any other method to obtain or disclose information about the case when they are not in the courtroom.”<sup>86</sup> This directive instructs the court, rather than jurors directly.<sup>87</sup> Courts are to issue the instruction when the jury is impaneled.<sup>88</sup> The rule is an amendment to Michigan Court Rule 2.511(H), which instructs state courts as to how they must swear in the jury.<sup>89</sup> Laudably, Michigan’s approach includes courts in the process; it’s important that individual judges are aware of the implications of certain technology in the courtroom. The rule-based approach helps ensure that judges understand the rules and that all judges statewide are giving the same instructions.<sup>90</sup> A system-wide rule also puts lawyers and parties before the court (not just jurors) on notice regarding forms of communication during trial. The oath, which remains unchanged from its previous version, requires jurors to swear that they will decide the case based only on evidence before them:

(1) The jury must be sworn by the clerk substantially as follows: “Each of you do solemnly swear (or affirm) that, in this action now before the court, you will justly decide the questions submitted to you, that, unless you are discharged by the court from further deliberation, *you will render a true verdict, and that you will render your verdict only on the evidence introduced and in accordance with the instructions of the court, so help you God.*”<sup>91</sup>

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California, *Perry et al. v. Schwarzenegger et al.*, <https://ecf.cand.uscourts.gov/cand/09cv2292/> (last visited Aug. 21, 2010); Karen Ocamb, LGBT POV, Judge in Olson/Boies Prop. 8 Case Allows Blackberries, Tweeting – TV in question (Dec. 26, 2009), <http://www.lgbtpov.com/2009/12/judge-in-olsonboies-prop-8-case-allows-blackberries-tweeting-%E2%80%93tv-in-question/>; Posting of Michael Petrelis to Petrelis Files, Olson/Boies Judge’s Sunshine Gift to Gays: “Tweeting” Allowed, <http://mpetrelis.blogspot.com/2009/12/olsonboies-judges-sunshine-gift-to-gays.html> (Dec. 26, 2009; 10:57 EST). Granted, the case drew national interest, and Judge Walker’s actions were likely a response to the media’s formal request to broadcast proceedings, as well as a proactive attempt to handle the expected flood of media attention. *See, e.g.*, Ocamb, *supra*. This case does not speak directly to the problem of Twitter in the jury box, but still illustrates that, regarding technology in the courtrooms, the judiciary holds broad discretion and will exercise it when appropriate.

<sup>86</sup> Order Adopting Amendment of Rule 2.511 of the Michigan Court Rules (June 30, 2009), <http://courts.michigan.gov/supremecourt/Resources/Administrative/2008-33.pdf>.

<sup>87</sup> MI Rules MCR 2.51, *available at* <http://coa.courts.mi.gov/rules/documents/1Chapter2CivilProcedure.pdf> (last visited Oct. 2, 2010).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> A directive that instructs the court could also reach judges sitting as fact-finders in non-jury trials, who should be apprised as to how Twitter and other forms of consumer technology could affect their fact-finding process. *See, e.g.*, Cutler, *supra* note 18.

<sup>91</sup> MI Rules MCR 2.51, *available at* <http://coa.courts.mi.gov/rules/documents/1Chapter2CivilProcedure.pdf> (emphasis added) (last visited Oct. 2, 2010).

However, the amendment adds specific instructions regarding electronic communications and internet research:

- (2) *The court shall instruct the jurors* that until their jury service is concluded, they shall not
- (a) discuss the case with others, including other jurors, except as otherwise authorized by the court;
  - (b) read or listen to any news reports about the case;
  - (c) use a *computer, cellular phone, or other electronic device with communication capabilities while in attendance at trial or during deliberation. These devices may be used during breaks or recesses but may not be used to obtain or disclose information prohibited in subsection (d) below;*
  - (d) use a computer, cellular phone, or other electronic device with communication capabilities, or any other method, to obtain or disclose information about the case when they are not in court. As used in this subsection, information about the case includes, but is not limited to, the following:
    - (i) information about a party, witness, attorney, or court officer;
    - (ii) news accounts of the case;
    - (iii) information collected through juror research on any topics raised or testimony offered by any witness;
    - (iv) information collected through juror research on any other topic the juror might think would be helpful in deciding the case.<sup>92</sup>

The Michigan directive emanates from the state's Supreme Court. It may be preferable for the message to come from the highest court in the state for several reasons. For one, the rule has the strength and appearance of law if it issues from the highest court in the state. Granted, the "appearance of law" aspect could of course be achieved by passing a bill or rule through the legislature. However, the court system itself is probably in the best position to accurately assess the problem of tweeting/internet-surfing jurors in the jurisdiction. The legislature would have to convene committees and hearings in order to learn about the issues at stake and to make a public record of the legislative process. Additionally, the court system will probably be able to quickly develop a response tailored to the jurisdiction's existing rules and procedures.

### 3. Connecticut – A Statewide Study of the Juror's "Life Cycle"

In February 2010, the Connecticut state court system began implementing policies regarding jurors tweeting and posting Facebook status updates.<sup>93</sup> The new rules will prohibit jurors from tweeting,

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<sup>92</sup> *Id.* (emphasis added).

