

MORE FROM THE #JURY BOX: THE LATEST ON JURIES AND SOCIAL MEDIA

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ABSTRACT

This Article presents the results of a survey of jurors in federal and state court on their use of social media during their jury service. We began surveying federal jurors in 2011 and reported preliminary results in 2012; since then, we have surveyed several hundred more jurors, including state jurors, for a more complete picture of juror attitudes toward social media. Our results support the growing consensus that jury instructions are the most effective tool to mitigate the risk of juror misconduct through social media. We conclude with a set of recommended best practices for using a social-media instruction.

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INTRODUCTION

Born out a common-law tradition and guaranteed by the U.S. Constitution, the impartial jury is one of the most fundamental American institutions. It is also one of the most resilient. The impartial jury has survived the telephone, the radio, the automobile, and the television.¹ There is no reason why it cannot survive Facebook and Twitter, too. But to ensure the continued fairness and integrity of the jury system, the legal profession must be proactive and vigilant in addressing juror misconduct through social media.²

In mid-2011, against a rise in reported instances of juror misconduct through social media, U.S. District Court Judge Amy St. Eve began an informal survey of actual jurors. The survey asked jurors at the conclusion of their service whether they had been tempted to communicate about the case through social media and, if so, what prevented them from doing so. Based on 140 responses from jurors in federal court, we reported in a March 2012 article that the survey data supported the growing consensus in the legal profession that courts should specifically instruct jurors not to use social media to communicate about the case.³

In this Article, we introduce 443 additional responses from jurors in both federal and state court, and revisit the informal survey results anew, with assistance from an additional co-author. Part I discusses social-media developments since our last article and highlights three recent judicial opinions. Part II presents the results of the informal survey. As we explain in Part III, the results continue to support the emerging consensus that jury instructions are the most effective tool to mitigate the risk of juror misconduct through social media. Although the informal survey results are not scientific, we hope that they will further the dialogue by adding the voices of actual jurors.

¹ See, e.g., Catharine Skipp, *Jurors' TV Viewing Is Growing Issue*, N.Y. TIMES, Dec. 29, 1989, at B1 (describing potential effects of both television and movies on juror sympathies); *Jurors Forbidden To Listen On Radio*, WASH. HERALD, Oct. 24, 1922, at 8 (covering "the first time in history" that jurors were instructed not to listen to the details of a trial being broadcast on radio).

² *State v. Smith*, No. M2010-01384, 2013 WL 4804845, at *9 (Tenn. Sept. 10, 2013) ("The American judicial system 'depends upon public confidence in the jury's verdict.'" (quoting *United States v. Siegelman*, 640 F.3d 1159, 1186 (11th Cir. 2011)).

³ See Hon. Amy J. St. Eve & Michael A. Zuckerman, *Ensuring an Impartial Jury in the Age of Social Media*, 11 DUKE L. & TECH. REV. 1 (2012).

I. RECENT DEVELOPMENTS IN SOCIAL MEDIA

A. *The Revolution Continues*

Social media has continued to grow in both usage and influence.⁴ More than ever, Americans of all ages are joining and using Facebook, Twitter, LinkedIn, and other social networks.⁵ George H.W. Bush, for example, recently became the third U.S. President on Twitter.⁶ Facebook now has more than 1.1 billion users who, every minute, post 243,000 photos to the network, up from 208,000 a year ago.⁷ Twitter's expanding user base now "tweets" 350,000 comments every minute, up from 100,000 a year ago.⁸ And every minute, 120 new LinkedIn accounts are created, up from 100 a year ago.⁹ These dizzying numbers are just the tip of the iceberg—there are hundreds of other social networks, and new ones are popping up all of the time.¹⁰

⁴ Anthony Carranza, *Social Media Networking Stats and Trends in 2013*, EXAMINER.COM (Oct. 14, 2013), <http://www.examiner.com/article/social-media-networking-stats-and-trends-2013>; see also Ryan Holmes, *5 Predictions for Social Media in 2014*, CNNMONEY (Dec. 10, 2013, 12:44 PM), <http://tech.fortune.cnn.com/2013/12/10/social-media-2014> (predicting that "upstart" social networks will "catch fire"); Shea Bennet, *Social Media Growth Worldwide—2 Billion Users By 2016, Led by India*, MEDIA BISTRO (Nov. 19, 2013, 3:00 PM), http://www.mediabistro.com/alltwitter/social-media-growth-worldwide_b51877 ("[T]he huge opportunity to recruit new users in less-developed markets [will] ensur[e] that the social networking uptick will continue for years to come.").

⁵ See Drew Desilver, *Chart of the Week: A Minute on the Internet*, PEW RESEARCH CENTER (Nov. 27, 2012), <http://www.pewresearch.org/fact-tank/2013/11/27/chart-of-the-week-a-minute-on-the-internet> ("Keeping up with what people do online is no easy task . . ."); Belle Beth Cooper, *10 Surprising Social Media Statistics That Will Make You Rethink Your Social Strategy*, FASTCOMPANY (Nov. 18, 2013, 5:52 AM), <http://www.fastcompany.com/3021749/work-smart/10-surprising-social-media-statistics-that-will-make-you-rethink-your-social-stra> (reporting that baby boomers are one of the fastest growing demographics on social media).

⁶ Chris Taylor, *George H.W. Bush is Third U.S. President to Join Twitter*, MASHABLE (Dec. 10, 2012), <http://mashable.com/2013/12/10/president-bush-twitter>. The other two are Presidents Obama and Clinton. *Id.*

⁷ Desilver, *supra* note 5.

⁸ *Id.*

⁹ *Id.*

¹⁰ See, e.g., Nick Bilton, *Teenagers Prove Fickle When Choosing Social Networks*, N.Y. TIMES BITS BLOG (Oct. 26, 2013, 12:07 PM), <http://bits.blogs.nytimes.com/2013/10/26/teens-prove-fickle-when-choosing-their-favorite-social-network> (discussing changing attitudes about particular social networks); Adrienne Erin, *New Social Networks You Didn't Know About (Until Now!)*, AL.COM (July 15, 2013, 12:24 PM), <http://www.al.com/living/index.ssf/>

The legal profession continues to embrace social media, but it has been forced to confront difficult questions.¹¹ What are the limits on researching a juror through social media?¹² Can a judge have a social-media profile?¹³ What is the evidentiary value of a Facebook “like”?¹⁴ Can social-media activity give rise to personal jurisdiction?¹⁵ How can courts best manage increased public awareness of judicial proceedings?¹⁶ These and other important questions have not stopped social media from taking hold in

2013/07/new_social_networks_you_didnt.html (discussing “Srgroups,” “NextDoor,” and “Path”); Bob Al-Greene, *10 Hot Social Networks to Watch*, MASHABLE (May 29, 2013), <http://mashable.com/2013/05/29/10-hot-social-networks> (discussing “Medium,” “Kleek,” “Viddy,” “RunKeeper,” “Ghost,” “Pose,” “Vine,” “Atmospher,” “Days,” and “App.net”).

