

PERSPECTIVES ON
STATE COURT LEADERSHIP

JUROR AND JURY USE OF NEW MEDIA: A BASELINE EXPLORATION

*One in a series from the Executive Session
for State Court Leaders in the 21st Century*

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This is one in a series of papers that will be published as a result of the **Executive Session for State Court Leaders in the 21st Century**.

The Executive Sessions at the Harvard Kennedy School bring together individuals of independent standing who take joint responsibility for rethinking and improving society's responses to an issue.

Members of the Executive Session for State Court Leaders in the 21st Century over the course of three years sought to clarify the distinctive role of state court leaders in our democratic system of government and to develop and answer questions that the state courts will face in the foreseeable future. Themes addressed include principles for effective court governance, the tension between problem solving and decision making, the implications of social media for court legitimacy, how courts defend themselves from political attack, and the notion of chief justices as civic leaders. Many themes were developed by Session members into papers published in a series by the National Center for State Courts.

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INTRODUCTION: A DISTINCTIVE PERSPECTIVE ON NEW MEDIA AND THE COURTS

Over the course of six meetings held between 2008 and 2011, the members of the Executive Session for State Court Leaders in the 21st Century considered leadership challenges presented by a series of both longstanding problems and new trends. The new social media's turn came in April 2010 with a discussion billed as examining "the opportunities and pitfalls of new media for state court leaders."¹ The youngest Session member, Garrett Graff, an expert on the new media, agreed to frame the issues for everyone's benefit. He immediately took the discussion to an unexpected place. The real challenge, he claimed, is that "this is much more than just a set of tools—this is a different way of thinking."² That is not to say that the tools themselves are unproblematic. Graff noted that one consequence of the new media is that "every single person who is now sitting in a courtroom has access to just about every piece of information ever published anywhere in the world. And that is a tremendous challenge to the way we traditionally think of sealing off the courtroom from the outside world for the duration of a trial."³ Currently, jury and juror use of the Internet to conduct independent research or to engage in *ex parte* communications on trial-related topics is universally prohibited as a violation of the juror's oath and can result in a mistrial or an overturned verdict.

The more profound challenge, however, is the change to the very nature of how people engage in truth finding. The Kennedy School's Christopher E. Stone summarized the challenge as a "dilemma for an institution that is used to insisting on its own ways of knowing things, ways that are different from what ordinary people do. Consider the rules of evidence—or just the rules on hearsay—we have an institution that is used to telling the whole society, 'Yeah, yeah, you think you learn things this way, but we have different rules for acquiring knowledge in this process.'"⁴

The jury trial clearly is where new ways of truth seeking are most likely to collide with the requirements

of traditional court processes. The potential casualty is fairness. Chief Justice Christine M. Durham of the Utah Supreme Court expressed skepticism about the ability of courts to find a compromise that accommodates new understandings of truth finding with the traditional trial process: "Where I have trouble is with what becomes of the fundamental definition of fairness in the American judicial system—which is founded on the concept of the adversarial system as the means of guaranteeing fairness. We have inextricably connected those two values, fairness and the adversary system, from the beginning of our history."⁵ If judges are no longer the gatekeepers for the flow of information into a courtroom, and if jurors no longer accept the legitimacy of restrictions on what is relevant to fact finding, can the American adversarial system continue to deliver fairness? The subsequent discussion led to a broad consensus that the Executive Session should, as part of its legacy, sponsor one or more jury experiments to inform court leaders as they confront changing technology and approaches to truth finding. More specifically, the National Center for State Courts (NCSC), with its tradition of jury research, was asked to design a research project to explore the impact of the new media on juries, develop the necessary survey and other methodologies needed to explore the impact of the new media on juries, and recommend potential ways to reconcile the use of new media with the dynamics of the adversarial system. This paper frames the research issues and describes what was learned from the pilot test of a jury study in 15 civil and criminal trials.