<sup>93</sup> CONN. JURY REPORT, *supra* note 81; CONN. PUBLIC SERVICE AND TRUST COMM'N, JURY COMMITTEE IMPLEMENTATION PLAN FOR ADOPTED RECOMMENDATIONS 18 (2009),



texting, e-mailing, posting Facebook statuses, and using electronic devices to search for or share information about court proceedings.<sup>94</sup> Judge Linda K. Lager, co-chair of the Public Service and Trust Commission Jury Committee, said the impetus for the specific rules is that “with a lot of the social networking sites and Twitter, people don’t get that it’s a form of communication . . . . The reason is that we want and expect, and the rules require, that a jury decides the case based on the evidence presented in the courtroom.”<sup>95</sup> In formulating its recommendations, the Jury Committee examined the “life cycle” of jurors from the time they first appear in court through the time they are selected as jurors.<sup>96</sup>

Connecticut’s approach has many advantages, the first being that it is a statewide effort by the courts, similar to the Michigan initiative. Additionally, the Jury Committee’s approach of considering the timeline of a trial and analyzing when a juror is perhaps most likely to tweet, and what the contents of that tweet might be, seems essential to crafting an effective solution.<sup>97</sup> In order to be effective, juror instructions must reach jurors at an optimal time; the jurors must fully understand the rule and must be able to apply it properly to the circumstances at hand in a given case.<sup>98</sup> Because a juror could fire off a tweet at almost any time during trial, any approach to solving the problem of tweeting jurors should carefully consider what the effect of a tweet would be at a given time during trial, depending on its content.

#### 4. Federal Courts – A Memo from the Top

The federal court system has also recently addressed jurors’ use of electronic communication technologies; in January 2010, the Judicial Conference’s Committee on Court Administration and Case Management (CACM) issued a memorandum to all federal district court judges regarding the issue.<sup>99</sup> Recognizing the need to tackle the

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<http://www.jud.ct.gov/Committees/pst/jury/Jury%20Committee%20Implementation%20Plan.pdf> [hereinafter CONN. JURY PLAN]; Hilda Munoz, *Jurors With BlackBerrys? New Rules May Forbid Them*, HARTFORD COURANT, Oct. 2, 2009, at A5, available at 2009 WLNR 19471004. For text of Connecticut court system’s Public Service and Trust Commission Jury Committee recommendations, implementation plan, meeting minutes, and other related committee documents, see the Public Service and Trust Commission Jury Committee home page, <http://www.jud.ct.gov/Committees/pst/jury/default.htm> (last visited Oct. 2, 2010).

<sup>94</sup> CONN. JURY REPORT, *supra* note 81, at 98; CONN. JURY PLAN, *supra* note 93; Munoz, *supra* note 93.

<sup>95</sup> Munoz, *supra* note 93.

<sup>96</sup> *Id.*; CONN. JURY REPORT, *supra* note 81, at 6-7.

<sup>97</sup> Other jurisdictions and agencies are similarly commissioning in-depth studies of technology and the jury system. For example, the Conference of Court Public Information Officers has sponsored a yearlong national research project on the effect of new media on the justice system. The executive summary and full report are available at CCPIO – New Media Report, <http://www.ccpio.org/newmediareport.htm> (last visited Sep. 1, 2010).

<sup>98</sup> See CONN. JURY REPORT, *supra* note 81, at 16-17.

<sup>99</sup> See, e.g., David Kravets, Threat Level Blog – Privacy, Crime, and Security Online, *Jurors: Stop Tweeting*, WIRED, Feb. 8, 2010, [http://www.wired.com/threatlevel/2010/02/jurors-stop-tweeting/?intcid=inform\\_relatedContent](http://www.wired.com/threatlevel/2010/02/jurors-stop-tweeting/?intcid=inform_relatedContent). See also Marcia Coyle, The BLT, The Blog of

increasing incidence of jurors improperly using cell phones and the internet during trial, at its December 2009 meeting CACM endorsed a set of jury instructions detailing prohibitions on using electronic technology to conduct research on or communicate about a case.<sup>100</sup> The memorandum encourages district judges to consider using the set of jury instructions to “help deter jurors from using electronic technologies to research or communicate about cases on which they serve. . . . The Committee believes that more explicit mention in jury instructions of the various methods and modes of electronic communication and research would help jurors better understand and adhere to the scope of the prohibition against the use of these devices.”<sup>101</sup>

The memorandum suggests giving a certain instruction before trial and a different instruction at the close of the case.<sup>102</sup> The “Before Trial” instruction informs jurors that they are to decide the case based only upon evidence presented in the courtroom, that they may not discuss the case with anyone in any way until deliberations begin, and that during deliberations they may not discuss the case with non-jurors until the jury returns a verdict.<sup>103</sup> The instruction makes specific reference to cell phones and other devices, as well as to web-based communication tools such as Twitter and to “other social networking websites, including Facebook, My Space, LinkedIn, and YouTube.”<sup>104</sup> The “At the Close of the Case” instruction begins by informing jurors that during deliberations, they “must not communicate with or provide any information to anyone by any means about this case.”<sup>105</sup> The instruction then elaborates upon this directive by informing jurors that they may not use any electronic device or web-based application to “communicate to anyone any information about this case or to conduct any research about this case” until the judge accepts the jury’s verdict.<sup>106</sup> This instruction also makes specific reference to technology such as “cell phone, smart phone, iPhone, Blackberry or computer; the internet, any internet