¹¹ *E.g.*, Nancy L. Ripperger, *Ethics: Facebook—Friend or Foe? What Are the Ethical Risks of Using Facebook in Your Litigation Practice?*, PRECEDENT MAGAZINE, Summer 2013, at 36–38, available at <http://www.mobar.org/uploadedFiles/Home/Publications/Precedent/2013/Fall/facebook.pdf>.

¹² *See, e.g.*, Michelle Celarier, *Ex-SAC Exec’s Defense Probes Jurors’ Social Media Postings*, N.Y. POST (Nov. 18, 2013, 11:57 PM), <http://nypost.com/2013/11/18/ex-sac-execs-defense-probes-jurors-social-media-postings> (reporting on a jury consulting firm “doing an extra level of due diligence on prospective jurors by Googling their names, checking out their social-media profiles and looking into public sites for asset searches”).

¹³ Yes, according to ABA Formal Opinion 462 (Feb. 21, 2013), available at http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/formal_opinion_462.authcheckdam.pdf. A related question is whether judges and lawyers may connect to each other on social media. *See* Jane Musgrave, *Florida High Court Asked to Decide Whether Judges, Lawyers Can Be Facebook Friends*, PALM BEACH POST (Jan. 16, 2013, 7:29 PM), <http://www.palmbeachpost.com/news/news/crime-law/state-high-court-asked-to-decide-whether-judges-la/nTyhj>.

¹⁴ *See, e.g.*, *Ebersole v. Kline-Perry*, No. 12-CV-00026, 2012 WL 3776489, at *5 (E.D. Va. Aug. 29, 2012) (“The greater the number of ‘likes’ on the page, the more likely it is that others visited the page The evidence was therefore relevant as to how widely disseminated the letter was”).

¹⁵ *See, e.g.*, *NobelBiz, Inc. v. Veracity Networks, LLC*, No. 13-CV-02518, 2013 WL 5425101, at *4 (N.D. Cal. Sept. 27, 2013) (rejecting broad-based argument that “all activity on social media sites is a form of advertising subjecting the account holding to personal jurisdiction wherever his or her social media account may be viewed”).

¹⁶ *See, e.g.*, Douglas Dowty, *Rick Springfield Mistrial a First for Social Media’s Impact in Central New York*, SYRACUSE.COM (Nov. 20, 2013, 3:23 PM), http://www.syracuse.com/news/index.ssf/2013/11/social_media_a_whole_new_game_in_cases_like_rick_springfield_mistrial.html (reporting on a mistrial declared during deliberations after new evidence surfaced from a social-media site, corroborating the plaintiff’s claims).

law offices and courthouses across the country.¹⁷ According to a recent report, 80 percent of the nation's largest law firms have blogs;¹⁸ many of them are also on Facebook and other social networks.¹⁹ Eighty-one percent of lawyers use social media.²⁰ Federal and state courts increasingly do too²¹—are you following @illinoiscourts on Twitter?

B. The Threats to Jury Impartiality Remain

In our prior article, we explained how social networking by jurors carries with it the dangerous potential to undermine the fundamental fairness of jury trials.²² This potential, unfortunately, continues to become reality in myriad reported cases.²³ In our previous work, we offered

¹⁷ See Simon Chester & Daniel Del Gobbo, *Social Media Networking For Lawyers: A Practical Guide to Facebook, LinkedIn, Twitter and Blogging*, LAW PRACTICE MAGAZINE, Jan.–Feb. 2012, at 28, available at http://www.americanbar.org/publications/law_practice_magazine/2012/january_february/social-media-networking-for-lawyers.html (“What a difference five years makes. Social media has exploded.”).

¹⁸ See Adrian Dayton, *You Read It Here: Blogs Never Sleep*, NATIONAL LAW JOURNAL (Sept. 16, 2013, 12:00 AM), <http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202619190022>.

¹⁹ See generally GUY ALVAREZ, BRIAN DALTON, JOE LAMPORT & KRISTINA TSAMIS, *THE SOCIAL LAW FIRM: AN ASSESSMENT OF THE USE OF SOCIAL TECHNOLOGIES AT AMERICA'S LEADING LAW FIRMS* (2013), available at <http://good2bsocial.com/wp-content/uploads/2013/12/THE-SOCIAL-LAW-FIRM.pdf>.

²⁰ See Stephen Fairly, *ABA Survey Says Lawyers Getting Clients Via Social Media*, NATIONAL LAW REVIEW (Aug. 29, 2013), <http://www.natlawreview.com/article/aba-survey-says-lawyers-getting-clients-social-media> (citing ABA LEGAL TECHNOLOGY SURVEY REPORT (2013)); see also Nicole Black, *Lawyers Get Creative With Use of Social Media*, SUI GENERIS (Oct. 8, 2013, 2:27 PM), <http://nylawblog.typepad.com/suigeneris/2013/10/lawyers-get-creative-with-use-of-social-media.html>.

²¹ See generally CONFERENCE OF COURT PUBLIC INFORMATION OFFICERS, 2013 CCPIO NEW MEDIA SURVEY (2013), available at http://ccpio.org/wp-content/uploads/2012/09/2013-New-Media-Survey-Report_CCPIO.pdf.

²² See St. Eve & Zuckerman, *supra* note 3, at 9. Social media creates problems elsewhere in the justice system too. See, e.g., James Staas, *Man Convicted of Witness Intimidation After Grand Jury Testimony Is Posted on Facebook*, BUFFALO NEWS (Oct. 30, 2013, 2:38 PM), <http://www.buffalonews.com/city-region/erie-county-court/man-convicted-of-witness-intimidation-after-grand-jury-testimony-is-posted-on-facebook-20131030>.

²³ E.g., Naomi Martin, *Juror in David Warren Trial Was Booted Because He Used Social Media*, NOLA.COM (Dec. 6, 2013, 9:30 AM), http://www.nola.com/crime/index.ssf/2013/12/juror_in_david_warren_trial_wa.html; Mark Pearson, *When Jurors Go 'Rogue' on the Internet and Social Media*, JOURNALAW (May 30, 2013,

numerous examples; now, based on recent reports, we offer even more.²⁴ These examples are an important reminder that judges and lawyers must remain vigilant in their efforts to ensure a fair trial in the age of social media.²⁵

Facebook remains a popular vehicle through which jurors commit misconduct. Consider, for example, the juror in Mississippi, who posted on Facebook: “I guess all I need to know is GUILTY. lol.”²⁶ Or the juror from across the Pond, who posted: “Wooooow I wasn’t expecting to be in a jury Deciding a paedophile’s fate, I’ve always wanted to F**k up a paedophile & now I’m within the law!”²⁷ Another recent example comes from a wrongful-death trial in Missouri, throughout which the jury foreperson regularly communicated about the case on Facebook.²⁸ Some examples of the Facebook communications include:

- **Juror:** “Got picked for jury duty.”
- **Juror:** “Sworn to secrecy as to details of this case. Most importantly . . . the 3:00 p.m. Cocktail hour is not observed!”

2:12 PM), <http://journalaw.com/2013/05/30/when-jurors-go-rogue-on-the-internet-and-social-media>.