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PREVIOUS STUDIES OF JURIES AND THE NEW MEDIA

At the time of the April 2010 discussion, only a slim body of research literature and scattered anecdotal information was available to inform the Executive Session or offer guidance to judges and others concerned about the impact of the new media on the jury system.

Most of the available information on new media-based juror misconduct is anecdotal. For example, a Florida judge was forced to declare a mistrial in a protracted, expensive federal drug case after discovering that one juror independently conducted Internet research on the case. When the judge questioned the remaining 11 jurors to determine if others needed to be replaced, eight admitted to conducting their own illicit research.⁶ Other examples of misconduct stem from the use of social networking sites. For example, an Arkansas judge was faced with a post-conviction defense motion to declare a mistrial because a juror posted updates about the case on his Twitter account.⁷ The judge denied the motion, but observers note a growing practice by defense attorneys seeking a mistrial of monitoring jurors' web use for evidence of misconduct. The judicial response to misconduct has also made news internationally. In 2011, a British judge sentenced a former juror to eight months in prison for contempt of court after the juror befriended and messaged on Facebook the defendant in

a multi-million dollar drug trial and provided the defendant with information about juror deliberations.⁸

Most estimates of the incidence of juror misuse of new media are no more than a step above what we can learn from anecdote. In a Reuter Law analysis of Westlaw data between 1999 and 2010, the study learned that, at least 90 verdicts in U.S. courts were challenged based on claims of Internet-related juror misconduct, with one-half of those challenges occurring within the most recent two years of the study. In 28 of the 90 civil and criminal cases, new trials were granted or verdicts overturned. Even where judges declined to declare a mistrial (46 of the 90 cases identified), in three-quarters of the cases they held Internet-related misconduct had occurred.⁹ By this evidence it would seem that juror misconduct is rare, as approximately 450,000 jury trials were conducted in the United States during the three-year period from 2008 to 2010.¹⁰

Another study sought to examine the extent and nature of jurors' social media-related misconduct by monitoring Twitter activity in the United Kingdom. A general search of Twitter accounts for the terms "jury service" and "jury duty" returned, respectively, 260 and 26 tweets over a 24-hour period. Ten of those Twitter accounts were randomly selected to be monitored over a seven-day period; seven serving jurors were identified. Although most of the trials were still ongoing at the end of the study period, no evidence was found of tweets tantamount to potential misconduct.¹¹

Judges are another potential source of information on the incidence and nature of juror misconduct related to the new media. In a 2011 study, 30 of 508 federal judges (6%) who responded to a Federal Judicial Center survey had detected social media use by jurors during trials or deliberations.¹² An earlier survey sent to all members of major state court-related professional organizations included a substantial number of judges (254) among its respondents. One question asked respondents, "In my professional life I have personally observed a juror use a social media profile site, microblogging, or a smart phone, tablet or notebook in the courtroom."¹³ Just short of 10 percent of the judges (9.8 percent) answered in the affirmative. Another

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question found that 33 percent of all respondents reported they had “personally observed a judicial officer (judge, magistrate, or other hearing officer) admonish someone for what was deemed the improper use of social media” as described in the question above.¹⁴ While intriguing, these percentages do not necessarily paint a reliable picture of the national situation. The judges participating in the survey were not randomly selected from among all judges, but instead were drawn from members of national-level judicial organizations who responded to an online survey. So as with the other studies cited, these findings cannot enlighten us about the actual extent and nature of juror use of new media during trials.

A systematically-based estimate of juror misconduct is available only from a 2008 British survey of 668 former jurors who served on 62 trials. The study contrasted juror self-reported use of the Internet in “standard” and “high-profile” trials (where the trial was of at least two weeks in duration and received “substantial” pre- and during-trial media coverage). In standard trials, 13 percent of jurors reported seeing Internet coverage of their case, with 5 percent of all jurors reporting actively looking for that information. High-profile cases prompted more jurors to obtain information about their case: one in four (26 percent) reported seeing Internet-based information, while one in eight (12 percent) said they had actively sought such information. The discrepancy in proportions between those merely seeing information and those actively seeking information might represent a reluctance to admit to actively violating their instructions, but that is speculation. So the best estimate of “misconduct” in standard trials is that it involves between 5 and 13 percent of jurors.¹⁵