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LegalTimes, No Talking, No Texting, No Tweeting (Feb. 8, 2010), <http://legaltimes.typepad.com/blt/2010/02/no-talking-no-texting-no-tweeting.html>; Federal Evidence Review, Model Jury Instruction Recommended To Deter Juror Use Of Electronic Communication Technologies During Trial (Feb. 9, 2010), <http://federalevidence.com/blog/2010/february/model-jury-instruction-recommended-deter-juror-use-electronic-communication-tech>; Law Librarian Blog, Judicial Conference’s New Model Jury Instructions Forbid Social Media Use by Jurors (Feb. 23, 2010), [http://lawprofessors.typepad.com/law\\_librarian\\_blog/2010/02/judicial-conferences-new-model-jury-instructions-forbid-social-media-use-by-jurors.html](http://lawprofessors.typepad.com/law_librarian_blog/2010/02/judicial-conferences-new-model-jury-instructions-forbid-social-media-use-by-jurors.html).

<sup>100</sup> Memorandum from Judge Julie A. Robinson, Chair, Judicial Conference Committee on Court Administration and Case Management regarding Juror Use of Electronic Communications Technologies (Jan. 28, 2010), [http://www.wired.com/images\\_blogs/threatlevel/2010/02/juryinstructions.pdf](http://www.wired.com/images_blogs/threatlevel/2010/02/juryinstructions.pdf) [hereinafter CACM Memo].

<sup>101</sup> CACM Memo, *supra* note 100, at 2.

<sup>102</sup> *Id.*, at 3.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

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.”<sup>107</sup>

The CACM instructions make clear prohibitions on juror communication during trial, and also specify when these prohibitions are in force. The specific references to consumer technology serve to minimize the risk that jurors may not understand Twitter, texting, etc. as potential forms of problematic communication. These references also serve to incorporate technology into existing doctrine regarding juror communication during trial. Since it was directly transmitted by the Judicial Conference to all federal district court judges, the memorandum is likely to encourage uniformity across federal courts,<sup>108</sup> subject, of course, to each judge’s discretion. The proposed instructions do not contain any explanation (either to the judiciary or to the jurors) of the reason behind the prohibitions. Even if the reasons for the restrictions are clear to the judge, it is important that lay jurors understand the prohibition on communication during trial and the potential consequences (to jurors, the parties, administration of the case) of improper communication.<sup>109</sup>

### III. PROPOSALS

The foregoing state and federal efforts represent varying, somewhat piecemeal efforts to attack the problem of technology interfering with jury verdicts. What follows is a synthesis of some of the most effective aspects of each of the foregoing examples, with particular exploration of the questions of timing and content of jury instructions. And while none of the foregoing examples focus on judicial education, I posit that it is a crucial part of mitigating the possibility of mistrial by Twitter. The following synthesis may be a useful framework for courts and judges in developing new policies to address technology in the jury box.

#### *A. The Judiciary Must Be Trained to Evaluate Possible Harmful Effects of Social Media and New Consumer Technologies in the Courtroom and Jury Box*

As explained in Part II, existing rules concerning juror misconduct do not neatly solve the issues raised by Twitter. But even where the question is more clear-cut – as it may be under some of the new rules described in the previous section – judges are vested with extremely broad discretion to fashion an appropriate and responsible procedure to

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<sup>107</sup> *Id.*

<sup>108</sup> Indeed, one of the Judicial Conference’s fundamental purposes is to “submit suggestions to the various courts in the interest of promoting uniformity of management procedures and the expeditious conduct of court business.” 28 U.S.C. § 331 (2008).

<sup>109</sup> See CONN. JURY REPORT, *supra* note 81, at 18.

determine whether misconduct actually occurred and whether it was prejudicial.<sup>110</sup> Juror misconduct in a civil proceeding does not, by itself, infringe constitutional rights; that question can only be determined after measuring the degree to which the misconduct affected the jury's impartiality.<sup>111</sup> In criminal cases, where preserving the defendant's constitutional rights demands that jurors be held to a somewhat heightened standard of conduct, judges must still evaluate the prejudicial effect of any alleged juror misconduct.<sup>112</sup> And in both civil and criminal cases, the judge is vested with discretion to fashion a proper remedy to juror misconduct, depending on the motion of the aggrieved party and the timing of such motion.<sup>113</sup> Accordingly, the solution for mitigating potential bad effects of consumer technology in the courtroom lies in effectively educating the judiciary and the jury pool as to the potential for "mistrial by Twitter." An informed judiciary will be better suited to evaluate threats and implement proper remedies, just as an informed jury will be less likely to commit misconduct.<sup>114</sup>

Sitting judges admit that "[m]any on the bench are 'blissfully ignorant' of what is going on in the media industry and the processes of

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<sup>110</sup> Existing doctrine regarding juror misconduct relies heavily on judicial discretion. Even in fairly clear-cut cases – e.g., where jurors clearly are exposed to outside information – it's not clear what the appropriate remedy is. The trial court has the authority and imperative to protect the jury from external influences and to preserve the jury's duty and function. See Gershman, *supra* note 64, at 325. When a court is informed during the trial that a juror has been contacted by an outside party or has engaged in conversations with a third party about the case, the court has a duty to investigate the matter. *Id.* A court is given extremely broad discretion to determine the appropriate way to handle such a report. *Id.* at 326. A court should begin the inquiry with the presumption that the jury is impartial; however, if a colorable claim of extrinsic influence on impartiality has been made, a court may be obligated to investigate the allegation even in the absence of a request by a party. *Id.* at 325.