²⁴ Published reports, of course, do not capture every instance of juror misconduct. Some of it goes undetected or cannot be proved. *See, e.g.*, *Kervick v. Silver Hill Hosp.*, 72 A.3d 1044, 1065 & n.13 (Conn. 2013) (rejecting claim that juror posted comments online about the trial where the comments were posted anonymously and there was no reliable evidence that a real juror actually posted them during trial).

²⁵ *Cf. Martin, supra* note 23 (“Use of social media by jurors in trials has become an increasing concern for judges and lawyers around the country. The worry is jurors will be exposed to information about the case that they are prohibited from seeing—such as news accounts that contain information not admitted in court—and that they will share information about the trial, which they are prohibited from doing while they are serving on the jury.”).

²⁶ *Shaw v. State*, No. 2011-KA-01536-COA, 2013 WL 5533080, at *8 (Miss. Ct. App. Oct. 08, 2013). The offending jurors also friended a trial witness on Facebook. *Id.* Even so, the appeals court affirmed the trial court’s denial of a motion for mistrial. *Id.*

²⁷ *See Juror Jailed Over Paedophile Facebook Post*, METRO NEWS (July 29, 2013, 5:09 PM), <http://metro.co.uk/2013/07/29/juror-jailed-over-paedophile-facebook-post-3903315>; John Aston, *Two Jurors Jailed for Contempt of Court Over Use of Internet During Trials*, THE INDEPENDENT (U.K.) (July 30, 2013), <http://www.independent.co.uk/news/uk/crime/two-jurors-jailed-for-contempt-of-court-over-use-of-internet-during-trials-8737004.html>.

²⁸ Sylvia Hsieh, *Juror’s Facebook Posts May Overturn Wrongful Death Verdict*, LAWYERS.COM (Feb. 14, 2013), <http://blogs.lawyers.com/2013/02/jurors-facebook-posts-overturn-verdict>. The offending juror was jailed for two months for contempt. *Id.*

- Friend:** “If he’s cute and has a nice butt, he’s innocent!”
- **Juror:** “Drunk and having a great food at our fav neighborhood hangout.”
 - Friend:** “I’m still amazed they allow jurors to nip from a flask all day.”
 - **Juror:** “Starting day 8 of jury service.”
 - Friend:** “Remember nice ass = innocent!”
 - **Juror:** “Civic duty fulfilled and justice served. Now, where’s my cocktail????”
 - Friend:** “Was it Miss Peacock in the library with the lead pipe?”
 - **Juror:** “Civil case . . . Verdict for the defendants I was the jury forearm deliberations and verdict . . . in under one hour.”²⁹

Not all recent reported examples of misconduct involve Facebook. Jurors continue to blog about their jury service,³⁰ like the California juror who posted dozens of comments on her personal blog throughout a lengthy trial.³¹ One of her early posts said: “[T]his is my secret blog. I don’t know how secret it really is though. I want to tell secret jury things.”³² As described in other recent reports, a juror discussed the case on a newspaper’s online comment board,³³ and another did online research about a witness and the judge.³⁴ One juror even communicated from her mobile

²⁹ *Id.*

³⁰ *See, e.g.,* *McNeely v. Cate*, No. 11-56393, 2013 WL 5651267 (9th Cir. Oct. 17, 2013) (considering a habeas claim based on the jury foreperson’s blog post during trial); *Figueroa v. Highline Med. Ctr.*, No. 68272-5-I, 2013 WL 5636674, at *7 (Wash. Ct. App. Oct. 14, 2013) (summarizing a juror’s blog postings during trial as “limited and innocuous”).

³¹ *People v. Johnson*, No. F057736, 2013 WL 5366390 (Cal. Ct. App. Sept. 25, 2013).

³² *Id.* at *133. The juror apparently posted, among other things, “hypothetical” questions related to the case. “At least one of her posts drew a comment from a family member who ‘love[d]’ the blogger’s ‘hypothetical question to a case that you cannot talk about (let alone blog about).’” *Id.* (alteration in original).

³³ *See* Michelle Bowman, *States Punish Web-Cruising Jurors*, LAWYERS.COM (June 18, 2013), <http://blogs.lawyers.com/2013/06/states-cpunish-web-cruising-juror>. The trial court found the juror in criminal contempt. *Id.*

³⁴ Drew Singer, *Juror Misconduct Strikes Again at Jenkins Ally’s Trial*, LAW360.COM (Oct. 24, 2013), <http://www.law360.com/articles/483305/juror-misconduct-strikes-again-at-jenkins-atty-s-trial>.

device in plain sight of the judge.³⁵ In that case, the judge noticed “an unexpected glow on a juror’s chest while the courtroom lights were dimmed during video evidence in an armed-robbery trial.”³⁶ The light, it turned out, was from the juror’s cell phone. He was texting.³⁷

C. Recent Case Law on Jurors & Social Media

Jurors’ often brazen acts of misconduct have contributed to a growing body of case law about jurors and social media. How should trial courts respond to possible juror misconduct on social media? What does it mean to be “friends” on Facebook? Are there limits on how courts can respond? In this Section, we review some recent cases that have addressed questions like these.

1. The Trial Court’s Duty to Investigate—State v. Smith

In *State v. Smith*,³⁸ the Tennessee Supreme Court considered how a trial court should react when it learns “during a jury’s deliberations that a juror exchanged Facebook messages” with a witness.³⁹ The issue arose out of a murder prosecution in which Dr. Adele Lewis, a medical examiner affiliated with Vanderbilt University, testified for the state.⁴⁰ Though four of the jurors were also affiliated with Vanderbilt, none of them were asked during voir dire whether they knew Dr. Lewis.⁴¹ After the close of evidence, the trial court charged the jury and instructed them to begin deliberations.⁴²

Problems came to light about an hour later.⁴³ Dr. Lewis informed the trial judge that a juror had initiated a Facebook conversation with her.⁴⁴ In an email to the judge, Dr. Lewis recounted the conversation:

[Juror]: A-dele!! I thought you did a great job today on the witness stand . . . I was in the jury . . . not sure if you

³⁵ *Oregon Juror Jailed for Texting During Trial*, ASSOCIATED PRESS (Apr. 18, 2013, 10:47 PM), <http://bigstory.ap.org/article/oregon-juror-jailed-texting-during-trial>. The judge held the juror in contempt of court and required him to spend the night in county jail. *Id.*

³⁶ *Id.*

³⁷ *Id.* On the topic of texting, Facebook recently announced that its mobile app will allow users to send each other Facebook messages with the ease of texting. See Kurt Wagner, *Facebook Makes Its Messenger App More Like Texting*, MASHABLE (Oct. 29, 2013), <http://mashable.com/2013/10/29/facebook-messenger-texting>.

³⁸ *State v. Smith*, No. M2010-01384, 2013 WL 4804845 (Tenn. Sept. 10, 2013).

³⁹ *Id.* at *1.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.* at *2.

⁴³ *Id.*

⁴⁴ *Id.*

recognized me or not!! You really explained things so great!!

