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Yes, Jurors Have a Right to Freedom of Speech Too! . . .
Well, Maybe.

Juror Misconduct and Social Networks

Porsha M. Robinson*

I. INTRODUCTION

The Constitution guarantees, among other freedoms, the freedom of speech by stating that "Congress shall make no law . . . abridging the freedom of speech." The First Amendment's plain meaning suggests that Congress cannot place a restraint upon or censure citizens' expressions of opinions and facts. For years, lawmakers and academics have explored this First Amendment guarantee, balancing state and individual interests, creating categories, establishing restrictions, indicating limitations and exceptions, making distinctions, and molding this First Amendment right into its current form. Today, the First Amendment is generally construed to protect free speech and free press, although "certain well-defined and narrowly limited classes of speech" may be limited or even punished. But, as with many rights and theories, innovation can cause new and unanswered questions to surface.

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1. U.S. CONST. amend. I.


3. Chaplinsky v. New Hampshire, 315 U.S. 568, 572-73 (1942) ("These [classes of punishable or preventable speech] include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.") (citation omitted).
The implications arising from the increased use of technology have created grey areas in First Amendment law.⁴

One such grey area is a juror’s right to free speech during a trial. Many scholars have acknowledged that the use of social networking by jurors impacts an accused person’s Sixth Amendment right to an impartial jury.⁵ The main focus of the commentary has been on the risks to a fair trial that communication through social media poses and ways to mitigate that risk.⁶ However, few commentators have considered the weight of that Sixth Amendment right in relation to jurors’ First Amendment rights. When this Sixth Amendment right is balanced with the juror’s First Amendment right to post what he or she pleases under the right of “freedom of speech,” tension arises. Furthering the problem, there seems to be no consistency in protocol among states to combat the use of social media during trials in regards to what jurors are allowed to post and the consequences jurors face when they over-step those boundaries. Even with the increasing number of technological advances, jurors should still have a First Amendment right to freedom of speech during trials.⁷ To address this issue, courts need to create an efficient method of handling misconduct because of social media usage by juries. Taking these issues into consideration, this Note acknowledges the importance of ensuring that a defendant is afforded his or her Sixth Amendment rights, but argues for the importance of preserving jurors’ First Amendment rights as well by converging the interests and purposes


⁶ Id.

⁷ See Marcy Strauss, Juror Journalism, 12 YALE L. & POL’Y REV. 389, 390, 406 (1994) (arguing in favor of juror speech because it “serves several critically important functions in society - functions protected under the First Amendment to the United States Constitution”).
that underlie both the First and Sixth Amendments to achieve an approach that aligns them.

Part II of this Note explores the meaning and origins of the Sixth Amendment right to an impartial jury. It describes what constitutes an impartial juror, the types of misconduct often encountered by courts today, and how courts analyze such claims. Part III looks at the First Amendment rights of jurors, examining how courts view juror speech in general and standards that can be applied by courts with regards to juror speech via social media. Part IV examines the use of social media by jurors, the impact of such usage on a defendant's Sixth Amendment rights, and approaches courts have taken in attempting to remedy the situation. Part V gives examples of methods designed to address social-media-related juror misconduct, and analyzes the benefits and consequences of implementing such methods. Part VI acknowledges the importance of considering jurors' First Amendment rights when implementing a strategy to address this issue. It also lays out the important aspects that need to be included in such an approach, as well as a suggestion for the type of reform that would be most efficient in combating the problem that the use of social media by juries has created.

II. JUROR MISCONDUCT AND THE SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY

A. The Meaning of an Impartial Jury

Impartial: "Unable to perceive any promise of personal advantage from espousing either side of a controversy."

In order to efficiently determine what constitutes juror misconduct, it is important to figure out what exactly courts are trying to protect in regards to a defendant's Sixth Amendment right

to an impartial jury.\textsuperscript{9} Though the concept of what it means to be "impartial" may, in itself, seem simple, in reality, the concept is very confusing.

The Sixth Amendment states that:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.\textsuperscript{10}

This is a defendant's constitutional right, in a criminal prosecution, to have a trial by an impartial jury.\textsuperscript{11}

The origins of what constitutes an impartial jury can be traced back to United States v. Burr.\textsuperscript{12} The case explains the importance and value of an impartial jury.\textsuperscript{13} Aaron Burr, Vice President to Thomas Jefferson, was prosecuted for treason.\textsuperscript{14} His attorney argued that Burr was denied a fair trial because the public had already been filled with belief of his guilt through different

\textsuperscript{9} Strauss, supra note 7, at 395 (discussing the conflict between the First and Sixth Amendments in regard to juror journalism).

\textsuperscript{10} U.S. CONST. amend. VI (emphasis added).

\textsuperscript{11} Id.

\textsuperscript{12} 25 F. Cas. 49 (Marshall, Circuit Justice, D. Va. 1807).

\textsuperscript{13} Id. at 50 ("The real reason of the rule is, that the law suspects the relative of partiality; suspects his mind to be under a bias, which will prevent his fairly hearing and fairly deciding on the testimony which may be offered to him. The end to be obtained is an impartial jury; to secure this end, a man is prohibited from serving on it whose connexion [sic] with a party is such as to induce a suspicion of partiality. The relationship may be remote; the person may never have seen the party; he may declare that he feels no prejudice in the case; and yet the law cautiously incapacitates him from serving on the jury because it suspects prejudice, because in general persons in a similar situation would feel prejudice.").

\textsuperscript{14} Id. at 52.
media, which would make it difficult to find impartial jurors. Chief Justice Marshall explained that:

"[t]he great value of the trial by jury certainly consists in its fairness and impartiality. Those who most prize the institution, prize it because it furnishes a tribunal which may be expected to be uninfluenced by an undue bias of the mind. I have always conceived, and still conceive, an impartial jury as required by the common law, and as secured by the constitution, must be composed of men who will fairly hear the testimony which may be offered to them, and bring in their verdict according to that testimony, and according to the law arising on it." 

Chief Justice Marshall depicted the impartial jury as an integral part of the judicial system, and thus a juror's ability to render a fair verdict based only on the evidence presented at trial is required by law. He explained further that in order to be impartial, it is necessary for a jury to "enter upon the trial with minds open," and let the evidence presented at trial be what enables them to make a decision and not "preconceived opinions." Chief Justice Marshall concluded by providing a standard for determining whether a juror is partial or not. He stated that "light impressions" on the juror, which still allow for an open mind, are not sufficient to object to a partial juror. Rather, what is objectionable are the "strong and deep impressions" that close the juror's minds to anything offered at trial. He stated that:

those who try the impartiality of a juror ought .
. . to hear the statement made by himself or given by others, and conscientiously determine,

15. Id. at 49.
16. Id. at 50.
17. Id.
18. Id.
19. Id. at 51.
20. Id.
21. Id.
according to their best judgment, whether in general men under such circumstances ought to be considered as capable of hearing fairly, and of deciding impartially, on the testimon[sic] which may be offered to them, or as possessing minds in a situation to struggle against the conviction which that testimony might be calculated to produce.  

The *Burr* Court made a determination about whether jurors who had prejudged the defendant’s guilt could serve as a juror and held that people are not permitted to serve on a jury when they have such an impression of the case that they would not be able to maintain an open mind. It is possible to extract a standard from this case that can be applied broadly: people who are not able to maintain an open mind and make a decision based solely on the evidence presented at trial are not considered impartial and should not be able to serve as a juror for that trial.  