Taken together, these studies, partial though they are, demonstrate the potential threat that the new media may present to the continued viability of the jury system. The paucity of relevant data to assess the magnitude of that threat led to the pilot study described in this paper. Before describing that study and how it fits within the tradition of jury research, we briefly look at the specific threats being posed to long-standing assumptions of how truth seeking traditionally takes place in the jury context. In practical terms, there are four primary ways in which the new media threaten

the integrity of the trial jury. First, jurors may be exposed to *ex parte* information—that is, case-related information that has not been admitted as witness testimony or trial evidence and thus is not subject to rigorous examination by the parties. The information may consist of facts discovered during online research efforts or opinions expressed by individuals communicating with jurors during the trial or deliberations. Second, online speech is casual in nature. People may be less thoughtful about their statements, as well as less reticent in broadcasting them via the Internet. Yet unless judges and attorneys continually monitor cyberspace for posts related to ongoing trials, they may never learn that such potential misconduct has taken place and thus be unable to assess whether it requires a mistrial. Third, a juror’s online communications may reveal premature judgment or a preexisting bias. If these communications take place in a relatively public forum, such as postings on blogs or social networking sites, they undermine the legitimacy of the jury’s verdict by raising doubts about the jurors’ impartiality or competence, ultimately threatening the very legitimacy of the courts as an institution in the eyes of the public. Fourth, Internet and social media use represents a fundamental shift in the way people live their lives and even how they perceive and interpret new information;¹⁶ separating jurors from the devices on which they depend imposes a burden that may prove unsupportable for many jurors. Of course, most of these threats date back to the earliest jury trials. But online information and communications are instantaneous, and *ex parte* information can be directed toward jurors even without their seeking it or their intent to access it.

A PILOT STUDY OF JUROR AND JURY USE OF NEW MEDIA

RESEARCH DESIGN

Staff from the NCSC’s Center for Jury Studies put forward to Executive Session members a variety of methodological approaches that could address the issues discussed above. The design possibilities included conducting mock jury studies in a laboratory setting

or studying jurors in actual cases through either randomized experiments, post-trial surveys, interviews, or focus groups. The researchers recommended conducting a series of post-trial surveys administered to jurors, judges, and attorneys, a methodology the NCSC Center for Jury Studies has used successfully in previous studies of juror decision-making. That decision was a vote for realism—using real jurors in real cases—and a preference for quantitative data. And as a practical matter, no court in this country would consent to permitting jurors to conduct online research or communications to satisfy the requirements of a randomized experiment. A summary of the options and the rationale for the ultimate choice of a study based on surveying jurors immediately after a trial is offered as a methodological appendix. The appendix also details steps taken to reassure jurors about the confidentiality of their survey responses and contains a description of the contents of each study package including the general focus of the surveys distributed to judges, attorneys, prospective jurors, and jurors, and alternates.

Mindful of specific limitations to the method of post-trial surveys, in particular a need to rely on juror candor about their violations of the judge's instructions, the research design incorporated a number of additional components to minimize their impact on study reliability and validity. Surveys of trial judges and attorneys allowed the researchers to verify factual information about the trial such as the content and clarity of the jury instructions, case complexity, and weight of the evidence (pro-plaintiff/prosecution versus pro-defendant). The ability to compare juror perspectives with those of the judge and lawyers also offered invaluable insights about how lay decision-making differs from that of legal professionals.

PROFILE OF PILOT STUDY CASES AND PARTICIPATING JURORS

The final design of the pilot study envisioned a sample of thirty civil and non-capital criminal trials. A total of nine trial judges in seven states (California, Connecticut, Florida, Michigan, Pennsylvania, Texas, and Virginia) agreed to participate in the pilot study. Collectively, they were given 50 study packets for use in upcoming trials. Ultimately, six judges (from

California, Connecticut, Florida, Michigan and Texas) returned complete study packages for six criminal trials and seven civil trials and partial study packages for two additional civil trials. Finally, prospective juror surveys were returned for the thirteen trials plus an additional seven civil trials in which the cases settled before the jury was formally impaneled. None of the participating judges reported any difficulty in securing the attorney waivers and consents to participate.