[Dr. Lewis]: I was thinking that was you. There is a risk of a mistrial if that gets out.

[Juror]: I know . . . I didn't say anything about you . . . there are 3 of us on the jury from Vandy and one is a physician (cardiologist) so you may know him as well. It has been an interesting case to say the least.⁴⁵

The trial judge told the lawyers about the email at some point, but it is unclear when, how, or what discussions took place.⁴⁶ Deliberations went on and the jury found the defendant guilty of first-degree murder, for which he was sentenced to life in prison.⁴⁷

Before the jury left the courthouse, defense counsel suggested that the court examine the juror who communicated with Dr. Lewis.⁴⁸ The court flatly denied the request, being “satisfied with the communication that [it had] gotten from Dr. Lewis with regard to the matter.”⁴⁹ The intermediate appellate court affirmed, but the Tennessee Supreme Court reversed.

In a lengthy opinion, the state high court began by observing that, “[l]ike judges, jurors must be—and must be perceived to be—disinterested and impartial.”⁵⁰ This means that the trial court must ensure that jurors “base their verdict solely on the evidence introduced at trial.”⁵¹ If the trial court learns of any inappropriate communications between a juror and a third party, it must “assure that the juror has not been exposed to” any improper information or influence.⁵² On the rise of social media, the high court acknowledged that technology has “made it easier for jurors” to have third-party contacts,⁵³ but explained that “pre-internet” case law provides an appropriate framework to address instances of juror misconduct committed through social media.⁵⁴

Applying these pre-internet principles, the Tennessee Supreme Court held that the trial court failed to adequately investigate the “nature and extent of the improper communications” between the juror and Dr.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at *2–*3.

⁴⁸ *Id.* at *3.

⁴⁹ *Id.*

⁵⁰ *Id.* at *4.

⁵¹ *Id.*

⁵² *Id.* at *5.

⁵³ *Id.* at *7.

⁵⁴ *Id.*

Lewis.⁵⁵ The court explained that, after learning of the communication, the trial judge “was required to do more than simply inform the parties . . . and then await the jury’s verdict.”⁵⁶ The trial judge should have “immediately” conducted a “hearing in open court to obtain all the relevant facts surrounding the extra-judicial communication,” including its impact on the juror’s “ability to serve as a juror” and whether any improper information was shared with other jurors.⁵⁷ Without such a hearing, the record was inadequate and the case was remanded with instructions to conduct a hearing.⁵⁸

The state high court concluded its opinion with a comment on the digital age. Observing that the judicial process depends on public confidence in its outcomes, the court cautioned that juror communications about a case on social media could erode that confidence.⁵⁹ More than that, the court continued, juror misconduct through social media threatens the fundamental American guarantee of a fair trial.⁶⁰ And so for these reasons, the court admonished trial courts “to take additional precautions to assure that jurors understand their obligation to base their decisions only on the evidence admitted in court.”⁶¹ Specifically, the court explained:

Trial courts should give jurors specific, understandable instructions that prohibit extra-judicial communications with third parties and the use of technology to obtain facts that have not been presented in evidence. Trial courts should clearly prohibit jurors’ use of devices such as smart phones and tablet computers to access social media websites or applications to discuss, communicate, or research anything about the trial. In addition, trial courts should inform jurors that their failure to adhere to these prohibitions may result in a mistrial and could expose them to a citation for contempt. Trial courts should deliver these instructions and admonitions on more than one occasion.⁶²

2. *What’s in a Friend?*—*Sluss v. Commonwealth*

The meaning of a Facebook friendship has become increasingly significant as parties begin to cry foul over jurors’ undisclosed Facebook

⁵⁵ *Id.* at *9.

⁵⁶ *Id.* at *7.

⁵⁷ *Id.*

⁵⁸ *Id.* at *8.

⁵⁹ *Id.* at *9 (citing *St. Eve & Zuckerman, supra* note 3, at 12).

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

connections.⁶³ In *Sluss v. Commonwealth*,⁶⁴ for example, the Kentucky Supreme Court considered the defendant's claim of juror bias based on, among other things, two jurors' undisclosed Facebook friendships with the victim's mother.⁶⁵

The case arose out of the tragic death of eleven-year-old Destiny Brewer, who died when Ross Brandon Sluss crashed his truck into a vehicle carrying her.⁶⁶ Sluss, who was intoxicated at the time, was later charged with murder and other offenses.⁶⁷ The case was in the public eye from the beginning and community members "took to the internet to discuss the incident and the upcoming trial on websites such as Facebook and Topix."⁶⁸

At Sluss' trial, the jurors were asked during general voir dire if they knew the victim or her family.⁶⁹ Two jurors—call them Juror 1 and Juror 2—said nothing.⁷⁰ None of the jurors were asked if they were "Facebook friends" with the victim or her family.⁷¹ Then, during individual voir dire, Juror 1 stated that she had a Facebook account from which she knew only that the murder "happened."⁷² Juror 2 stated that she was not on Facebook and knew nothing of the murder.⁷³ Jurors 1 and 2 sat on the actual jury, which found Sluss guilty of murder.⁷⁴

Defense counsel later discovered that both jurors were "Facebook friends" with the victim's mother, whose Facebook profile contained information about her daughter's death.⁷⁵ Counsel proffered screenshots of the pertinent Facebook pages to the trial court and unsuccessfully moved for a new trial.⁷⁶

⁶³ See, e.g., *W.G.M. v. State*, No. CR-12-0472, 2013 WL 4710406, at *1–*4 (Ala. Crim. App. Aug. 30, 2013) (rejecting claim of juror misconduct based on undisclosed Facebook friendship because (1) juror was never asked about social-networking relationships during voir dire; and (2) "the status of being a 'friend' on Facebook does not necessarily equate to a close relationship from which a bias could be presumed").

⁶⁴ *Sluss v. Commonwealth*, 381 S.W.3d 215 (Ky. 2012).

⁶⁵ *Id.* at 217.

⁶⁶ *Id.*

⁶⁷ *Id.* at 218.

⁶⁸ *Id.* at 221.

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 222.

⁷⁴ *Id.* at 221–22.

⁷⁵ *Id.*

⁷⁶ *Id.*

Sluss then appealed to the Kentucky Supreme Court, arguing primarily that “the mere fact that each juror was a ‘Facebook friend’ with [the victim’s mother] creates a presumption of juror bias and should have been disclosed during voir dire.”⁷⁷ Not so, the court explained: Facebook friendships “do not necessarily carry the same weight as true friendships or relationships in the community, which are generally the concern during voir dire.”⁷⁸ Some people, like the victim’s mother, have thousands of Facebook friends, and the nature of each friendship “varies greatly, from passing acquaintanceships . . . to close friends and family.”⁷⁹ As such, the court concluded that “a juror who is a ‘Facebook friend’ with a family member of a victim, standing alone, is arguably not enough evidence to presume juror bias sufficient to require a new trial”; what matters is the actual nature of friendship.⁸⁰

Although mere Facebook friendships were not enough, the court was troubled by the jurors’ apparent misstatements during voir dire and also the trial court’s inadequate investigation of the relationship between the jurors and the victim’s mother.⁸¹ The state supreme court accordingly reversed and remanded, directing the trial court to consider, among other things, whether the jurors lied during voir dire about their Facebook usage; whether the jurors were, in fact, Facebook friends with the victim’s mother and, if so, when they became friends; and the nature and extent of any actual friendships between the jurors and the victim’s mother.⁸²

3. *The Limits on Proactive Measures*—Steiner v. Superior Court

Many courts and lawyers now appreciate the challenge of ensuring an impartial jury in the age of social media. In the high-profile prosecution of Jodi Arias, for example, defense counsel sought an order requiring the jurors to reveal their Twitter usernames “so their accounts can be monitored for communications about the case.”⁸³ (The court denied the motion.⁸⁴)

Some attempts to ensure impartiality, however, have gone too far. Take, for example, the judicially imposed restrictions at issue in *Steiner v.*

⁷⁷ *Id.* at 222.