Later, in *Irvin v. Dowd*, the Supreme Court addressed, in a habeas corpus proceeding, whether the murder conviction and death sentence of the defendant-petitioner was valid. The defendant-petitioner was prosecuted for six murders in a case that was highly publicized. There were also press releases that stated that the defendant-petitioner had confessed to the crimes. The argument on appeal was whether such widespread publicity had a prejudicial effect that disabled jurors from being able to decide defendant’s guilt or innocence impartially. The Court acknowledged that impartiality is a “state of mind,” not a “technical conception,” and that the Constitution does not have a specific test

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22. *Id.*  
23. *Id.* at 52.  
24. *Id.* at 52.  
26. *Id.* at 718.  
27. *Id.* 719.  
28. *Id.* at 719–20.  
29. *Id.*
or procedure to determine whether a juror is impartial.\textsuperscript{30} The Court went on to say that in order to ensure a defendant’s Sixth Amendment right to an impartial jury, “[i]t is sufficient if [ ] juror[s] can lay aside [their] impression[s] or opinion[s] and render a verdict based on the evidence presented in court.”\textsuperscript{31} This standard, however, has been difficult to apply\textsuperscript{32} because unless manifested though a juror’s overt acts, it is nearly impossible to determine whether a juror has “closed his mind” against the testimony and evidence given at trial.\textsuperscript{33}

B. Typical Forms of Juror Misconduct and How Courts Handle Such Misconduct

Even in light of the complexity of defining impartiality, there are categories of misconduct that are quite common in cases throughout the United States. These categories include: “juror discussion of the case before deliberations;”\textsuperscript{34} “unauthorized juror visits to the crime scene or other investigation conducted by jurors;”\textsuperscript{35} “experiments by jurors;”\textsuperscript{36} “juror exposure to pretrial

\textsuperscript{30} Id. at 724–25 (quoting United States v. Wood, 229 U.S. 123, 145–46 (1936)) (internal quotation marks omitted).
\textsuperscript{31} Id. at 723 (citations omitted).
\textsuperscript{32} Id. at 724.
\textsuperscript{33} Id. at 722 n.3.
\textsuperscript{34} 3 Mark J. Kadish & Rhonda A. Brofman, Criminal Law Advocacy § 55.02 (Matthew Bender ed. 2012).
\textsuperscript{35} Id.
\textsuperscript{36} Id. See also Gershman, supra Note 5, at 332 (“Examples of improper juror experimentation include a juror who placed a heavy load in the trunk of his car as a conscious way to determine whether such weight in a trunk would have imparted knowledge to the defendant of the presence of drugs, a juror’s experiment in attempting to fire a weapon while holding it in a position consistent with the defendant’s account, clocking how long it would take to drive a certain distance, and simulating a witness’s use of binoculars to determine whether the witness could possibly have seen what he claimed he saw. The same principle that forbids jurors from acquiring specialized knowledge through extra-judicial means also accounts for the prohibition against jurors making unauthorized visits to locations described in the trial testimony.”).
publicity during trial;”37 “introduction of facts not in evidence to the
jury,”38 “unauthorized material or extraneous information in the
jury room;”39 “improper juror contacts with third persons;”40 “juror
intoxication or other juror incapacity;”41 and “juror bias.”42 Though
this is not a complete list of what has been found to constitute
misconduct, these are generally the most common forms of juror
misconduct.43

Curtailing juror misconduct in trials is so important because
it prevents the jury from forming preconceptions of guilt and
ensures the use of only admitted evidence. It is important that the
evidence used by the jury in determining the outcome of a case
comes from “a public courtroom where there is full judicial
protection of the defendant’s right of confrontation, of cross-
examination, and of counsel.”44 By discussing the case and utilizing
certain methods of research and communication, a juror may
discover the guilt of the defendant, a prior criminal record or
misconduct, or even a reputation that the defendant has among
peers.45 The discovery of this type of information can lead to a
verdict that is unfavorable to the defendant because it tends to
“impair the value of collective decision-making, lack the context of
the court’s legal instructions, prejudice a defendant who may not

37. Kadish and Brofman, supra Note 34, at §55.02.
38. Id.
39. Id.
40. Id.
41. Id.
42. This includes both latent and patent bias. Gershman, supra note 5, at
349 (“Courts generally reject claims of implied bias. However, courts have
recognized that in some instances jurors may be exposed to such highly
inflammatory circumstances that presuming the existence of a bias is
reasonable. Such imputed bias has been shown when jurors have learned of
the defendant’s guilt in an earlier trial on the same charges, have been
exposed to extremely prejudicial pre-trial publicity, have been exposed to
highly prejudicial events during the trial, have a very close relationship with
one of the important actors in the case, were a victim of the crime and are
emotionally involved in the case, and gave dishonest answers on the voir dire
to get on the jury.”).
43. Kadish and Brofman, supra Note 34, at §55.02.
45. Gershman, supra note 5, at 328.
have had the opportunity to present evidence, and benefit the prosecution by reducing the burden of proof."  

Because of the potential improper verdicts, courts are given "considerable discretion in determining whether an investigation into alleged juror misconduct is warranted and how the investigation will be conducted." Determining whether a juror is guilty of misconduct is often quite a feat for courts because they must make the determination "guided by the content of the allegations, including the seriousness and likelihood of the alleged bias, and the credibility of the source."  

Regardless of who raises the issue of misconduct, there generally must be "substantial evidence" to warrant an investigation into the claim of misconduct. If a juror is found to have engaged in impropriety, the movant has the initial burden of producing evidence to substantiate the claim. Remmer v. United States, provides a helpful standard in holding that:

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

This presumption then shifts the burden to the non-moving party to prove that "there exists no 'reasonable possibility that the jury's

46. *Id.* at 341.
49. *Id.*
50. *Id.*; see also Haley v. Blue Ridge Transfer Co., 802 F.2d 1532, 1537 n.9 (4th Cir. 1986) ("Courts have generally applied the presumption of prejudice automatically after there has been an unauthorized communication to the jury.").
52. *Id.* at 229.
verdict was influenced by an improper communication."

When a claim of wrongdoing arises, many courts will take into consideration not only if there is a possibility of harm, but also whether there was actual harm because of such alleged misconduct.

Once a proper motion for misconduct is made, the options for a judge to examine the potential and actual harm include:

[D]eny the objection and proceed with the trial;
[ ] give a curative instruction, designed to remove any possible taint from the jury's collective mind, and proceed with the trial;
[ ] hold an in camera hearing and order a new trial if it finds misconduct so prejudicial as to deny the defendant a fair trial;
[ ] determine the existence of prejudicial misconduct without an in camera hearing and order a new trial;
[or] dismiss or replace the offending juror if the misconduct only affects one or two jurors and occurs prior to the start of deliberations.

Once misconduct is found, the judge can take various remedial measures to rectify juror impropriety. Of the various remedies, mistrials are the most extreme given the wasted resources, energy, and effort.

The reason why discovering juror misconduct is so important seems relatively clear: courts want to ensure that juries reach a fair verdict, based solely on the information given during trial. Understanding this exact objective is necessary to balancing the First and Sixth Amendment rights relevant here. Knowing the importance of the right to an impartial jury enables courts to tailor a solution to juror misconduct that meets the goal of a fair trial

54. Kadish and Brofman, supra Note 34, at §55.02.
55. Id.
56. Id.
57. McGee, supra note 47, at 306–07.
under the Sixth Amendment without completely denying the speech rights of jurors guaranteed by the First Amendment.

III. JUROR MISCONDUCT AND THE FIRST AMENDMENT RIGHTS OF JURORS

A. The Importance of Juror Speech

As with other types of speech, there is value in juror speech. For example, juror speech allows insight into some aspects of the judicial system and allows jurors to explain and give opinions on what they may view as flaws in the system. Listening to what jurors have to say can also reveal insight to the inner workings of the judicial system, which, if it suggests that justice has been served, can help to instill faith in the institution itself. Revealing how legal decisions are reached and whether or not they were made fairly and legally may also help to preserve the integrity of the system. Juror speech can also provide the public with essential information about the duty of the jury. Experience seems to be the best teacher, and so others may learn through the experiences of those who have served as a juror. Thus, any standard that is applied to juror speech needs to take the value of such speech into consideration.