The response rates to the various surveys were high overall. The average juror response rate was 97 percent in criminal trials and 70 percent in civil trials. The lower response rate for the civil trials was largely the result of three cases in which only one juror completed the questionnaire: excluding these cases resulted in a 93 percent juror response rate for civil cases. The judge survey response rate was 93 percent. At least one attorney survey was returned in 14 trials (93%) and both attorney surveys were returned in 11 trials (73%). A completed case information sheet was included in all six of the criminal trials and in seven of the civil trials (77%) for an overall response rate of 87 percent.

From prospective jurors, we received 506 completed surveys for 22 cases where the surveys were distributed to the remaining jurors in the pool after trial jurors and alternates had been selected. This meant that prospective jurors removed from the panel for cause, for hardship, or by peremptory challenge may have been excused from the courtroom before the surveys were distributed. Consequently, it is not possible to calculate the exact response rate for the Prospective Juror Surveys, but a conservative estimate based on the initial jury panel size ranged from 10% to 98%, with an average of 60%.

The trials offered a reasonable cross section of case types tried in state courts. Charges alleged in the criminal trials ran the gamut from manslaughter to robbery to drug offenses to sexual assault (two cases) to firearms offenses. Trials lasted from one to four days and resulted in three guilty verdicts, one hung jury, and two unknown trial outcomes. With the exception of one dram shop liability case,¹⁷ all of the civil trials involved automobile torts. The civil trials lasted one to seven days and resulted in three plaintiff

verdicts with damage awards ranging from \$6,000 to \$892,500, four defendant verdicts, and two unknown trial outcomes. None of the trials completely restricted juror access to technology while in the courthouse, but all did prohibit juror use of Internet technologies and social media while the trial was in session and during jury deliberations.

The prospective jurors, trial jurors, and alternates reflected the demographics of their respective jury-eligible communities in terms of gender, race, ethnicity, and age distribution. The only significant difference in general demographic characteristics was that, collectively, the prospective jurors, trial jurors, and alternates had substantially higher proportions of college graduates (34% versus 11%), higher employment rates (77% versus 61%), and greater likelihood of being married (65% versus 45%) than their respective community populations.¹⁸ Some of the differences may be explained by the juror qualification screening procedures in those communities, which tend to disproportionately exclude younger and lower socioeconomic persons from jury service. Another possible explanation is that jurors with higher socioeconomic characteristics were more likely to complete the surveys than were their less well-educated fellow jurors.

Time limitations imposed on the pilot study by the concluding date for the Executive Session led to a smaller sample of completed trial packages than initially hoped for. The purpose of the pilot study, however, is not to provide reliable estimates about the propensity of juror and jury use of new media. Instead, pilot studies tell us whether the methodology being employed is sound. In addition, it can provide a basis for fresh thinking about the phenomenon being studied.

RESULTS

As a preliminary matter, the judges who participated in the study all viewed juror and jury use of new media as a moderately severe problem. On a scale of 1 (not at all severe) to 7 (very severe), more than half of the judges rated independent research by jurors and juror communication with outsiders as a problem at either a 4 or 5 level. Only one judge gave a rating of 7. On average, the attorney respondents also rated

the problem of juror use of new media as moderately severe (4.8 for independent research and 4.7 for ex parte communication), but their responses were considerably more varied than those of the judges. Most judges rated their own technological knowledge as fairly strong (5.4 average); only one judge gave a self rating lower than a 4. On average, the lawyers viewed themselves as less technologically knowledgeable than the judges (4.4 on a scale of 1 to 7).

Prospective jurors overwhelmingly had daily, if not immediate, access to a variety of Internet-based communication devices and computers including desktop or laptop computers with Internet access.