The leading case involving juror exposure to external influences is *Remmer v. United States*, 347 U.S. 227 (1954). In that case, an anonymous caller contacted the jury foreman and offered a bribe to acquit the defendant. Without consulting the defense, the judge asked the FBI to investigate the matter and concluded that the approach was harmless. The Supreme Court remanded the case for a hearing, holding that a "presumption of prejudice" should apply to any extra-judicial contact with a juror about the case. *Id.*, at 229; see also Gershman, *supra* note 64, at 328.

The Supreme Court in two subsequent jury-intrusion cases found inherent prejudice in the jury's exposure during the trial to external influences. In *Turner v. Louisiana*, the Court reversed a murder conviction on the ground that the jury was contaminated by the continuing association throughout the trial between the jurors and two deputy sheriffs in charge of the jury, who were also key prosecution witnesses. See *Turner v. Louisiana*, 379 U.S. 466 (1965); see also Gershman, *supra* note 64, at 325. In *Parker v. Gladden*, the Court reversed another murder conviction because a court bailiff, who had supervised the jury, told several jurors privately that the defendant was guilty. See *Parker v. Gladden*, 385 U.S. 363 (1966); see also Gershman, *supra* note 64, at 325. As these cases illustrate, trial courts are vested with extremely broad discretion to fashion an appropriate and responsible procedure to determine whether misconduct actually occurred and whether it was prejudicial. Ultimately, Twitter as a mechanism for potential juror misconduct falls to the discretion of trial judges. The issue of whether a juror's tweet constitutes misconduct involves an evaluation of circumstances (including the content of the tweet, the time during trial when it was sent or received or otherwise alleged to have interfered with the trial, and the tweet's effect on proceedings) that a trial judge is in the best position to assess.

<sup>111</sup> See generally 75B AM. JUR. 2D *Trial* §§ 1301-1405 (2010).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> An informed jury will also be better able to recognize misconduct among fellow jurors, thus being more likely to report misconduct as it occurs.

getting information out in other means than newspapers.”<sup>115</sup> While photography is prohibited in all federal courts, districts have implemented varying policies regarding cell phones and laptop computers (which allow real-time communication).<sup>116</sup> Continuing Legal Education and similar programs exist to inform judges about technology in the courtrooms, but most seem to focus on either how the parties use technology in building their cases, or technology in the context of courthouse workflow and caseload management.<sup>117</sup> There is a dearth of programming regarding technology in the jury box. While judges may independently evaluate technological threats to the jury system and may implement their own rules, court systems should develop a uniform curriculum designed to acquaint judges with the ways jurors can access technology before, during, and after trial, and the ways such access could affect a trial. Judges may then incorporate such knowledge into existing jurisdictional doctrine regarding juror misconduct. Such a system would ensure that judges are aware of new potential threats to the administration of justice, while still respecting the discretion afforded to trial judges.

B. *Jurors Must Be Properly Informed and Instructed During Jury Selection and During Trial*

Judges recognize the need to explain the judicial process in a transparent and comprehensible manner: Chief Judge Walker of the United States District Court for the Northern District of California has said “[w]e need to explain what we do, explain our decisions, explain the entire process in a way that people can understand and can have access to.”<sup>118</sup> Furthermore, advances in consumer technology have changed the way judges address juries about the rules of evidence and juror conduct; “[t]he warning not to read anything in the newspaper ‘is now the beginning of a very long paragraph of things they’re not supposed to be doing’ that includes telling them not to blog or Twitter or search the internet to research the case.”<sup>119</sup> Boilerplate instructions do not seem to go far enough anymore.<sup>120</sup> Efforts to constrain what jurors may say or read during trial have been described as “an effort to sequester without sequestering the jury.”<sup>121</sup> Ultimately, judges rely on jurors’ good faith in following instructions, “[a]nd mostly it works.”<sup>122</sup> A judge in California’s Central District has said that “[t]here is no

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<sup>115</sup> Cutler, *supra* note 18.

<sup>116</sup> *Id.*

<sup>117</sup> See, e.g., ABA Legal Technology Resource Center, <http://www.abanet.org/tech/ltrc/home.html> (last visited Aug. 21, 2010).

<sup>118</sup> Cutler, *supra* note 18.

<sup>119</sup> *Id.*

<sup>120</sup> Schwartz, *supra* note 38.

<sup>121</sup> Cutler, *supra* note 18.