Concern about juror speech, however, is not a new issue. Jurors’ First Amendment rights and the impact of exercising those rights on the fairness of a trial on which jurors serve can be traced back to the concern over jury journalism, where jury members attempt to profit by giving their account of what happened during a trial. The concern over juror journalism is that jurors will be

59. See Strauss, supra note 7, at 406–09 (discussing the value of freedom of expression in the context of juror journalism).
60. Id. at 406.
61. Id.
62. Id.
63. Id.
64. See Strauss, supra note 7, at 406–08.
65. See id. at 389.
66. Id.
motivated by the potential profit they may gain, and in turn would be incapable of rendering a fair and unbiased verdict.\footnote{67}

Juror journalism began to become popular in the 1990s in the wake of several high profile cases, most notably with the murder trial of O.J. Simpson,\footnote{68} and jurors have since sold their stories to newspapers and even written books about their experiences of serving on a jury.\footnote{69} For example, when juror journalism was on the rise, a juror in the trial of Bernard Goetz (accused of shooting several people who tried to mug him in a subway in New York) recorded his daily impressions of the case on a tape recorder to keep track of them.\footnote{70} He kept this record because he "had a reasonable belief that it might be worth something."\footnote{71} He ended up selling his story to the \textit{New York Post} for close to $5,000.\footnote{72} In 2009, jurors who sat on the trial of Scott Peterson (convicted for the murder of his wife and unborn son) wrote a book about their experiences serving on the trial entitled \textit{We, The Jury}.\footnote{73} More recently, after the trial of officers Kenneth Moreno and Franklin Mata (who were acquitted of rape), a juror serving on the trial published an e-book, entitled \textit{Confessions of a Rape Cop Juror},

\footnote{67. \textit{Id.} at 393. \textit{See also Gershman, supra} note 5, at 345–46 (discussing high profile cases including: Martha Stewart trial where the juror gave several media interviews after the conviction and was accused by Stewart’s lawyers of misconduct by lying to get on the jury; Texas murder trial of millionaire Robert Durst where a juror appeared on television to promote her book, in which she describes her experience on the jury (this occurrence acquitted Mr. Durst); Tyco trial, where a juror “visibly appear[ed] throughout the trial to favor the defendants, suggesting that she deliberately sought to become a member of the jury for questionable motives”; also alleged in the trial of Scott Peterson, his lawyers contended that at least three “stealth jurors” lied to get on the jury in order to convict Peterson).}

\footnote{68. \textit{Id.} at 391–93, 91 n.11.}

\footnote{69. Strauss, \textit{supra} note 7, at 391–95.}


\footnote{71. Strauss, \textit{supra} note 7, at 392 (quoting Freitag, \textit{supra} note 70).}

\footnote{72. \textit{Id.}}

that chronicled the jury’s process of reaching the controversial and unpopular verdict.\textsuperscript{74}

Sometimes when juror journalism occurs, attorneys attempt to have the judge declare a mistrial, claiming that the juror’s desire to sell their story tainted the trial.\textsuperscript{75} One example of this was in \textit{State v. Smart},\textsuperscript{76} where the defense attorney in a trial in which a woman was charged with inducing her teenage lover to kill her husband claimed that a juror was documenting her recollections of the trial via audiotapes.\textsuperscript{77} The attorney claimed that the juror tried to sell the materials to the defense and was hoping to sell them to a publisher.\textsuperscript{78} The court denied the motion for a mistrial, finding that there was no evidence to prove that the juror intended to sell the tapes during her service as a juror.\textsuperscript{79} When juror journalism was first a growing concern, there were no hard-and-fast standards under which to analyze whether a restriction of a juror’s speech was constitutional.\textsuperscript{80} There are now arguments, however, for different standards that should apply to juror speech, but there does not appear to be a consensus on which to apply.\textsuperscript{81}

\textit{B. Two Possible Standards to Apply to Juror Speech}

One argument is that strict scrutiny should apply when analyzing a restriction on juror speech.\textsuperscript{82} This argument finds its


\textsuperscript{75} Strauss, supra note 7, at 393–94.

\textsuperscript{76} 622 A.2d 1197 (N.H. 1993).

\textsuperscript{77} Id. at 1200, 1210–11.

\textsuperscript{78} Id. at 1211.

\textsuperscript{79} Id.

\textsuperscript{80} See Strauss, supra note 7, at 409–15 (exploring two seemingly different standards of regulating juror speech).

\textsuperscript{81} See id.; see also Erwin Chemerinsky, Silence is Not Golden: Protecting Lawyer Speech Under the First Amendment, 47 EMORY L.J. 859, 862–67 (1998) (making the argument that attorney speech about cases and the judicial process should be viewed as political speech, which would be protected by the First Amendment).

\textsuperscript{82} Chemerinsky, supra note 81, at 862–67.
basis in comparing juror speech to that of political speech—speech that is about the government and government officials. The Supreme Court has continually described a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." In order to restrict such political speech, the restrictions must pass strict scrutiny. Under the strict scrutiny standard, a regulation will only be upheld if it serves a compelling government interest and is narrowly tailored to serve that interest.

The argument is that since courts are a part of the judicial branch of government, anything that is involved in the judicial process should be considered government action. If court proceedings are considered to be government actions, then "[a]ny speech about a judge or a judge's rulings" should be governed by a strict scrutiny standard. Under a strict scrutiny standard, the government has the burden of proving that the action was "necessary to achieve a compelling purpose" and that the action is narrowly tailored to achieve that interest. One problem with this standard, however, is that it may only protect speech related to the court system itself and officers in their official capacity. As the Court speaks of "debate on public issues," there is a question as to

83. Id.
85. See Burson v. Freeman, 504 U.S. 191, 198 (1992); see also Chemerinsky, supra note 81, at 863.
86. Burson, 504 U.S. at 198.
87. Chemerinsky, supra note 81, at 863.
88. Id. at 863 ("It is not just the actions of the judge in court that constitute government action; in holding that the discriminatory use of peremptory challenges by attorneys representing private parties in civil cases and even criminal defense attorneys are impermissible, the Court made it clear that court proceedings are government actions.") (citations omitted). See also Georgia v. McCollum, 505 U.S. 42, 51–52 (1992) (citations omitted); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 620 (1991).
89. Chemerinsky, supra note 81, at 863.
90. Id. at 881.
91. See id. at 863–64.
whether jurors' discussion of pending cases rise to the level of political speech to warrant strict scrutiny review.\textsuperscript{92}

There is, however, another argument that the First Amendment rights of jurors are analogous to the First Amendment rights of attorneys during the trial.\textsuperscript{93} So long as a juror is sitting on the jury, he or she is an officer of the court, just like an attorney is an officer of the court.\textsuperscript{94} Some argue that officers of the court should receive less free speech protection because "officers of the court have a fiduciary responsibility not to prejudice fair trials because they have special access to information and a professional responsibility not to thwart a fair judicial process."\textsuperscript{95}

In \textit{Gentile v. State Bar of Nevada},\textsuperscript{96} Chief Justice William Rehnquist stated that "[t]he State has a substantial interest in preventing officers of the court, such as lawyers, from imposing such costs [(referring to the adverse effects of pretrial publicity)] on the judicial system and on the litigants."\textsuperscript{97} In that case, Dominic Gentile, a criminal defense attorney, gave a press conference in which he made remarks "that the State sought the indictment and conviction of an innocent man as a 'scapegoat' and had not 'been honest enough to indict the people who did it; the police department, crooked cops.'"\textsuperscript{98} The State Bar of Nevada brought a disciplinary action against Gentile, alleging that he violated Nevada's code of professional responsibility.\textsuperscript{99} The Court


\textsuperscript{93.} Strauss, \textit{supra} note 7, at 412–16 (reviewing the \textit{Gentile v. State Bar of Nev.} standard as it applies to speech after the trial was already over in the context of juror journalism and acknowledging that the problem with that analysis is that jury members are officers of the court only during the trial; once the trial is over, so is their duty, and thus, it is unclear whether this standard would still apply post-trial).

\textsuperscript{94.} \textit{Id.}

\textsuperscript{95.} Chemerinsky, \textit{supra} note 81, at 871–72 (discussing Mark R. Stabile, \textit{Free Press-Fair Trial: Can They Be Reconciled in a Highly Publicized Case}, 789 GEO. L.J. 337 (1990)).


\textsuperscript{97.} \textit{Id.} at 1075.

\textsuperscript{98.} \textit{Id.} at 1034.