⁷⁸ *Id.*

⁷⁹ *Id.* (explaining further that “Facebook allows only one binary choice between two individuals where they either are ‘friends’ or are not ‘friends,’ with no status in between”).

⁸⁰ *Id.*

⁸¹ *Id.* at 223–24.

⁸² *Id.* at 229.

⁸³ *See Motion on Arias Jurors’ Twitter Handles Denied*, ASSOCIATED PRESS (Dec. 4, 2013, 2:02 PM), <http://www.myfoxphoenix.com/story/24135483/motion-on-arias-jurors-twitter-handles-denied>.

⁸⁴ *See id.*

Superior Court.⁸⁵ *Steiner* began as an ordinary tort case in which the plaintiff alleged injuries from asbestos in the defendants' products.⁸⁶ As the case moved towards trial, however, the defendants became concerned that jurors would "Google" the plaintiff's attorney, Simone Farrise, and see statements on her website about victories in similar cases.⁸⁷ After jury selection, but before opening statements, the defendants asked the trial court to order Farrise to remove those references for the duration of the trial.⁸⁸ Farrise objected, but the trial court shared the defendants' concern and so granted their request.⁸⁹ The court also "admonished the jurors not to Google the attorneys."⁹⁰

After trial, Farrise restored her website and then appealed both the jury verdict (which was for the defendants) and the trial court's order directed at her website. Though the California Court of Appeal affirmed the verdict, it found error in the trial court's order requiring Farrise to take down portions of her website.⁹¹ As the appellate court explained, the order was overbroad and constituted "an unlawful prior restraint on the attorney's free speech rights under the First Amendment."⁹² Prophylactic measures directed at a website unrelated to the case went "too far."⁹³ "Juror

⁸⁵ *Steiner v. Superior Court*, 164 Cal. Rptr. 3d 155 (Cal. Ct. App. 2013). There are other examples too. *E.g.*, *Marceaux v. Lafayette City-Parish Consolidated Gov't*, 731 F.3d 488, 494–96 (5th Cir. Sept. 30, 2013) (reversing district court's order shutting down a website in advance of jury selection); William R. Levesque, *Seizure of Juror's Computer Rescinded*, TAMPA BAY TIMES, Jan. 9, 2013, at 1B (reporting that a federal judge ordered the U.S. Marshalls to seize a former juror's personal computer after allegations of Internet misconduct arose after her service; the judge rescinded the order after the prosecutor raised due process concerns). On the limits of the trial court's investigative power, see, for example, Richard Raysman & Peter Brown, *Social Media Use As Evidence of Juror Misconduct*, 11 INTERNET L. & STRATEGY 5, 3 (2013).

⁸⁶ *Steiner*, 164 Cal. Rptr. 3d at 157.

⁸⁷ *Id.* at 158.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ For the discerning reader who wonders why the trial court's order was not moot, the order was indeed moot, but the appellate court concluded that the public interest warranted consideration of the issue. *Id.* at 160 ("The actual order . . . does raise questions as to a trial court's authority to issue an order restricting an attorney's free speech rights during trial to prevent potential jury contamination. Because any order restricting such speech during trial is likely to become moot before [an appeal] can be heard, we agree it raises an issue of broad public interest that is likely to evade timely review." (citing *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 546–47 (1976)).

⁹² *Steiner*, 164 Cal. Rptr. 3d at 157.

⁹³ *Id.* at 166.

admonitions and instructions, such as those given here, were the presumptively adequate means of addressing the threat of jury contamination in this case.”⁹⁴

II. THE INFORMAL SURVEY OF ACTUAL JURORS

In March 2012, we reported the preliminary results of our informal survey of actual jurors.⁹⁵ We had 140 responses at that time, all from jurors in federal court. Now, with 443 additional responses from jurors in both federal and state court, we revisit the results anew. As explained below, the results show a small but significant number of jurors who were tempted to communicate about the case through social media. Almost all of these jurors ultimately decided not to do so because of the court’s social-media instruction. Even jurors who were not tempted to communicate about the case through social media indicated that the court’s instruction was effective in keeping their temptation at bay. After briefly describing the survey, we turn to the numbers and then share comments from the jurors themselves.

A. Background on the Survey

For more than three years, actual jurors in Illinois have been asked to complete a short survey at the conclusion of their jury service. The survey began with jurors in the U.S. District Court for the Northern District of Illinois, and about a year ago expanded to jurors in the Circuit Court of Cook County, Criminal Division. All survey responses were anonymous.

Each participating juror sat in either a federal criminal or civil case in the Northern District of Illinois or a state criminal case in Cook County, Illinois. The federal cases were presided over primarily by Judge Amy J. St. Eve.⁹⁶ Judge Charles P. Burns presided over all of the state criminal cases. In every case, the presiding judge administered a model social-media instruction during opening and closing instructions.⁹⁷ Additionally, in many of the longer trials, the judge daily admonished jurors not to communicate about the case through social media.

The survey asked the jurors about their experience and included these questions about social-media use during trial:

⁹⁴ *Id.* at 157.

⁹⁵ See generally St. Eve & Zuckerman, *supra* note 3.

⁹⁶ U.S. District Judge Matthew F. Kennelly presided over some of the early cases.

⁹⁷ For the text of the model instructions on which the actual instructions were based, see Judicial Conference Committee on Court Administration and Case Management, *Proposed Model Jury Instructions: The Use of Electronic Technology to Conduct Research on or Communicate About a Case* (June 2012), <http://www.uscourts.gov/uscourts/News/2012/jury-instructions.pdf>.

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

If so, what prevented you from doing so?⁹⁸

The results that follow are not scientific, nor are they intended to be.⁹⁹ Perhaps most significantly, juror participation was voluntary and some jurors may not have been candid (though juror anonymity likely encouraged candor).¹⁰⁰ Despite their informality, the results are nonetheless instructive in navigating the social-media minefield. In addition to the numerical tally, the results come together to form one of the largest collections of comments from actual jurors about social media.