<sup>122</sup> *Id.*

simple solution to immunizing jurors from extraneous influences,” and that absent a very specific explanation regarding what fairness in a jury trial requires, “we’re going to have decisions badly warped. This has already begun to happen with jurors twittering about their ongoing experiences. And not necessarily about the evidence but about the dress of the lawyers or whether a particular lawyer is ‘hot.’”<sup>123</sup>

### 1. When to Inform Jurors of Court’s Policies/Rules/Instructions

Any effort to prevent problems associated with Twitter use by jurors must grapple with a difficult question of timing: Assuming that jurors will be instructed in some way against Twitter use during trial, when should such an instruction be given?<sup>124</sup> The general norm is to instruct seated jurors before the commencement of trial and at the close of trial before deliberations that they are not to discuss the case with anyone.<sup>125</sup> Indeed, the Judicial Conference’s suggested jury instructions apply only to selected jurors and are meant to be given immediately before trial and immediately before deliberations.<sup>126</sup> However, as the Roker and *Stoam* incidents indicate, tweets sent during the early stages of jury selection and after the jury has reached a verdict may still be problematic, even if they are not solid foundations for mistrial motions.<sup>127</sup>

If the initial juror summons were to inform jurors of the restriction on Twitter, etc., in the courtroom, jurors would know the rules immediately and would have time to ask questions regarding the electronic communications policy before being assigned to a jury. Furthermore, the admonition would ostensibly prevent jurors from conducting internet research in anticipation of being selected for jury duty (searching, for example, local court dockets).<sup>128</sup> On the other hand, notifying jurors via the initial summons runs the risk of being too early in the “life cycle” of a juror. At the time of summons receipt, jurors don’t yet know what topics or parties they are prohibited from tweeting or researching, and they may be likely to disregard the rule because they have not yet been seated on a jury, or even visited the

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<sup>123</sup> *Id.*

<sup>124</sup> Just as different jurisdictions have varying standards and instructions regarding juror misconduct, each jurisdiction handles jury selection somewhat differently. For example, citizens called for jury service in Travis County, Texas, have the option of using the court’s internet-based I-Jury system to answer a summons, impanel, be excused, or inform the court of scheduling or eligibility issues. See Travis County District Clerk, I-Jury Online Impaneling, [http://www.co.travis.tx.us/district\\_clerk/jury/default.asp](http://www.co.travis.tx.us/district_clerk/jury/default.asp) (last visited Aug. 21, 2010).

<sup>125</sup> See generally 75B AM. JUR. 2D *Trial* § 1305 (2010).

<sup>126</sup> CACM Memo, *supra* note 100.

<sup>127</sup> Siemaszko, *supra* note 29; Chartier, *supra* note 40.

<sup>128</sup> See, e.g., CONN. JURY REPORT, *supra* note 81, at 42 (suggesting that while potential jurors should be allowed to pursue business and personal matters in the courtroom before being seated on a jury, potential jurors who access a court’s wireless internet network should be subject to an on-screen “pop-up” message, warning jurors that they may not use the wireless network “for illegal or improper purposes, such as researching the cases that they may hear”).

courthouse.

Most courts have a central jury room where a court clerk may address the pool of potential jurors before jurors are divided into the court's various parts. This could be a good "inception point." At this point, jurors know they could be on a jury in the near future, so may be more likely to pay attention to and heed instructions from the court.<sup>129</sup> However, potential jurors may not heed the instruction because they have not yet been placed on a jury and thus may not consider that rules for jurors could apply to them.

Another possibility is during voir dire, the process by which attorneys winnow the group of potential jurors down to the jury that will sit at trial.<sup>130</sup> An advantage of introducing the rules at this point is that the court probably has the jurors' attention, more so than at any point previous to voir dire.<sup>131</sup> Cautioning jurors of the potential consequences of improper tweeting earlier in the juror selection process could prevent inadvertent disclosure of juror identity or other similar issues (as Al Roker's tweets impermissibly showed photographs of the courtroom interior and his fellow jury pool members). However, introducing the rules regarding electronic communications during voir dire could be problematic, as jurors may be confused or otherwise influenced by the presence of attorneys. For example, they may not understand the communication about the rules to be an instruction expressly from the court to the jury, but may interpret it as part of the attorneys' jury selection process.<sup>132</sup> Also, jurors may interpret the rule or instruction as a potential means for being disqualified, and thus an individual juror may believe that she could be kicked off a case because she spends a lot of time on the internet, is connected to thousands of people via online social networks, or otherwise has a strong online presence.<sup>133</sup> Such a belief could distort behavior during voir dire. For example, an otherwise-qualified juror who simply does not want to serve may cite to her personal blog or Twitter account as a reason she should be excused from service, or may (perhaps disingenuously) post material that could somehow make her a less attractive juror.

The best option is to give the chosen jury and the alternates the instruction during impaneling. The Michigan directive orders that the new instruction be given to jurors at this time,<sup>134</sup> and the CACM instructions are designed to be given to seated jurors at the beginning of trial (as well as right before deliberations).<sup>135</sup> At this point, jurors have

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<sup>129</sup> See CONN. JURY REPORT, *supra* note 81, at 68-69.

<sup>130</sup> See BLACK'S LAW DICTIONARY 764 (3rd pocket ed. 2006).

<sup>131</sup> See CONN. JURY REPORT, *supra* note 81, at 68-69.