\textsuperscript{99.} \textit{Id.} at 1033.
recognized that attorney speech about pending cases is protected by the First Amendment, but held that if such speech poses a "substantial likelihood of materially prejudicing an adjudicatory proceeding," then it can be regulated. The Court stated: "Because lawyers have special access to information through discovery and client communications, their extrajudicial statements pose a threat to the fairness of a pending proceeding since lawyers' statements are likely to be received as especially authoritative." The Court then concluded: "We agree with the majority of the States that the 'substantial likelihood of material prejudice' standard constitutes a constitutionally permissible balance between the First Amendment rights of attorneys in pending cases and the State's interest in fair trials."

Keeping this assertion in mind, the argument that jurors and attorneys should be subject to the same standard of review in regards to restriction on speech seems rational. Though statements from jurors may not be received as authoritative, jurors still, through the impartiality requirement, have a civic duty that can be likened to a "fiduciary responsibility not to prejudice fair trials" and a "responsibility not to thwart a fair judicial process." Thus, if jurors are viewed as analogous to officers of the court because they serve a vital function in the effectiveness of the judicial process during criminal trials, their speech about pending cases would be held to the "'substantial likelihood of material prejudice' standard."

100. Id. at 1075; Chemerinsky, supra note 81, at 875 (citing MODEL RULES OF PROF'L CONDUCT R. 3.6(a)).
102. Id. at 1075.
103. See Strauss, supra note 7, at 414.
105. See Strauss, supra note 7, at 414–15 (quoting Gentile, 501 U.S. at 1071 (Rehnquist, C.J., concurring)).
IV. SOCIAL MEDIA AND JURIES

The use of the Internet has increased tremendously over the past two decades. Along with this surge in usage is the increase in utilization of social media.\textsuperscript{106} Today, people use social media as a constant means of communication, which includes: simply catching up with family and friends, networking for jobs, sharing views on current events, reading about what is happening around the world, entertaining themselves, blogging, sharing photos, and much more.\textsuperscript{107} While social networking sites have been around since the late 1990s, they have gained more popularity in recent years.\textsuperscript{108} Whether viewed as a beneficial phenomenon or a hindrance, the existence of social networks implicates various areas of the law, including an integral part of the judicial system — the jury.\textsuperscript{109}

Social networking allows individuals to express themselves by various means. For many, logging into social networking services like Facebook or Twitter has become a daily routine, causing them to post and interact through these sites without thought.\textsuperscript{110} Since the jury mostly consists of lay people, the likelihood that a majority of the people sitting on a jury utilize social media is significantly high.\textsuperscript{111} As the usage of social media by jury members increases, so does the chance that they may mention something about the trial with which they are involved.\textsuperscript{112} The amount that a juror posts on a


\textsuperscript{107} See generally id. (noting the ways people use social media).

\textsuperscript{108} See id. at 214–18.


\textsuperscript{111} See id.

social networking site on a regular day may indicate how much a juror posts during trial because a person may be unlikely to change their habits simply because they are serving as a juror. For example, if a person is accustomed to updating his or her Twitter followers almost every five minutes about the most insignificant details of their lives, it may be hard for that same person to not inadvertently post details about the trial for which they are on the jury. The modern usage of social media by the average person can thus create problems when the average person becomes a juror.

A. Extent of Social Media Use & Its Potential Impact on the Impartiality of Juries

Communication between jurors about subjects that do not relate to the trial is generally considered acceptable conduct; the problem arises when the juror communicates about what is happening in the trial on which the juror is currently sitting. Juror disclosure of happenings during trial is not a new occurrence. Social media is just another avenue for jurors to discuss the events of a case, and despite disapproval, it is a constant occurrence. Thus, the rise of social media has caused an increase in juror misconduct.

113. Vinson, supra note 109, at 402.
114. See id.
115. Hoffmeister, supra note 110, at 425.
116. See Goldstein, supra note 109, at 594–95 (discussing how in the past jurors have discussed cases with outsiders that include: government officials who are not a part of the case, strangers (especially those who happen to be in and around the courthouse), and members of the press).
117. Id.
119. See supra note 119 and accompanying text.
JURIES AND SOCIAL NETWORKS

Reuters Legal, a division of Thomson Reuters Corporation that provides legal news from around the country, conducted a three-week study in late 2010 where it searched for tweets on Twitter that included the terms "jury duty."\(^{120}\) The search revealed that a tweet referencing jury duty was made almost once every three minutes from prospective or sitting jurors.\(^{121}\) Many of the tweets expressed complaints about having to serve as a juror or how bored they were, but a significant number of tweets were in regards to their perception of the defendant’s guilt or innocence.\(^{122}\)

Twitter is just one of many social networks.\(^{123}\) With the growing number of social networks, one can only imagine how much information jurors actually post about the trial for which they are serving through all of the different networks.\(^{124}\) As jurors continue to utilize social networks during trials, many are concerned that these actions are jeopardizing the fairness of these trials.\(^{125}\) The use of social media begins to create impartiality because it allows jurors to be influenced by outside forces and obtain access to outside information.\(^{126}\) The content of a juror’s social media activities may also prove an actual, existing bias.\(^{127}\)

Prohibiting juror communication about the trial is important to maintaining juror impartiality.\(^{128}\) Such prohibitions are


\(^{121}\) Id.

\(^{122}\) Id.

\(^{123}\) Id.


\(^{126}\) Id.

\(^{127}\) Cf. id. (noting that a juror tweeted "Report from jury duty: defendant looks like a murderer. GUILTY. Waiting for opening remarks.").

\(^{128}\) Goldstein, \textit{supra} note 109, at 589.
intended to enable jurors to remain impartial during deliberation, and allow them to render a verdict free of undue influences.\textsuperscript{129} When a juror violates his oath\textsuperscript{130} and partakes in conduct that impacts his ability to be impartial and unbiased, it constitutes jury misconduct.\textsuperscript{131} Jurors who post details of a trial can infringe on a defendant's Sixth Amendment right to a fair trial.\textsuperscript{132} So, courts limit communications because they want to ensure jury impartiality.\textsuperscript{133} Two of the main ways that social media usage can impact juror impartiality is by allowing the juror access to information that was

\textsuperscript{129} Id.

\textsuperscript{130} When jurors are sworn in, they take an oath that they will give a true verdict based on the evidence. Sometimes jury instructions refer to this oath. For example, the Tenth Circuit's Civil Pattern Jury Instructions state:

\begin{quote}
You, as jurors, are the judges of the facts. But in determining what actually happened—that is, in reaching your decision as to the facts—it is your sworn duty to follow all of the rules of law as I explain them to you. You have no right to disregard or give special attention to any one instruction, or to question the wisdom or correctness of any rule I may state to you. You must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I explain it to you, regardless of the consequences. However, you should not read into these instructions, or anything else I may have said or done, any suggestion as to what your verdict should be. That is entirely up to you. It is also your duty to base your verdict solely upon the evidence, without prejudice or sympathy. That was the promise you made and the oath you took.\end{quote}


\textsuperscript{131} Gershman, *supra* note 5, at 324.

\textsuperscript{132} See Rosalind R. Greene & Jan Mills Spaeth, *Are Tweeters or Googlers in Your Jury Box?*, 46 ARIZ. ATT'Y 38, 39–40 (Feb. 2010), [available at](http://www.azattorneymag-digital.com/azattorneymag/201002/?pg=41#pg5).