B. The Results

To date, 583 jurors have participated in the informal survey, representing 358 jurors from federal court and 225 jurors from state court. The first question asked the juror whether she was tempted to communicate about the case through social media. Jurors from both federal and state court overwhelmingly responded in the negative, though a sizable, significant minority said “yes” or some equivalent.¹⁰¹ Here is the breakdown:

| | Number | Percent |
|--------------|--------|---------|
| Total | 583 | -- |
| Not tempted | 520 | 89.19% |
| Tempted | 47 | 8.06% |
| No Response | 16 | 2.74% |

Consistent with the preliminary results we reported in March 2012, a significant number of jurors referenced the judge or the judge’s instruction as the reason why they did not, or were not even tempted to, communicate about the case on social media.

⁹⁸ The full text of the Jury Questionnaire, together with jurors’ responses, is on file with the authors.

⁹⁹ See St. Eve & Zuckerman, *supra* note 3, at 21 & n.114 (acknowledging the unscientific nature of the results).

¹⁰⁰ See ROBERT M. LAWLESS, JENNIFER K. ROBBENOLT, & THOMAS S. ULEN, *EMPIRICAL METHODS IN LAW* 77 (2010) (observing that respondent anonymity is likely to increase response rate and accuracy in surveys about “sensitive behaviors”).

¹⁰¹ We observed a slight uptick in the rate of temptation over time. Although no hard conclusions can be drawn due to the unscientific nature of this survey, we believe this may be an area ripe for future inquiry.

Notably, the results from federal and state court are nearly identical. We observed almost the exact same rates of temptation and response across both forums:

| | Federal | | State | |
|--------------|---------|---------|--------|---------|
| | Number | Percent | Number | Percent |
| Total | 358 | -- | 225 | -- |
| Not tempted | 317 | 88.55% | 203 | 90.22% |
| Tempted | 30 | 8.38% | 17 | 7.55% |
| No Response | 11 | 3.07% | 5 | 2.22% |

We also observed similar comments from jurors in both forums. At almost identical rates, federal and state jurors told us that the judge or the judge's instruction influenced them not to communicate about the case through social media. Jurors across both forums also explained their decision to refrain from social media by mentioning their oath, respect for the judicial process, and integrity.

1. Analysis of Responses from Jurors Who Were Tempted

Across both forums, forty-seven jurors responded that they were tempted to communicate about the case through social media. Forty-five of the forty-seven tempted jurors said that they ultimately did not succumb to their temptation. The two others said nothing either way—one stressed that she was tempted to talk about her “experience” and not “content,” and the other simply said that she was tempted to communicate with her “family.”

Asked what “prevented” them from communicating about the case on social media, most of the forty-five jurors—forty-one of them—referenced the court's social-media instruction. One juror, for example, said that she wanted to talk about the case on Facebook, but did not because of “the Judge's orders.” Others similarly made direct references to judge's social-media instruction in explaining what prevented them from giving in to their temptation:

- “Judge told us not to communicate”
- “The request of the Judge”
- “The Judge's orders” (2 jurors)
- “The Judge”
- “Direct orders”
- “I morally thought I should obey the Judge”
- “The Judge saying not to”
- “The Judge's admonishment”

- “The Judge’s instructions”
- “Instructions not to do it”
- “Your instructions”
- “Agreement with judge not to do so”
- “ask[ed] not to”
- “Judge’s orders and importance to the case”
- “Nope. The judge was clear about not sharing the information”
- “I was instructed not to, and I tend to do the right thing”
- “I was tempted but told not to, so I follow[ed] the rules”
- “Wanted to but knew I could not”
- “We were told not to”

One juror, who likely sat in a longer trial, pointed to the judge’s “daily warnings” (underline in original) as the reason for her restraint. Repetition was important to another juror, who likewise explained that the judge’s “repeated directions not to” communicate about the case on social media were effective.

Other tempted jurors indirectly referred to the judge’s instruction in explaining why they did not communicate about the case on social media. At least two of them mentioned the “law”—“point of law” and “I have to be loyal to the law”—and numerous others pointed to their oath or respect for the process:

- “I took an oath”
- “My oath”
- “I follow rules under the oath I made”
- “I knew it was my duty to fulfill the oath I took before the court not to say anything”
- “My duty as a jur[or] under oath”
- “Took oath not to communicate”
- “My oath not to tell”
- “I took this very seriously and wanted to do what I swore I would”

- “I swore not to”
- “I had to remind myself that this is a job and I made an oath and was going to follow rules under the oath I made”
- “I was tempted, but my respect for the privilege of service as a juror to our Court System prevented me from doing so”
- “I respect the process”

Consistent with the court’s instructions, others decided not to give in to their social-media temptations because they understood that doing so would threaten their impartiality. One juror, for example, was tempted by Google but stayed offline in order “to keep an open mind.” Other jurors explained their decision like this:

- “I did not want to sway my opinion”
- “To keep an open mind”
- “Afraid I would be bias[ed]”
- “Changing my personal opinion”

Although no jurors were threatened with contempt, two jurors sought to avoid criminal sanctions; in their words:

- “I didn’t want to ruin the trial or get arrested or something”
- “JAIL” (capitals in original)

In an apparent recognition of the mistrial that might result, one juror decided not to communicate about the case in light of the “time invested of all jurors.” Another juror similarly remarked that as the trial went on, her temptation diminished because she “then had enough invested not to.”

2. Analysis of Responses from Jurors Who Were Not Tempted

The overwhelming majority of jurors—520 or 88.55 percent of the sample—reported no temptation to communicate about the case through social media. Some were emphatic about it:

- “No not at all” (nine jurors)
- “Absolutely not” (three jurors)
- “No” (underline in original; ten jurors)
- “No!”

Although most jurors responded to the question about temptation by stating simply “no” or some equivalent, about seventy jurors went further without any prompt and explained why. The comments from these jurors are revealing.

Similar to those from the tempted jurors, the comments from the jurors who were not tempted overwhelmingly related to the court’s social-media instruction. Many jurors explicitly referenced the judge or the instruction as the reason for their lack of temptation:

- “The Judge’s orders” (three jurors)
- “The Judge asked us not to”
- “The Judge’s instruction” (two jurors)
- “The Judge made it pretty clear not to”
- “The Judge’s order not to discuss the case”
- “The Judge said not to”
- “Judge’s admonition to not communicate about the case”
- “instructed not to”
- “stayed true to my given orders”
- “Instructed by Judge not to”
- “I was told not to”
- “Because the Judge instructed us not to”
- “The fact that we were not supposed to”
- “did not want to break the rules”
- “Jury instructions”
- “The Judge”
- “No, Judge said not to!”
- “You told us not to”
- “Judge asked us not to go online re: this case”
- “Judge’s direction”
- “the reminders from the judge were good all the same”
- “Followed requests of court not to discuss”

- “The warning”
- “instructions from the Judge” (two jurors)
- “was instructed not to”
- “ordered not to look”

One juror characterized the social-media instruction as a “gag order” and explained that she did not discuss the case on social media because “there was a gag order prohibiting us from discussing the trial.” Two jurors said “the law,” and another remarked that “its against the law” to communicate about the case through social media.