The jurors themselves—both the prospective jurors and the jurors ultimately selected as trial jurors or alternates—viewed themselves as moderately technologically knowledgeable (4.7 average rating for prospective jurors, and 5.0 average rating for jurors/alternates). Prospective jurors overwhelmingly had daily, if not immediate, access to a variety of Internet-based communication devices and computers including desktop or laptop computers with Internet access (89%), cellular telephones (86%), PDAs (75%), and smart phones (55%). Eighty-seven percent (87%) of prospective jurors had personal email accounts and sixty-four percent (64%) had some type of social network account (58% Facebook, 20% LinkedIn, 13% Twitter, and 11% MySpace). Six percent (6%) had a personal blog. Internet access and usage for trial jurors and alternates closely resembled that of the prospective jurors (slightly more of whom were owners of smart phones, computers, and Facebook accounts, and slightly fewer had personal email accounts and blogs). These statistics are comparable to those of Internet access and usage in other studies of contemporary American culture.¹⁹

Most of the judges indicated that they admonished the prospective jurors not to use the Internet for independent research or ex parte communications as part of the voir dire process and that they gave formal admonitions to the impaneled jurors and alternates. Overall, these admonitions were very specific about the types of activities that jurors were prohibited from doing during the trial, whether they were in the courthouse or elsewhere. The attorneys also rated the clarity of the Internet-related instructions as very high—6.8 out of 7 for instructions on independent research, 6.6 for instructions on premature juror discussions, and 6.9 for instructions on discussions with family and friends.

The critical question is: did jurors or alternates admit to engaging in juror misconduct—with or without the Internet—during the course of the trial?

These instructions appear to have had the desired effect on jurors, as most of them correctly understood these basic restrictions. Two-thirds of the prospective jurors, for example, reported that using the Internet to research any aspect of the case or the trial participants would violate the judge's instructions (15% believed that some types of independent research would not violate the judge's instruction and 20% were not sure). Eighty-seven percent (87%) of prospective jurors said that using the Internet to communicate with friends or family or to post information about the trial would also violate the judge's instructions (7% believed that such communication would not violate the judge's instruction and 7% were not sure). Eighty-six percent (86%) claimed that they could refrain from all Internet usage for the duration of the trial if instructed to do so by the trial judge; the remaining 14 percent said that they would not be able to do so. Older people and people with previous jury experience indicated more willingness to comply with such a restriction, which may reflect comparatively less technological knowledge for older jurors, and

thus less daily dependence on Internet access, than younger jurors. This also illustrates the importance of this research with the introduction of a more technologically sophisticated and connected cohort to the jury pool.

Despite their common understanding about restrictions on their Internet use, a sizeable proportion of prospective jurors reported they would have liked to use the Internet to obtain information about legal terms (44%), the case (26%), the parties involved (23%), the lawyers (20%), the judge (19%), the witnesses (18%), and their fellow jurors (7%). Slightly fewer prospective jurors also admitted that they would have liked to use the Internet to email family and friends about the trial (8%), connect with another juror (5%), connect with one of the trial participants (3%), tweet about the trial (3%), blog about the trial (3%), or post information about the trial on a social networking site (2%). Similarly, sizeable numbers of the trial jurors and alternates admitted that they would have liked to use the Internet for case-related research (28%) and for ex parte communications (29%). The level of interest was approximately equal for jurors serving in civil versus criminal trials. Jurors serving on trials with comparatively more complex evidence expressed greater interest in using the Internet to conduct case-related research, but did not express any greater interest in engaging in ex parte communications.

The critical question is: did jurors or alternates admit to engaging in juror misconduct—with or without the Internet—during the course of the trial? If so, did these actions affect their individual or collective decision-making? The short answer is yes, jurors and alternates disclosed that they had engaged in juror misconduct, but only old-fashioned forms of misconduct such as premature discussions with other jurors (10% of jurors and alternates) and face-to-face or telephonic discussions with family and friends about the trial (6%).²⁰ Sixteen jurors across nine different trials admitted to engaging in these activities, but only four (all serving in different trials) reported that those discussions helped them understand the evidence. Those four reported that they relied on those discussions at least moderately (4 to 6 on a scale of 1 to 7) in reaching their verdicts.