<sup>132</sup> *Id.*

<sup>133</sup> See Ashmore, *supra* note 25; Hardy, *supra* note 25; Chartier, *supra* note 40.

<sup>134</sup> MI Rules MCR 2.51, available at <http://coa.courts.mi.gov/rules/documents/1Chapter2CivilProcedure.pdf> (last visited Oct. 2, 2010).

<sup>135</sup> CACM Memo, *supra* note 100.

a better idea of what is off-limits, as they have been through voir dire and probably understand the general contours of the case they are about to hear.<sup>136</sup> Furthermore, each juror has now assumed his/her role as juror more fully than at any previous stage of jury selection, and will thus be more likely to understand that rules pertaining to juror conduct apply. Finally, it is crucial to notify jurors of the limitations on their conduct that will apply throughout the trial.<sup>137</sup>

It would be important at this point in the proceedings for the judge to emphasize the rationale behind the various prohibitions on speech and other behavior; if jurors understand the principles that guide the ban on extraneous communication and evidence, it is more likely that they will avoid misconduct by applying those principles to situations they may encounter (such as relevant news stories or tweets).<sup>138</sup> It would also be important to repeat the instruction or some version of it throughout the trial, since jurors (especially habitual tweeters) probably use the internet every day and may need to be reminded of how their internet use could conflict with their duties.<sup>139</sup> The CACM instructions suggest that jurors be reminded and re-instructed immediately before deliberation.<sup>140</sup>

Finally, the court should reiterate the instruction when the jury is being charged. If jurors are reminded of the instruction regarding conduct when they receive the instruction regarding the substantive law, they may be more likely to resolve the legal issue in accordance with both sets of instructions.

## 2. How to Instruct Jurors

A court's solution to the complications Twitter imposes upon the jury system should address procedural and structural mechanisms that Twitter undermines, such as the jurors' oath, the voir dire and peremptory juror challenge process, precautionary instructions regarding deliberations, trial judge vigilance, and representation by competent counsel. One difficult aspect of serving on a jury is understanding exactly what information one can consider; even evidence presented in the courtroom can be difficult to filter, as a judge may instruct juries to disregard evidence after they've already heard it. A court's instruction should speak to the way Twitter affects this already complex situation.

The instruction should inform jurors of the reasons they may not consider information that has not been presented as evidence in court,

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<sup>136</sup> CONN. JURY REPORT, *supra* note 81, at 68.

<sup>137</sup> *See id.*, at 70.

<sup>138</sup> *See id.*, at 73-4 (recommending that judges "instruct the jury in plain and understandable language regarding . . . conduct of deliberations" to ensure juror understanding and compliance).

<sup>139</sup> *See id.*, at 43 (noting that a "benefit" of affording jurors with internet access is "reinforcing the charge given to jurors that they may not investigate or research cases that are before them").

<sup>140</sup> CACM Memo, *supra* note 100.



and why they can't discuss the case.<sup>141</sup> The instruction should emphasize everyone's right to fair trial; perhaps the instruction should acknowledge that the rules are indeed a limitation on freedoms that jurors usually enjoy, but that they must temporarily give them up in their role as jurors. The Michigan instruction clearly indicates that the restrictions on jurors' speech begin once the jurors are sworn in and end when they are released from service.<sup>142</sup> Such an instruction is laudable for its clarity in informing jurors when they must curb their usage of Twitter.

Fair trial and free press are, perhaps, equally important values in our justice system. However, where some courts may allow the press to tweet or blog during proceedings, jurors should be reminded that they are in the courtroom as jurors, not as contributors to the free press. Courts should advise jurors that if they tweet about the trial, they may be impermissibly crossing the line between the jury and the press, and may be creating prejudicial publicity.<sup>143</sup> Similarly, it may be appropriate to remind jurors that lawyers are also constrained, but by rules regarding professional responsibility. Such a reminder would emphasize how procedural and ethical rules (and following/upholding them) are important to a fair, functioning judicial system.<sup>144</sup>

Because of the potential for waste of judicial resources, jurors should be cautioned of the possible consequences of their misconduct.<sup>145</sup> Jurors may exercise more restraint and tend to err on the side of caution when tweeting if they understand that their actions could mean that weeks of preparation and court proceedings could be called a mistrial.<sup>146</sup>

The admonition should be specific enough to cover Twitter and other forms of social media, internet research, e-mail, text messages, and "traditional" forms of communication such as conversations, or reading, watching, or listening to the news. However, the instruction should be broad enough that jurors understand what exactly is being limited – namely, prejudice and access to information that is not presented at trial – so they don't exploit any loopholes that may remain

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<sup>141</sup> See generally 75B AM. JUR. 2D *Trial* § 1305 (2010).

<sup>142</sup> MI Rules MCR 2.51, available at <http://coa.courts.mi.gov/rules/documents/1Chapter2CivilProcedure.pdf> (last visited Oct. 2, 2010).