Other jurors’ explanations for their lack of temptation linked the social-media instruction to principles of fairness:

- “The Judge’s instructions and I did not want to compromise the case”
- “Judge’s direction [and] wanted to provide a fair and unbiased decision”
- “[The Judge] instructed us not to look through any social networks. Besides, I want to hear and see evidence of the case”
- “My own personal belief but the judge’s orders”

Some jurors just referenced fairness as the reason for their lack of temptation:

- “Did not want to jeopardize proceeding in any way”
- “I didn’t want to be biased in the case”
- “I did not want to compromise the case”

For a handful of jurors, their lack of temptation and their juror oaths went hand-in-hand:

- “I was sworn to not say anything”
- “it would have been improper once I was instructed not to”
- “My duty not to do so”

Others attributed their lack of temptation to something more personal:

- “promise to God”
- “morally”

- “I took this very serious[ly] and kept my mouth shut”
- “I was not going to undermine the integrity of the process”
- “Civic duty”
- “My sense of integrity”
- “Kept an open mind”
- “did my job”
- “Respect” (two jurors)
- “Got home too late to think about going on Facebook :)”

For one juror, refraining from prohibited social-media communications was a source of personal pride: “I was proud of the fact that we, as a jury, did not discuss the case until it came time for deliberations.” For another, it was out of “fear,” presumably another reference to being held in contempt for violating the court’s instruction. And since jurors, after all, are human, one remarked that “nothing” could prevent her from using social media to communicate about the case, although she insisted she was not tempted to do so.

Finally, in reporting no temptation, twenty jurors explained that they do not use (or have no interest in ever using) social-networking services. Thirteen of them, or 65 percent, were from federal court, with the remaining seven jurors, or 35 percent, from state court. Additionally, the rate of jurors reporting that they do not use social media increased with time in both federal and state court. The comments from these jurors are a good reminder that, despite the rise of social media, not every juror is a user. Some of their comments include:

- “not big on technology!” (underline in original)
- “don’t use any of those”
- “I don’t use them, except for LinkedIn but I do not ‘chat’ on the Internet”
- “don’t use them”
- “I do not use social networks”
- “I do not use any of those social networks ever”
- “don’t use those things much”
- “I don’t have any accounts”

- “I very rarely use these networks”
- “I don’t use social networks to communicate”
- “No interest”
- “I am not on any of those networks. Just follow Twitter but do not Tweet”
- “I don’t really do ‘social networks’”
- “No, I don’t use that too much”
- “I don’t ‘social network’ anyway”
- “don’t use those elect. gadgets”
- “I don’t use social networks much”
- “not on social networks”
- “not interested”
- “didn’t want to”
- “don’t use those sites”
- “don’t have, don’t care”
- “I don’t use them”

III. BEST PRACTICES FOR ENSURING AN IMPARTIAL JURY IN THE AGE OF SOCIAL MEDIA

A. Employ a Social-Media Instruction

The informal survey responses, though unscientific, support the emerging majority view that the best way to ensure an impartial jury in the age of social media is through carefully crafted jury instructions.¹⁰² As borne out by jurors in our sample, such instructions can effectively mitigate the risks of juror misconduct associated with social media. As dozens of jurors told us, they did not communicate about the case on social media because of the “Judge’s instruction,” or because “[t]he Judge made it pretty clear not to.”

Unlike more draconian tools like threats of imprisonment and blanket technology bans, social-media instructions are more respectful of

¹⁰² Christian Nolan, *Supreme Court Requires Jury Instruction to Avoid Social Media*, CONN. LAW. TRIB. (Aug. 9, 2013, 6:22 PM), <http://www.ctlawtribune.com/id=1202614781226> (describing the practices of the Connecticut state court system).

jurors, and less likely to negatively impact their willingness to serve.¹⁰³ Trial judges are intimately familiar with instructing juries and have traditionally relied on instructions as the primary defense against misconduct.¹⁰⁴ There is no reason to deviate now. The law presumes that jurors will follow their instructions,¹⁰⁵ and in the social-media context, scores of actual jurors told us that they actually did.¹⁰⁶

Social-media instructions may not prevent every instance of juror misconduct. Instructions are not a silver bullet, but there likely is none; after all, the jury system is “fundamentally human”¹⁰⁷ and therefore entails a “risk of human fallibility.”¹⁰⁸ But as experience, studies and our informal survey results support, a social-media instruction is a necessary and often independently sufficient method to minimize, if not eliminate, the risk of juror misconduct through social media. Resolving to employ a social-media instruction, however, is only the beginning. There are further questions of timing and content.

B. Instruct on Social Media Early and Often

Courts should instruct juries on social media early and often. We suggest an instruction in the judge’s opening remarks to the jury, as a part of the judge’s closing instructions before the jury begins deliberations, and daily in trials spanning several days. Indeed, one of the jurors in our sample lauded the judge for the “daily” instruction. Another said that she was tempted at the beginning but less so over time, which underscores the importance of repetition.¹⁰⁹

¹⁰³ See *J.E.B. v. Alabama ex rel. T.B.*, 577 U.S. 127, 146 (1994) (observing that the integrity of our jury system depends on full public participation in the process).

¹⁰⁴ See *Steiner v. Superior Court*, 164 Cal. Rptr. 3d 155, 163 (Cal. Ct. App. 2013) (“It is well established that ‘frequent and specific cautionary admonitions and jury instructions . . . constitute the accepted, presumptively adequate, and plainly less restrictive means of dealing with the threat of jury contamination.’” (citation omitted) (modification in original)).

¹⁰⁵ See *Weeks v. Angelone*, 528 U.S. 225, 234 (2000) (“A jury is presumed to follow its instructions.”).

¹⁰⁶ See *supra* Part II.B.2.

¹⁰⁷ *People v. Marshall*, 790 P.2d 676, 699 (Cal. Ct. App. 1990).

¹⁰⁸ *Anderson v. Fuller*, 455 U.S. 1028, 1033 (1982); see also *Rideau v. Louisiana*, 373 U.S. 723, 733 (1963) (Clark, J., dissenting) (“[I]t is an impossible standard to require that tribunal to be a laboratory, completely sterilized and freed from any external factors.”).

¹⁰⁹ See also *State v. Smith*, No. M2010-01384, 2013 WL 4804845, at *9 (Tenn. Sept. 10, 2013) (“Trial courts should deliver [social-media and Internet-related] instructions and admonitions on more than one occasion.”).

C. Make the Instruction Effective

The mere existence of a social-media instruction, without regard to content, might be enough for some jurors, as it was for two jurors in our sample. One juror said, “I am an honest person so knowing I had rules to follow made it easy.” Another juror agreed: “I am a rule follower.” Though not unique, jurors of this type are rare.

For most jurors, the content of the social-media instruction is what matters. Our prior article provided some suggestions about effective content and highlighted the numerous articles and model instructions that can guide the reader on the subject. We take the same approach here, and briefly offer some guiding principles.