\textsuperscript{133} See generally *id.* at 324–44 (addressing the various ways courts limit jurors' communication); see also Goldstein, *supra* note 109, at 599.
not available during trial and by enabling bias against those involved in the case.\textsuperscript{134}

1. Social Media As A Means of Finding Information

Many of the traditional juror misconduct cases occur because jurors perform outside research about the current case.\textsuperscript{135} Such gathering of information includes researching: jury instructions, definitions of legal jargon, substantive law, and how courts have ruled in other cases.\textsuperscript{136} More problematic is the ability to look up information on the parties in a case—the defendant, witnesses, and even judges and attorneys.\textsuperscript{137} A simple search on Google is enough to produce information, but social networks can be used similarly, sometimes providing much more information.\textsuperscript{138} By searching a person's name and viewing their profile, on a social network site, one can learn a great deal about that person.\textsuperscript{139} For example, in a case involving the sexual abuse of two teenage girls, jurors independently viewed one of the alleged victims' MySpace profiles.\textsuperscript{140} Although nothing relevant was revealed through viewing the profiles,\textsuperscript{141} it is not difficult to imagine how the situation could have turned out differently. If, for example, the jurors found information that led them to believe that the victims were promiscuous, such information may have impacted the verdict in the case. Even if this type of information were not admitted during trial because it violates evidentiary rules, the juror would have

\begin{itemize}
\item \textsuperscript{134} See generally Gershman, supra note 5 (addressing how jurors' use of social media can lead to acquisition of information outside of the trial and how their communications of their opinions evidences possible biases); Goldstein, supra note 109 (addressing jurors' use of social media, their acquisition of information outside of the trial, and their disclosure of personal biases).
\item \textsuperscript{135} See generally Daniel William Bell, Note, Juror Misconduct and the Internet, 38 AM. J. CRIM. L. 81 (2010) (discussing how the Internet impacts the problem of jurors conducting outside research while sitting on a trial).
\item \textsuperscript{136} Id.
\item \textsuperscript{137} See Browning, supra note 112, 217–19.
\item \textsuperscript{138} See id.
\item \textsuperscript{139} Id.
\item \textsuperscript{140} See id. at 217.
\item \textsuperscript{141} See id.
\end{itemize}
found the information for himself. This would be the type of situation that courts intend to prevent—jurors being impacted by outside influences, which in turn affects their ability to be impartial.

In addition to information about the parties involved in the case, jurors can also use the Internet to find superfluous technical information that will allow them to answer a determinative question in the case.  Although the Sixth Amendment applies to criminal cases, it is helpful to view how jurors utilize social media during their time as jurors in civil cases as well. For example, in a wrongful death action in Kentucky, there was a claim that the defendant, a police officer, shocked the deceased with a Taser, which in turn caused his death. The estate of the decedent filed a motion to have the verdict set aside, alleging that two jurors “consulted Taser International’s website[,] and used information from the site to persuade other jurors that Tasers are non-lethal,” causing the jury to exonerate the police officer. The city of Louisville, Kentucky ultimately paid $150,000 to settle the claims.

A juror in a criminal case can use social networks in a similar manner by just logging on and directly messaging one of their online friends and asking them for, what the juror may believe to be, their expert opinion on an issue. For example, if a juror did not believe that a certain object could actually be used to murder someone and asked a friend for his “expert opinion,” that juror may have extra, and possibly incorrect, information concerning something that was not presented at trial. Having this extraneous information or viewpoint could prejudice the defendant because

142. See Bell, supra note 135, at 85–86.
143. U.S. Const. amend. VI (“In all criminal prosecutions . . . .”) (emphasis added).
145. Browning, supra note 112, at 218; see also Wolfson, supra note 144.
146. See Andrew Wolfson, Louisville Pays Family $150,000 in Death of Tasered Man, LOUISVILLE COURIER-JOURNAL, Jan. 9, 2010.
147. See Bell, supra note 135, at 83–86.
2. Social Media As a Means of Forming a Bias

Social networks can also be used to “appeal to the masses” about a case on which the juror is sitting. For example, a juror in England, on a child kidnapping and sexual assault case, posted a message on Facebook that discussed specifics of the case and asked friends what their views were on how the case should be decided; in essence surveying what the defendant’s fate should be. The juror was dismissed once the court discovered this activity. Though this is not an American case, it illustrates just how a juror can use Facebook or any other social network to form an opinion before even hearing all of the evidence offered at trial.

Imagine being a juror and deciding to post on a social network that you got called for jury duty for a case that involves substantial media attention and that evokes the morals or emotions of most of your friends. All of a sudden, your post has generated hundreds of comments on how the defendant is a remorseless malefactor and that he deserves to be punished. Even if most of these accusations are unfounded based on the evidence at trial, if you are the type of person who easily submits to the demands and wishes of others, you may vote in a manner that is acceptable in the eyes of your social media friends even if that outcome is contrary to the weight of the evidence. Posts like this can lead a juror to

151. Id.
152. See id.
153. See United States v. Fumo, 655 F.3d 288, 305 (3d Cir. 2011) (“[A] juror who comments about a case on the Internet or social media may engender responses that include extraneous information about the case, or
reach a conclusion that is not based on the evidence introduced. Since the Sixth Amendment guarantees a right to an "impartial jury,"\textsuperscript{154} if a post impacts a juror's decision or impartiality, then it violates the defendant's Sixth Amendment right.\textsuperscript{155} Instead of a jury of twelve peers, the defendant could now have a jury of potentially thousands of a juror's closest "friends" who are conducting a completely different type of deliberation via social media.\textsuperscript{156}

There can be a variety of other reasons for juror misconduct concerning online communication.\textsuperscript{157} Some jurors may feel as if important information was withheld and that such information is necessary for them to find in order to return the correct verdict.\textsuperscript{158} Other jurors may not completely understand what exactly they are not allowed to discuss and with whom they are not to discuss such things.\textsuperscript{159} Some jurors may not see a problem with posting information about the case on social networks at all.\textsuperscript{160} Yet other jurors may just disregard the court's instructions and feel the need to discuss the case to seek popular opinion, instill awareness, or simply boast that the life of another is in their hands. Whatever the reason, jurors continue to communicate via social media, sometimes at the cost of tainting a trial. To be sure, the popularity of social networks has influenced juror behavior, for better or worse.\textsuperscript{161}

\begin{itemize}
\item attempts to exercise persuasion and influence. If anything, the risk of such prejudicial communication may be greater when a juror comments on a blog or social media website than when she has a discussion about the case in person, given that the universe of individuals who are able to see and respond to a comment on Facebook or a blog is significantly larger.
\end{itemize}

\textsuperscript{154} U.S. CONST. amend. VI.
\textsuperscript{155} \textit{See Fumo}, 655 F.3d at 305.
\textsuperscript{156} \textit{See id.}
\textsuperscript{157} \textit{See Hoffmeister, supra} note 110, at 433–36 (discussing the reasons for improper juror communication).
\textsuperscript{158} \textit{See Zora, supra} note 150, at 585.
\textsuperscript{159} \textit{See Greene \\& Spaeth, supra} note 132, at 39 ("It seems, however, that many jurors do not see blogging, tweeting or posting as communication, or at least they don't consider it to fall within the rubric of traditional admonitions.").
\textsuperscript{160} \textit{See Hoffmeister, supra} note 110, at 433–34 (discussing the reasons for improper juror communication).
\textsuperscript{161} \textit{See id.} at 435.
B. The Impact on Legal Proceedings Because of Different Court Approaches to Handling Social Media-Related Juror Misconduct

1. Overturning Verdicts and Declaring Mistrials

Though most jurors may not have been purposely trying to reach these results, posts on social networks have resulted in verdicts being overturned and cases being reversed and remanded based on juror online conduct. For example, in December 2011, the Supreme Court of Arkansas overturned the murder conviction of a death row inmate because a juror tweeted during the proceedings.

In Dimas-Martinez v. State, the defendant had been convicted and put on death row for holding a seventeen-year old at gunpoint, robbing him, and then shooting him. During the proceedings, a juror tweeted: “Choices to be made. Hearts to be broken. We each define the great line.” When asked about the tweet, the juror responded that it did not pertain to just the case, but to “future stuff” as well. He also added that “Define the

162. See Greene & Spaeth, supra note 132, at 39. See also Nicole B. Casarez, Examining the Evidence: Post-Verdict Interviews and the Jury System, 25 HASTINGS COMM. & ENT. L.J. 499, (2003) (discussing jurors disclosing information to the press). The same reasons that jurors communicate with the press may relate to why jurors post on social networks. This includes: “providing a peek behind closed doors,” “expressing emotions relating to jury service,” “conveying the difficulty or ease of decision-making,” “admitting doubts, mistakes, misconduct,” “appraising the lawyer, judges or justice system,” “endorsing or defending their decision,” and “divulging the votes, remarks, or opinions of others.” See id. at 520–46.