<sup>143</sup> See generally ALFRED FRIENDLY & RONALD L. GOLDFARB, TWENTIETH CENTURY FUND, CRIME AND PUBLICITY: THE IMPACT OF NEWS ON THE ADMINISTRATION OF JUSTICE (1967); Norbert L. Kerr, Geoffrey P. Kramer, John S. Carroll, James J. Alfini, *On the Effectiveness of Voir Dire in Criminal Cases with Prejudicial Pretrial Publicity: An Empirical Study*, 40 AM. U. L. REV. 655 (1991) (article appears in symposium issue on the selection and function of the modern jury).

<sup>144</sup> See, e.g., CONN. JURY REPORT, *supra* note 81, at 10.

<sup>145</sup> In a Florida drug case, several jurors admitted to conducting online research eight weeks into the trial. The judge declared a mistrial, resulting in the parties' lawyers and the judge being furious. See Schwartz, *supra* note 38.

<sup>146</sup> *Id.*

after describing specific prohibitions.<sup>147</sup>

There is a question as to whether courts should give examples of which tweet content is and is not permissible. For example, tweeting “I’m on jury duty,” “Jury duty sucks,” and the like may be permissible (that is, not likely to raise questions of juror misconduct, prejudice, or bias), as it doesn’t reveal information about a case and does not seem to indicate any particular juror bias or prejudice. But drawing the line could be riskier than allowing a certain amount of judgment and discretion. Issuing overly specific guidelines could get a court in trouble if a juror misconstrues the example as a permission of sorts, and crosses the line by tweeting, for example, “Jury duty sucks and so does Plaintiff X’s case.” Such a tweet would appear to indicate bias as well as a possible violation of the juror’s duty to not render a decision until she has heard all arguments and evidence. In any event, a simple request from the judge that sitting jurors use their discretion regarding Twitter or any other internet service will not suffice, as it seems that leaving such matters to jurors’ discretion has been the cause of many of the problems discussed herein. This question is a new presentation of the older question of what “about the case” means when judges instruct jurors to not talk about the case with others. It is important, therefore, that judges understand the role of Twitter and other technologies in the jury box, so that they can effectively explain to jurors the prohibitions on their communications and the reasons behind such prohibitions.<sup>148</sup>

While an instruction that jurors use discretion may not be appropriate for jurors who are in the middle of a trial, a request for discretion could be issued to jurors who have not yet been assigned to a case, or who have just completed their service. It seems clear that the restrictions on juror communication are coterminous with jurors’ duty to

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<sup>147</sup> CONN. JURY REPORT, *supra* note 81, at 69-70.

<sup>148</sup> An excellent example may be found in the Hurley article, *supra* note 83, where an Oregon state court judge shares what he/she instructs jurors regarding communications during trial. The judge gives the “boilerplate” instructions and then tells jurors “I will give you some form of this instruction every time we take a break. I do that not to insult you or because I don’t think you are paying attention, but because, in my experience, this is the hardest instruction for jurors to follow.” Hurley, *supra* note 83. The judge explains possible rationales for the rule in a clear and understandable fashion: “The first [reason] is to help you keep an open mind. When you talk about things, you start to make decisions about them and it is extremely important that you not make any decisions about this case until you have heard all the evidence and all the rules for making your decisions, and you won’t have that until the very end of the trial. The second reason for the rule is that we want all of you working together on this decision when you deliberate. If you have conversations in groups of two or three during the trial, you won’t remember to repeat all of your thoughts and observations for the rest of your fellow jurors when you deliberate at the end of the trial.” *Id.* The judge gives very specific instructions regarding communication with third parties: “If any person tries to talk to you about this case, tell that person that you cannot discuss the case because you are a juror. If that person persists, simply walk away and report the incident to my staff.” *Id.* The judge also gives specific instructions regarding extrinsic evidence: “**Do not** make any independent personal investigations into any facts or locations connected with this case. **Do not** look up any information from any source, including the Internet. **Do not** communicate any private or special knowledge about any of the facts of this case to your fellow jurors. **Do not** read or listen to any news reports about this case or about anyone involved in this case.” *Id.* (emphasis in original).

render a fair verdict.<sup>149</sup> While potential or former jurors are not obliged to refrain from certain communications, an inappropriate pre- or post-trial tweet could create prejudicial publicity, cast doubt on a verdict or settlement or otherwise undermine the court's final pronouncement, or even reveal bias that a party could use as grounds for a mistrial.<sup>150</sup> Thus, a cautionary "instruction" may be appropriate for pre- and post-service jurors in order to minimize the risk of problematic tweets.

### C. Court Systems Must Examine the Roles of Social Media and Consumer Technology During the "Life Cycle" of Jurors

Since a juror can tweet and receive tweets via cell phone or other pocket-size electronic device, Twitter implicates court policies on electronics in the courtroom. Court systems must examine the roles of social media and consumer technology during the "life cycle" of jurors in order to implement proper policies regarding electronic devices in the courtroom. Almost all federal courts and many state courts have banned electronic devices from the courtroom altogether.<sup>151</sup> After two mistrials due to jurors using cell phones during deliberation, courts in Ramsey County, Minnesota recently enacted a policy prohibiting jurors from bringing any wireless communication device to court.<sup>152</sup> Other states confiscate jurors' electronic devices during trial and deliberation, but allow their use at other times.<sup>153</sup> Still other states leave the matter of electronic devices to the discretion of individual judges.<sup>154</sup>

As expected, the issue of electronics in the courtroom becomes more important in the instance of a highly publicized proceeding; some federal judges have recently relaxed the ban on electronic devices for members of the press covering major trials.<sup>155</sup> During the civil trial regarding the highly publicized death of Jennifer Strange, who died hours after drinking too much water in a Sacramento radio station contest, the court required jurors to sign declarations under penalty of perjury, both before and after they served.<sup>156</sup> The declarations stated

<sup>149</sup> See, e.g., CACM Memo, *supra* note 100.