1. Hit Social Media on Its Head

At its core, an effective social-media instruction must appreciate the changing nature of the risk and the importance of social media to the modern-day juror.¹¹⁰ Social media has become part of Americans’ daily lives; many use Facebook, Twitter and other social networks almost reflexively, and increasingly from their mobile devices.¹¹¹ Some jurors may not even realize that it is wrong to communicate on social media about the case. And given the extraordinary ability to broadcast oneself on social media, even one-sided online comments like “I am on jury duty” can invite responses and start a conversation.¹¹²

This brave new world of social media “now requires trial courts to take additional precautions” to preserve the fairness and integrity of the jury system.¹¹³ Standard “no communication” instructions will no longer do;

¹¹⁰ See *For Modern Jurors, Being On a Case Means Being Offline*, NAT’L PUB. RADIO (June 24, 2013), <http://www.npr.org/blogs/alltechconsidered/2013/06/24/195172476/jurors-and-social-media> [hereinafter *Modern Jurors*]. For a succinct discussion of the dangers specific to social media, see, for example, the Tennessee Supreme Court’s discussion in *Smith*, 2013 WL 4804845, at *5–*7, and our prior discussion, see St. Eve & Zuckerman, *supra* note 3.

¹¹¹ See *Modern Jurors*, *supra* note 110; Maeve Duggan & Aaron Smith, *Cell Internet Use 2013*, PEW INTERNET & AMERICAN LIFE PROJECT (Sept. 16, 2013), <http://pewinternet.org/Reports/2013/Cell-Internet.aspx> (reporting that 63 percent of cell-phone users access the internet through their phone).

¹¹² See Martin, *supra* note 23 (juror struck for saying she was on the jury in a high-profile case). As one New Jersey judge put it, even a seemingly innocent Tweet can be seen as “an invitation to a conversation.” *Modern Jurors*, *supra* note 110.

¹¹³ *Smith*, 2013 WL 4804845, at *9; see also *Steiner v. Superior Court*, 164 Cal. Rptr. 3d 155, 165 (Cal. Ct. App. 2013) (“The traditional prohibition against external communication and outside research must be rewritten to meet the demands of the twenty-first century.” (quoting Laura Whitney Lee, Note, *Silencing the ‘Twittering Juror’: The Need to Modernize Pattern Cautionary Jury*

courts must explicitly admonish jurors against using Facebook, Twitter, and other social media to communicate about the case or their jury service during trial.¹¹⁴ Because the social-media world is constantly changing, the instruction should use broad language that captures the universe of potential digital communications tools at jurors' fingertips. The resulting social-media instruction might sound like "something out of a Best Buy catalog" (as one news report put it),¹¹⁵ but no matter: Specificity is critical and is becoming the new reality in American courtrooms.¹¹⁶

2. *Include a Meaningful Explanation*

In stating why she followed the court's instruction, one juror in our sample pointed out that the judge "explain[ed]" the rule. Another said that she "felt the request was justified." Particularly at a time when restrictions on social-media use "might feel like solitary confinement" to some,¹¹⁷ it is important to tell the jury why the restrictions exist. It is not because of some technical legal formality, but is necessary to ensure the fundamental fairness of the trial in a variety of ways. By explaining to the jury the important reasons that underlie the rule, jurors are more likely to be invested in preserving the integrity of the process and less likely to write off the rule as unimportant or unnecessary.

3. *Remind Jurors of Their Oath and Its Importance*

Jurors generally want to do the right thing. They recognize that "[j]ury service is a duty as well as a privilege of citizenship," and that their work is essential to the fair administration of justice.¹¹⁸ Some may cringe at the prospect of jury duty, but in our experience, nearly all who serve take their obligation seriously and find the experience personally rewarding. It is thus not surprising that many jurors in the informal survey referenced their oaths as the reason they did not communicate about the case on social

Instructions to Reflect the Realities of the Electronic Age, 60 DEPAUL L. REV. 181, 186 (2011)).

¹¹⁴ See, e.g., *Kervick v. Silver Hill Hosp.*, 72 A.3d 1044, 1059 n.11 (Conn. 2013) (encouraging all state courts to adopt a model instruction that explicitly covers "all types of oral and written communications, including electronic communications such as e-mailing, blogging, texting, Twittering, and posting on Facebook and other social networking sites").

¹¹⁵ See *Modern Jurors*, *supra* note 110.

¹¹⁶ See *id.* ("[W]hile jurors were once warned not to discuss with others the cases they were hearing, warnings to jurors in today's social media age have become much more consistent. Jurors are increasingly hearing what they should not do with the devices that connect them to the world.")

¹¹⁷ See *id.*

¹¹⁸ See *Thiel v. S. Pac. Co.*, 328 U.S. 217, 224 (1946).

media.¹¹⁹ Staying true to their oath was personal—a source of “pride” for one, a “civic duty” for another, and a matter of “respect” for several others.

An effective instruction should capitalize on these concepts, weaving them into the instruction. Rather than threatening jurors with contempt, jury instructions should remind the jurors of their oath and its importance, and work in references to civic pride, respect, and democratic ideals.¹²⁰ These concepts resonate with jurors and help them to further appreciate their opportunity to “participate in the administration of justice,” an opportunity that one scholar has called the “pinnacle of democratic participation.”¹²¹

4. *Don't Forget the Basics*

Juror misconduct through social media is a growing concern, but not all jurors use social media. Even for the vast majority that do, social media is not the only vehicle through which they can commit misconduct. One of the jurors in our sample, for example, volunteered that he was not tempted to use social media, “but I did want to research the case.” A juror in a recent high-profile case in New York admitted to doing just that, and was swiftly dismissed from the case (after some stern comments from the judge).¹²² And according to another recent report, an Oklahoma state court juror did something much more basic: She drove by the crime scene during deliberations.¹²³ The takeaway? Remain vigilant about social media. But don't be blinded by it.

CONCLUSION

“The jury system is an institution that is legally fundamental but also fundamentally human.”¹²⁴ There is no perfect solution to the growing risk of juror misconduct associated with social media. But there are effective ways to mitigate the risk and preserve the fairness and integrity of the system. Based on informal survey data from 583 actual jurors, we continue to suggest that courts employ specialized social-media instructions early and often during trial. Our survey data may be unscientific, but the voices of actual jurors speak volumes. They tell us that jurors tend to follow

¹¹⁹ See *supra* Part II.B.1.

¹²⁰ See, e.g., Andrew Guthrie Ferguson, *The Joy of Jury Duty*, THE ATLANTIC, May 3, 2013 (“Turning the dread of jury duty into a form of enjoyment begins with understanding why jury duty matters.”).

¹²¹ Brian C. Kalt, *The Exclusion of Felons from Jury Service*, 53 AM. U.L. REV. 65, 129 (2003).

¹²² Singer, *supra* note 34.

¹²³ See *Wilkerson v. Newton-Embry*, No. 09-CV-00251, 2012 WL 2571277, at *3 (N.D. Okla. July 02, 2012).

¹²⁴ *People v. Marshall*, 790 P.2d 676, 699–700 (Cal. 1990).

properly crafted social-media instructions; that jurors generally appreciate their critical role in the judicial process; and that these conclusions apply with equal force to jurors in both federal and state court.