164. 385 S.W.3d 238, 257 (Ark. 2011).
165. Id. at 240–42.
166. Id. at 246.
167. Id.
Great Line” was an album by the band Underoath. The Supreme Court of Arkansas stated that even more troubling about this juror’s tweeting was that after being asked about it, he continued to tweet during the trial. Before the jury announced its verdict, he tweeted: “It’s over.” Other tweets by this juror referenced how “the coffee suck[ed]” and how many days he had spent at trial. The court did not discuss any First Amendment right of the juror, but based its holding on the fact that the juror admitted to tweeting. It held that this proved that the juror did not follow the court’s instructions, which in turn prejudiced the defendant. The court explained that:

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

The court emphasized the fact that it was the juror’s inability to be discreet about the case and follow directions that was problematic and increased the likelihood of prejudice to the defendant, therefore the circuit court erred in denying the motion for mistrial.

168. Id.
169. Id. at 247.
170. Dimas-Martinez, 385 S.W.3d at 257.
171. Nuss, supra note 163.
172. Dimas-Martinez, 385 S.W.3d at 248.
173. Id.
174. Id.
175. Id.
In *Juror Number One v. Superior Court*, the juror sat on a criminal trial in which the defendants were convicted of offenses for brutally beating a man. The juror posted on Facebook about the evidence that was presented at trial and invited his Facebook friends to comment. The juror deleted some of his posts, though. The trial court wanted to use the Stored Communications Act (SCA) to force the juror to consent to authorize Facebook to release all items he posted during the trial, since Facebook would not disclose this information without such consent. The juror filed a petition for a writ of prohibition and the Third District of the California Court of Appeals ruled that the juror failed to establish that the trial court exceeded its power to inquire into the alleged juror misconduct. The court stated “even if Juror Number One has a privacy interest in his Facebook posts, that interest is not absolute. It must be balanced against the rights of real parties in interest to a fair trial, which rights may be implicated by juror misconduct.” The court found that there was a presumption of prejudice because the juror violated the jury instructions. Because the court did not have access to all of the juror’s posts, it could not rule that there was “no substantial likelihood” that the juror had a bias against the defendants, and thus denied the juror’s petition for writ of prohibition.

177. *Id.* at 153.
178. *Id.* at 154.
179. *Id.*
181. *Juror No. One*, 142 Cal. Rptr. 3d at 153.
182. *Id.* at 162.
183. *Id.* at 159.
184. *Id.* at 163 (Mauro, J., concurring).
185. *Id.* at 162. See also *id.* at 166 (Mauro, J., concurring).
Surprisingly, even attorneys who serve as jurors have affected the verdict of the trial on which they sat due to their own improper social network usage. An attorney in San Diego, who was serving as a juror on a felony criminal matter, posted on a blog during the proceedings. His post stated:

[T]oday I was impaneled along with 12 others from the voter rolls of San Diego County in a felony theft and burglary trial in Department 37 of the old downtown courthouse, in the courtroom of the Honorable Laura Palmer Hammes, a stern, attentive woman with thin red hair and long, spidery fingers that as a grandkid you probably wouldn’t want snapped at you. Nowhere do I recall the jury instructions mandating I can’t post comments in my blog about the trial. (Ha. Sorry, will do.) So, being careful to not prejudice the rights of the defendant—a stout, unhappy man by the first name of Donald . . .

The State Bar Court of California found that because the juror identified the name of the presiding judge, the first name of the defendant, and the specific crimes the defendant was charged with, he violated both the rules governing juror duties as well as the California Business and Professions Code. Furthermore, an appellate court set aside the verdict and the case was sent back to a lower court “for further proceedings consistent with the Court of Appeal’s decision.”


188 See id.

189. Id. at 11.

190. Id. at 2.
This type of misconduct often occurs before a verdict is reached, allowing judges to remedy the problem before having to go to the extreme of granting a new trial. In Michigan, a juror posted on Facebook about her belief of the defendant’s guilt before the jury had reached a verdict. Her post stated she was: “actually excited for jury duty tomorrow . . . it’s gonna be fun to tell the defendant they’re guilty.” Because she disobeyed the judge by failing to follow the jury instructions and disregarding the oath, the juror was replaced with an alternate and fined for her actions.

2. Denials of Motions for Mistrials and Overturning Verdicts

Although there have been instances where the verdict was overturned or a mistrial was declared because of a juror’s conduct on social networks, some cases have not resulted in the same outcome. In People v. Ortiz, the defendant was convicted of first-degree murder. A juror kept a blog about the stages of the trial. The court took an objective view of the blog entries and stated:

Although Juror W. indisputably discussed the case while the matter was pending in violation of the court’s admonition, and thereby committed misconduct, none of the discussions were directed at appellant or the substance of the case against him . . . . Juror W. never

192. Id.
193. Id.
194. Id.
197. Id. at *1
198. Id. at *4.
mentions appellant by name, nor does he refer to any of the factual allegations, evidence, or legal defenses at issue in the case. The entries are also devoid of any indication that Juror W. had prejudged the case, relied on extraneous materials, or based his verdict on anything other than the evidence and instructions presented at trial. Any stated “cynicism” or “lack of respect” for the legal system in general was not the basis for the finding of misconduct because Juror W. was not admonished to refrain from engaging in that type of discussion.199

The entries contained no evidence that suggested prejudice, reliance on outside information, or that anything besides what was presented at trial was used in reaching a decision.200 Although the court concluded that there was misconduct because the juror discussed the case despite the court’s warning, it held that this did not rise to the level of misconduct that calls for granting a new trial because the juror’s entries were not substantively about the case and did not evidence any prejudice.201

During the federal corruption trial of former Pennsylvania Senator Vincent Fumo, the judge took a similar approach to the court in Ortiz.202 Fumo was charged with several counts of fraud, tax evasion, and obstruction of justice regarding his activities while holding public office.203 Throughout the jury selection and the actual trial, a juror posted the following comments on his Facebook wall:

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

199. Id. at *6.
200. Id.
201. Id.
203. Id. at 294.
— Jan. 11: (apparently referring to the end of the government’s case): “[Juror 1] is wondering if this could be the week to end Part 1?”
— Jan. 21: “[Juror 1] wonders if today will really be the end of Part 1? ? ?”
— Mar. 4: (conclusion of closing arguments): “[Juror 1] can’t believe tomorrow may actually be the end!!!”
— Mar. 8: (Sunday evening before second day of deliberations): “[Juror 1] is not sure about tomorrow . . . ”
— Mar. 9: (end of second day of deliberations): “[Juror 1] says today was much better than expected and tomorrow looks promising too!”
— Mar. 13: (Friday after completion of first week of deliberations): “Stay tuned for the big announcement on Monday everyone!”

The juror also posted a message on Twitter—which gained media attention—stating: “This is it . . . no looking back now!”

In determining whether these statements constituted sufficient grounds for granting a new trial, the court analyzed whether the juror’s posts substantially prejudiced the defendant. The court reasoned that the juror’s tweet that said “This is it . . . no looking back now” was vague and unclear, suggesting that the case was already decided, which would not have a negative impact on the trial. Thus, because the juror’s general status updates on Facebook did not reveal information that appeared to prejudice the defendant, let alone “substantially prejudice” him, the court denied defendant’s motion for a mistrial.

Even in circumstances where the juror is clearly speaking about the trial or jury duty, some courts have refused to find that

204. Id. at 298.
205. Id.
206. Id. at 304.
207. Id. at 306.
208. Id. at 305-06.
the postings have impacted the juror’s ability to be impartial. In the well-covered Chandra Levy murder trial, a potential juror posted the following during the jury selection process for the upcoming trial: “Guilty. Guilty. I say no. I will not be swayed. Practicing for jury duty.” After questioning by the judge in chambers, however, the juror was allowed to remain in the selection process.