CONCLUSIONS AND RECOMMENDATIONS

This pilot study is based on a very small sample of trials, all presided over by trial judges known to be acutely concerned about the potential injustice that might result from inappropriate juror use of new media. It is possible (even hopeful) that the specificity and frequency with which those admonitions were repeated throughout the trial dampened the jurors' likelihood of violating those instructions. It is also possible that it reduced the likelihood that jurors would disclose such misconduct.

The pilot study prompted sufficient disclosure by jurors of their interest in using new media to conduct independent research and to communicate with outsiders, as well as disclosure of some types of juror misconduct—namely, pre-deliberation discussions with other jurors and discussions with family and friends—to alleviate most concerns about juror candor in our study. Undoubtedly, other jurors committed similar misconduct, but chose not to disclose it when completing the survey. In the specific instances where it is possible to compare the pilot study findings with previous studies of the prevalence of premature juror discussions and ex parte discussions with friends and family members, the similarity in the observed patterns offers reassurance that our methodology is sound. The pilot study methods, if applied to a sufficient sample of jury trials, would provide a conservative estimate of the frequency of juror misconduct involving new media and the case or trial characteristics that generate the most interest on the part of jurors in using those technologies. Such a study would also provide useful insights for trial judges and lawyers about effective techniques to identify and remove jurors who could not or would not be able to comply with an admonition to refrain from Internet use, to provide legitimate avenues for jurors to obtain information that they believe they need to make fair and informed decisions, and to develop clear and specific jury instructions that will result in greater comprehension of the underlying rationale for the restrictions and ultimately greater compliance with instructions.

These tentative findings encourage cautious optimism that the frequency of juror misconduct involving new media currently is less than one might imagine based on the number of recent news media accounts of jurors run amok.

But what about juror use of the new media in their efforts at truth-finding in a case and the potential for that use to challenge the ability of the adversarial system to deliver fair trials? Mindful of the narrow purpose of all pilot studies, there are some tentative insights from this study. First, few jurors reported committing misconduct of any kind—with the Internet, friends, or families. Second, however, a substantial proportion of jurors either could not recall that the judge had given an admonishment about new media use or incorrectly believed such searches were permissible. Third, a sizeable proportion of actual and prospective jurors indicated a desire to use the Internet to obtain information relevant to the trial. Fourth, a significant proportion of jurors indicated they would be unable to refrain from Internet use for the duration of a trial. These are but hints at what a national study might find, implications for further research and examination of practice, but insufficient for policy-making.

These tentative findings encourage cautious optimism that the frequency of juror misconduct involving new media currently is less than one might imagine based on the number of recent news media accounts of jurors run amok. The pilot study findings are less optimistic about the future. The vast majority of trial jurors are already exceptionally wired-in, having both the technological access and the practical experience to use these communication devices effortlessly. The substantial portion of jurors who admitted to wanting to use the Internet to research case-related

information or communicate with family and friends suggests that many jurors view these technologies as commonplace tools. As younger cohorts join the jury pool, access to the Internet and reliance upon it for information-gathering can only increase. Judges and lawyers therefore can expect to see jurors' desire to use these tools increase in coming years, and they will have to take more effective steps to convince jurors to forgo these tools in the interest of fairness to litigants. A key factor will be the degree to which jurors continue to believe that the testimony of witnesses, especially expert witnesses hired by the parties, is more compelling evidence than what they can uncover on their own through information available to them via the Internet.

For some individuals, Internet use appears to have an addictive quality, compelling them to compulsively check email or post to blogs or social network accounts.