<sup>150</sup> See the discussion regarding the *Stoam* case, *supra* Part I.C.

<sup>151</sup> See, e.g., Fed. R. Crim. P. 53. But see Lynne Marek, *What's That You're Hearing in Court? It's 'Twittering.'* THE NATIONAL L. J., Mar. 16, 2009, 2009 WLNR 22679118 (positing that some federal judges are now allowing the press to use Twitter and other technology to report directly from their courtrooms, in the interest of bringing more transparency to the judicial process).

<sup>152</sup> Baldas, *supra* note 80; Ramasastry, *supra* note 80.

<sup>153</sup> Buford, *supra* note 80.

<sup>154</sup> *Id.*; CONN. JURY REPORT, *supra* note 81, at 98-99.

<sup>155</sup> Marek, *supra* note 151. See also the case of federal judge Mark Bennett of the Northern District of Iowa, a particularly technology-savvy judge who allows reporters to blog during court proceedings. Bennett said that in one case in particular, "I thought the public's right to know what goes on in federal court and the transparency that would be given the proceedings by live-blogging outweighed any potential prejudice to the defendant." Debra Cassens Weiss, ABA Journal Legal Technology Blog, Judge Explains Why He Allowed Reporter to Live Blog Federal Criminal Trial (Jan. 16, 2009), [http://www.abajournal.com/news/bloggers\\_cover\\_us\\_trials\\_of\\_accused\\_terrorists\\_cheney\\_aide\\_and\\_iowa\\_landlor](http://www.abajournal.com/news/bloggers_cover_us_trials_of_accused_terrorists_cheney_aide_and_iowa_landlor).

<sup>156</sup> Cheryl Miller, *New Bill Targets Web-Surfing Jurors*, RECORDER, Feb. 22, 2010, 2010 WLNR

that jurors would not and did not use personal electronic and media devices to research or communicate about any aspect of the case.<sup>157</sup>

While courts may restrict electronic communications to varying degrees, it seems undisputable that outright bans or confiscation of phones and other electronic devices are the safest methods of ensuring that no tweets make their way out of the jury box during trial or deliberations. In a time when many employers expect employees to be reachable via Blackberry or phone at all hours, and when cell phones have become a common way for parents to manage childcare throughout the day, courts must deal with the practical limitations such restrictions impose on jurors. Many courts provide telephones and computer terminals at the courthouse for jurors to use during their service, for example.<sup>158</sup> Courts can control web access by installing filters or other software that prevents the user from accessing forbidden web sites or applications. This would be a good way for courts to define the boundaries of jurors' communication while they are on a case, without unduly interfering with jurors' everyday lives.<sup>159</sup>

#### CONCLUSION

Cases involving tweeting jurors illustrate the perils of social media and technology in hands of jurors. Any solution that seeks to prevent undue influence of social media on jury trials must accommodate the modern juror while balancing the parties' rights to due process and a fair trial, with courts' need to keep up with technology. While current jury instructions regarding communications during trial could stand to be revised in light of technological advances, rules that specifically refer to any particular technology would be quickly outdated. Therefore, the best solution will incorporate: (i) ongoing education of the judiciary regarding consumer technology in the courtroom, (ii) effective education and instruction of jurors (during the selection process and during trial) regarding rules of misconduct, prejudice, and bias, as well as the systemic reasons for those rules, and (iii) careful consideration by court systems of the role of consumer technology during the "life cycle of juror," along with subsequent implementation of proper policies regarding electronic devices in the courtroom. Such an approach will, (i) allow judges to properly incorporate Twitter (and other forms of

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<sup>157</sup> *Id.*

<sup>158</sup> For example, the Superior Court of the District of Columbia provides jurors with a business center equipped with internet access, a copier, and a fax machine. Superior Court of the District of Columbia, Special Operations Division, Jurors' Office, [http://www.dccourts.gov/dccourts/superior/special\\_ops/jurors.jsp](http://www.dccourts.gov/dccourts/superior/special_ops/jurors.jsp) (last visited Aug. 21, 2010).

<sup>159</sup> But restrictions do nothing to prohibit jurors from tweeting or texting once they leave the courtroom. While a post-duty tweet would presumably be permissible, as restrictions on juror speech terminate with the end of jury service, jurors should nonetheless be cautioned to be discreet in the interest of preserving the court's control over the release of the verdict. See discussion *supra* Part III.B.2.

consumer technology) into existing doctrine, (ii) enhance jurors' understanding of the rules that constrain their behavior during jury duty, and thus increase the likelihood that jurors will follow such rules, and (iii) encourage system-wide reform that would minimize the risk of jurors exploiting loopholes.

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