In Commonwealth v. Werner, the defendant was convicted of twelve counts of larceny. After the verdicts were returned, the defense attorney looked up the Facebook profiles of jury members, finding that two jurors had open profiles (accessible to the public Facebook community) and had made posts during the trial. One juror posted: “[I] had jury duty today and was selected for the jury . . . . Bleh! Stupid jury duty!” This juror received three responses, one of which stated: “Throw the book at ‘em.” The other juror’s Facebook page showed the following interaction:

“Waiting to be selected for jury duty. I don’t feel impartial.” A person responded, “Tell them ‘BOY HOWDIE, I KNOW THEM GUILTY ONES!” Later that day at 4:54 P.M., [this juror] posted again: “Superior Court in Brockton picks me . . . for the trail [sic ]. The[y] tell us the case could go at least 1 week. OUCH

211. Id. The conversation between the judge and juror was inaudible to those in the courtroom. Even though the judge allowed the juror to remain in the selection process, the juror was not chosen as one of the sixteen to serve during the trial. Id.
213. Id. at 159.
214. Id. at 162.
215. Id.
216. Id.
217. Id.
OUCH OUCH.” [The juror]’s wife replied to this at 9:37 P.M., “Nothing like sticking it to the jury confidentiality clause on Facebook . . . . Anyway, just send her to Framingham quickly so you can be home for dinner on time.” Later that evening, another of his friends responded: “I’m with [juror’s wife] . . . tell them that you asked all your F[ace] B[ook] friends and they think GUILTY.”

The court found that the postings “revealed no evidence of extraneous influences on the jury,” that “there was overwhelming evidence of [the defendant’s] guilt,” and that the jurors “had not been exposed to any extraneous information in any other postings or responses.” The court then held that it was in the trial judge’s discretion to deny the motion for a new trial.

These cases illustrate how the impact of juror misconduct on a legal proceeding differs among jurisdictions. There is a lack of uniformity in decisions—even in those with similar facts. As evidenced above, even in murder cases where the postings are vague, the misconduct can affect the case in different ways depending on the court and the judge. These types of decisions may give one defendant a second chance while another defendant, in the exact same predicament, does not get that chance.

V. METHODS TO ADDRESS SOCIAL-MEDIA RELATED JUROR MISCONDUCT

There are many proposed methods by which courts can limit jury misconduct. No method is perfect—each has benefits and consequences—but the goal should be to choose the most efficient and effective method that balances both the rights conferred by the First and Sixth Amendments. The following will discuss a few possible solutions and then Section VI will explain a possible
solution that balances both the First Amendment rights of jurors and Sixth Amendment rights of defendants.221

A. Limiting Forms of Communication

A more extreme method of preventing juror misconduct is to require the jurors to deactivate all social networks during the trial, which would prohibit the use of them even outside of the courthouse.222 This option is the most extreme suggestion and has not been implemented by courts.223 If such a restriction were put into effect, there would undoubtedly be claims that the restriction is not narrowly tailored to achieve the goal of protecting a defendant’s Sixth Amendment right and is therefore unconstitutional because less restrictive means could be implemented.224 Courts have, however, taken steps towards limiting communication.225

Courts have thus limited communication without completely prohibiting it.226 Jurors in Michigan are allowed to use their cell phones and other electronics only during scheduled breaks.227 New Jersey has a similar rule.228 Some courts take away electronics altogether, but these rules do not extend outside of the courthouse.229

221. Other possible solutions that are common but are not discussed in full detail in this Note, include: implementing a modified preliminary jury instruction that encompasses Internet usage; enhancing juror education on the issues social network usage poses; juror sequestration; elimination of “problem jurors” through voir dire; punishment/penalties in conjunction with holding the jury responsible as a unit; and allowing questions, which in turn gives the jury a more active role. See Hoffmeister, supra note 110, at 436–53; Zora, supra note 150, at 590–601.

222. Hoffmeister, supra note 110, at 441.
223. Id.
224. See supra note 224 (listing options that could be less restrictive).
225. See Bell, supra note 135, at 86–88; see also McGee, supra note 47, at 304.
226. See Bell, supra note 135, at 86–88.
228. Id. at 315–16.
229. See Bell, supra note 135, at 87; McGee, supra note 47, at 315; Zora, supra note 150, at 594–95.
Some jurisdictions warn against certain social network usage in their jury instructions. New York's pattern jury instructions, for example, advise the judge to recite:

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

These pattern instructions inform the jurors not to discuss the case with anyone via any means (whether verbally or social network) because doing so could jeopardize a fair trial and that there will be serious legal consequences if these instructions are not followed.

Limiting the main medium for juror misconduct through social media (access to the website itself) seems like a highly effective solution. But the consequences of such an action may actually outweigh the benefits. One problem is the reaction of the juror. People may not like to feel as if they are being controlled, and taking away a person's means of communication may cause them to react in ways that would be detrimental to the outcome of the case or perhaps even the function of the court. There are also people who may tend to perform an act just because they were told not to. So by telling jurors not to use their cell phones or other electronic devices with access to social networks, the court may actually be encouraging more use, or may even be putting the idea into their heads for the first time.

Another problem arises when one takes into consideration the extent of enforcing such limitations. There must be

232. Id.
determinations of who will check to make sure that the restrictions are being adhered to, how extensive that check should be, and what the consequences are when it is discovered that a juror violated the instructions. Furthermore, it is virtually impossible to limit the use of these electronics outside of the courthouse, so implementation of such restrictions may only go as far as the courthouse door.233

B. Elimination of Potentially Problematic Jurors Through Pre-Trial Investigation

Courts already employ voir dire, which is designed to determine whether a potential juror is capable of being impartial.234 Even with this process, though, it still seems as if more investigation into a potential juror is necessary.235 With frequent and common use of the Internet, almost anyone can perform a basic search on a person.236 Through investigating potential jurors, one can find whether that person is likely to partake in misconduct involving social media by viewing the type of things they normally post or how often they post. If a potential juror is one that constantly posts about other people or every detail of his or her own life (like keeping an up-to-date blog), it may be likely that that person will post about the trial in that same manner. Also, through online investigation, it may be possible to discover whether a person lied in answering any question during voir dire that would show impartiality or that that person is unfit to serve as a juror.237 It would be better to discover this information before the trial begins rather than after a verdict is already reached so as to possibly prevent wasting the time and resources of those involved with a trial.

Problems with this type of investigation are similar to those that arise when limiting communication. First, it would need to be

233. See Goldstein, supra note 109, at 599–600.
235. See id.
236. Hoffmeister, supra note 110, at 443.
237. See id. at 443. This all assumes that a juror has an open profile. Any Fourth Amendment or privacy interests of the juror that may be involved with these searches are outside the scope of this Note.
determined who will conduct the investigation. If the attorneys conduct the investigations, there is a risk that they may not reveal their findings if they find that a potential juror is advantageous to their client.

Depending on who is investigating, some inquiries may be more extensive than others, which may cause certain predictors of misconduct to go undetected. Some of these investigations may also prove to be time consuming and require extra resources, which in turn may reduce the efficiency of the judicial process. Also, there must be a determination of the scope of the investigations. One issue these investigations raise is that they may start to cross the line into infringing privacy rights. By looking online for information about potential jurors, they may feel as if these searches invade their private lives.

VI. HOW TO BALANCE JURORS' FIRST AMENDMENT RIGHTS WITH CITIZENS' SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY

The methods listed above, along with many other proposed methods to deal with the problem of juror misconduct and social media, hardly mention the First Amendment rights of jurors, seeming to indicate that protecting a defendant’s Sixth Amendment right is more important than protecting a juror’s First Amendment

238. Id. at 444–45 (discussing the concern that attorneys may not reveal the misconduct that they have discovered in their investigations).
239. Id.
240. Id. at 444.
241. Bell, supra note 135, at 87–88 (stating that certain voir dire questions may “substantially shrink the pool of eligible jurors,” which would “threaten the idea that juries should derive from a fair cross-section of the community”).
242. Id.
243. Id. Hoffmeister, supra note 110, at 444 (stating how Judge Richard Posner noted that “[m]ost people dread jury duty—partly because of privacy concerns” (quoting United States v. Blagojevich, 614 F.3d 287, 293 (7th Cir. 2010) (Posner, J. dissenting from denial of rehearing en banc))).
244. Id.
245. See supra note 224 (listing other possible methods).
right. It is important that the accused have a fair trial and an impartial jury; however, do the rights guaranteed by the Sixth Amendment trump those guaranteed by the First Amendment? Take the earlier mentioned Arkansas Supreme Court case for example, in which the court ordered a new trial because of a tweet that stated: “Choices to be made. Hearts to be broken . . . We each define the great line.” It is not necessarily certain that the juror that tweeted this was not speaking of an occurrence that happened in his own household. Though this is not probable, it is certainly possible. Cases that present this type of ambiguity raise several questions: how does one differentiate between what relates to a trial and what may be just a post that relates to the juror’s home life? If a juror is speaking of the judicial process as a whole, how should a determination be made as to whether that is acceptable? How does one decide the repercussions or even penalty for the juror if the post is an obscure one? Though freedom of speech is not absolute, it is important to find an optimal solution that takes into consideration all interests at stake; it is thus necessary to find a way to regulate juror speech in a manner that protects both the juror’s First Amendment right and the defendant’s Sixth Amendment right.