Such conclusions will not be welcome news to those who wish to rely upon a more vigorous use of standard admonishments or on depriving jurors of access to the new media to keep the traditional, "unwired" jury. Some judges propose new juror instructions that specifically itemize the types of prohibited new media activities (e.g., online research using Google, Wikipedia, Bing, Google Earth, etc.). Similarly, frequent repetitions of admonitions, especially before lengthy trial recesses, are seen as strengthening the impact of jury instructions. Some judges have begun asking jurors to sign written pledges to avoid juror Internet use during trial. Other commentators advocate admonitions that cite specific penalties (contempt proceedings, fines, imprisonment, etc.) that may be imposed for violating the rules. Other possible revisions to current practice are available. Judges, for example, can provide jurors a rationale as to why independent research is prohibited, specifically citing the general risks associated with relying on the Internet as a source of reliable information. That rationale can also

include an explanation of how the rules of evidence ensure that the accuracy of trial evidence is put to the test in a public forum.

For some individuals, Internet use appears to have an addictive quality, compelling them to compulsively check email or post to blogs or social network accounts. Increasingly, judges and lawyers are being urged to use *voir dire* to identify these individuals, assess their ability and willingness to comply with the rule, and excuse those who seem to be an excessive risk. Other strategies seek to deny juror access to these technologies by banning cellular telephones, smart phones, and other communication devices from the courthouse entirely, or by confiscating these devices from jurors during trial or deliberations. While having some effect within the physical confines of the courthouse, such strategies obviously cannot be enforced against jurors when they are not on the courthouse premises, barring complete sequestration of the jurors during trial and deliberations. And the efficacy or feasibility of such draconian measures even in the short-term seem doubtful. If the findings from the pilot study on the desire to use new media during jury service are borne out in a national study, then the challenges identified at the start of this paper must be viewed as very real.

What are the next steps? The pilot study demonstrates that the methodology employed is sound. Of particular note is the success in obtaining completed study packages in criminal trials, in which the increased due process requirements and protections for criminal defendants posed a greater risk of complications related to post-trial motions and appeals. Compliance with the study protocols was also good with respect to completion of the judge and attorney waivers, completed study packages, and overall response rates suggesting that replication with a larger number of trials is justified.

Nonetheless, the experience of conducting the pilot study also leads us to rethink some aspects of the methodology before proceeding with a full, national study of jurors and the new media. There is lingering concern that some jurors may be reluctant to disclose misconduct involving new media while they are under the control of the trial judge. The pilot study

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did not identify any instances of juror misconduct involving new media. A methodological approach that severed the link between the juror's identity and the case would minimize concerns about a lack of juror candor. Equally important, such separation would eliminate the selection bias present in any study that obtains data only from trials in which the judges presiding are willing to participate, making possible a more representative sample of trials and trial procedures than could be achieved in the pilot study. We therefore recommend a dual-track study on jurors and the new media, one implementing the pilot methodology and the other seeking out former jurors directly. Each approach has weaknesses that the other approach does not. They will complement one another.

METHODOLOGICAL APPENDIX

The following offers a full description and justification of the choices made in selecting the specific methods used in the pilot survey. It is offered for the benefit of researchers and others familiar with jury research, as well as for those readers who are curious about the available options for responding to the Executive Session's concerns about the intersection of the jury system with new media.

Mock jury research is a standard component of studies on jury decision-making. The primary advantage it brings is an ability to isolate one or more predictors to measure their impact on a dependent variable, such as the likelihood of doing independent web-based research. It is a particularly useful technique

to investigate whether a specific intervention (e.g., a new jury instruction, a procedural change, etc.) affects jurors' individual or collective reactions to trial evidence or testimony.

Mock jury studies, however, are not inherently realistic. Individuals who participate as trial jurors in mock trials are generally aware that they are participating in a trial simulation rather than an actual trial. Existing research on juror and jury use of new media suggests that jurors are keenly interested in learning about the trial participants (parties, lawyers, judge) and details about the case itself in addition to definitions of legal terms and information about case-related issues that arise during trial. In a mock jury study, jurors would know that those aspects of the case are fictional and would have no motivation to conduct online research.