In order to find an appropriate solution, it is important to remember why exactly jurors’ use of social media has been problematic—because it has sometimes been shown to affect a juror’s ability to be impartial. There are several main objectives in ensuring an impartial jury: courts want to make sure that they are limiting information that jurors use to reach a verdict to what is

246. Strauss, supra note 7, at 389.
247. Id.
249. See id. at 246–47 (referencing the juror’s answer as to what he meant by the tweet when he posted it).
250. Id.
251. See supra notes 82, 93 and accompanying text.
252. See United States v. Fumo, 655 F.3d 288, 306 (3d Cir. 2011) (discussing why a Facebook post was considered to be vague).
253. Strauss, supra note 7, at 408.
254. See supra Part II (exploring the meaning and origins of the Sixth Amendment).
presented in trial; courts want jurors to be free from outside influences; and courts want to discover anything that serves as proof that a juror is biased. Knowing these major concerns allows for a proper molding of an adequate solution.

With the aforementioned objectives in mind, a preferable solution is an approach that classifies the types of misconduct and allows judges to respond accordingly. This approach would allow jurors to continue to have protected speech (particularly when the speech is not prejudicial on its face) as well as ensure that defendants are not being blatantly prejudiced (particularly when the speech is prejudicial on its face) because it allows the application of different standards for each category.

A. Category 1: When Speech is Specifically and Identifiably About The Case and Receives Less First Amendment Protection

The first category includes social network interactions that are specifically about the case on which the juror is sitting. This category would include any activity that is patently obvious that it is about the case and given the information included, it would enable a reasonable person to be able to identify the case. These activities would include any information that is directly related to the defendant in the case, such as the defendant's name, statements about evidence presented at trial, comments about deciding factors in jury deliberation, comments that directly show that the juror is partial, anything that solicits outside influences such as asking for opinions or information, and activities of the like. This type of information is basically substantive information. The first category of juror misconduct is when the free speech of jurors is least protected.

255. Supra Part IV (discussing the jury, the use of social media, and its impact on trials).
256. Strauss, supra note 7, at 408–09.
257. It is important that restrictions in this category, however, are not "content-based restrictions" because if so, any restriction would have to pass strict scrutiny. For content-based restrictions (restrictions based on the subject matter of the speech), "strict scrutiny" is generally applied. The restriction will
When information of this type is divulged, there should be a presumption of material prejudice. Once a moving party proves that such information has been disclosed by the juror, the burden shifts to the non-moving party to prove that "there exists no 'reasonable possibility that the jury's verdict was [or will be] influenced by an improper communication.'" In ruling on the matter, the judge should then be governed by the "substantial likelihood of material prejudice" standard. Because these types of activities tend to generate outside influences and are the strongest evidence of potential biases, they should be governed by a standard geared towards protecting a defendant's Sixth Amendment right to an impartial jury. By creating a presumption of prejudice from this type of speech, the non-movant would have to show that the defendant's right to an impartial jury was not impinged, therefore affording more protection to the defendant.

B. Category 2: When Speech is Not About The Case, But About The Process and Receives More First Amendment Protection

In this category are social network interactions that are not specifically about the case on which the juror is sitting, but may be about surrounding circumstances — where it is not patently obvious that the speech is about the case itself. Such activity would include discussions of the procedural aspects of participating as a juror such as comments about the judicial process or general feelings towards the judges or judicial system, discussion of the

be upheld only if it is necessary "to promote a compelling interest," and is "the least restrictive means to further the articulated interest." See Sable Commc'ns of Ca., Inc. v. FCC, 492 U.S. 115, 126 (1989).

258. Supra Part III (discussing jury misconduct and the First Amendment rights of jurors).


260. Supra Part III (discussing jury misconduct and the First Amendment rights of jurors).

261. See Chemerinsky, supra note 81, at 862–67 (making the argument that attorney speech about cases and the judicial process should be viewed as political speech, which would be protected by the First Amendment).

262. Id. at 863.
feeling of serving as a juror, endorsing or defending their decision, and activities of the like. This category should also include vague references that do not solicit extraneous influences. This type of speech can be categorized as political speech based on the notion that the judicial process is considered a public issue and is thus important to public debate. The second category of juror misconduct is when the free speech of jurors is most protected.

Like political speech, attempts to restrict these activities should be governed by strict scrutiny. So, in order for a new trial to be granted, judges should be guided by determining whether the government has a compelling interest in restricting that speech and that the regulation is narrowly tailored “to achiev[ing] [that] compelling purpose.” In most cases, the compelling purpose will be the need to ensure a fair trial through an impartial jury. This justification would not necessarily be adequate in situations concerning the speech in this category, unless there is concrete evidence that the speech jeopardizes the opportunity for a fair trial. The burden here would be on the movant, thereby affording more protection to the speech of the juror.

By implementing this categorical approach, courts should be able to place factual situations into a category and provide remedies. When the speech is more prejudicial to the defendant on its face—category 1—a presumption of prejudice puts the burden on the non-movant to prove that prejudice doesn’t exist. When the speech is least prejudicial to the defendant on its face—category 2—strict scrutiny is applied without a presumption of prejudice. This places the burden on the movant to create an argument that

263. Id. at 863–64.
264. Id. at 864.
265. Id. at 863.
266. Id.
267. Id. at 862.
268. Id. at 881.
illuminates why restricting the speech in that instance is narrowly tailored to "to achiev[ing] a compelling purpose."269

Thus under these guidelines, the Facebook posts that were questioned in Commonwealth v. Werner270 would be placed in the first category. Facially, the posts directly suggested the possibility that the juror was not able to be impartial because he stated, "I don’t feel impartial" and also had friends commenting as to the defendant’s guilt and making statements such as “[t]row the book at ‘em.”271 There should be a presumption of prejudice and then the government would have to show that the defendant’s right to an impartial jury was not impinged.

Conversely, the tweet that read: “Choices to be made. Hearts to be broken . . . We each define the great line” would be placed in the second category.272 On its face, it does not directly discuss the case, does not solicit outside information, and does not directly show any prejudice. More evidence should be required to prove that such a tweet actually jeopardized defendant’s right to a fair trial and this tweet should therefore be placed in category 2, where strict scrutiny would be used instead of the substantial likelihood of material prejudice standard used in the actual case.273

Once the court gets into the habit of providing consistent remedial measures, decisions about what measure to take will be easier because there will already be precedent. There will be more uniformity and more foreseeability in the outcomes rather than what seems like inconsistency on how juror misconduct will impact a trial.

269. Id.
270. See supra notes 212–20 and accompanying text.
271. Id.
273. Id. at 248.
CONCLUSION

Courts have observed that "there are no perfect trials," but it is necessary to strive towards perfection by providing a method that aims at resolving the problems highlighted in this Note. Although there have been some steps toward remedying the problems that juror use of social media has posed, there needs to be more uniformity among courts in the handling of such solutions. Clarity needs to be brought to the rules that restrict disclosure by jurors and there needs to be consistent application imposed with regards to the penalties for misconduct. Furthermore, the solution must not give complete weight to the Sixth Amendment right to an impartial trial of the accused, but should balance that right with jurors' First Amendment rights to freedom of speech and the values it provides.