Moreover, mock jury exercises are generally designed as abbreviated trials featuring limited trial testimony and evidence. Many such exercises restrict the jurors' deliberations to a very short time period (e.g., one hour or less) or even omit the deliberation component entirely. In such a limited amount of time, very few jurors would have the opportunity to conduct online research or communicate with others, even if they had a desire to do so. Finally, even if the trial scenario were sufficiently engaging to make jurors believe and act as if the trial and its various participants were real for the duration of the exercise, the limited amount of variation that could be introduced from experiment to experiment would only provide insights about jurors' interest, willingness, and ability to conduct online research and ex parte communications in those types of cases, but not necessarily their actual behavior in a broader range of cases. Thus, a trial scenario involving an automobile negligence or product liability case would reveal little, if anything, about juror and jury use of new media in criminal cases involving drug offenses, child abuse, or aggravated homicide.

Another methodological approach to studying juror decision-making and behavior involves randomly assigning jurors to one of two (or more) trial conditions. This is usually done in the context of a mock jury experiment, but it has been successfully employed using real jurors in real trials. For example,

in its evaluation of the impact of permitting jurors in civil cases to discuss the evidence before final deliberations, the NCSC obtained permission from the Arizona Supreme Court to use random assignment to determine whether jurors would be instructed according to the traditional admonition (juror discussions prohibited) or according to Rule 39(f) of the Arizona Rules of Civil Procedure (juror discussions permitted in civil cases only).

Post-trial surveys, focus groups, and interviews with actual trial jurors are all well-accepted methods of collecting information about juror decision-making and behavior. Because they involve real jurors in real cases, they generally provide more generalizable information than mock jury experiments. They also allow researchers to investigate the impact of a variety of case-specific factors such as case type, litigant type, trial procedures, case complexity, and the strength of the evidence on juror decision-making and behavior. But there also are certain inherent limitations in these approaches. For example, juror surveys can be distributed, completed, and collected relatively quickly, but they are generally designed as a one-time survey with little or no opportunity for researchers to seek clarification about ambiguous responses or to probe for more nuanced information. Interviews and focus groups afford this flexibility, but fewer jurors typically participate because of the greater effort and longer commitment to participate.

Another significant limitation of these methods is the possibility that jurors will fail to disclose important information.

Another significant limitation of these methods is the possibility that jurors will fail to disclose important information. This might be unintentional. Jurors may simply forget important aspects of the trial or their decision-making process, particularly when a long interval of time passes between the end of the trial

and when the surveys, interviews, or focus groups are conducted. With respect to factual aspects of the experience, a sufficiently high response rate from the jurors who participated in the trial will help overcome this limitation to some degree. Moreover, a relative consensus among the jurors about factual aspects of the trial or deliberations provides greater confidence in the accuracy and reliability of that information.

To minimize the likelihood that jurors would forget key information about the trial, and to encourage robust response rates from all of the trial participants, the pilot study surveys were distributed immediately after the jurors had delivered their verdict in open court and before they were released from jury service.

A greater concern in the context of juror and jury use of new media is that jurors might intentionally fail to disclose violations of the trial judge's admonition concerning online research and ex parte communications. Increasingly, trial judges explicitly describe the potential penalties for violating the jury instructions, which in most courts can include contempt of court proceedings, fines, conviction of criminal offenses, and even imprisonment. Given the severity of these penalties, it is understandable that a juror might decline to disclose any such violation. Promises of confidentiality, anonymity, or immunity from prosecution can reduce these concerns, but they may not persuade all jurors to be fully candid in their responses. Jurors may also be reluctant to disclose socially undesirable information about themselves in a survey or focus group. However, the same jurors may be more forthcoming about socially undesirable behavior on the part of their fellow jurors.

Obtaining candid responses to the juror surveys therefore was a critical component to the study and protections were built into the research to guarantee the maximum amount of protection for both jurors and trial judges. The research design ensured that although juror surveys were linked to a specific trial, all surveys were anonymous and the individual responses were kept confidential. This level of confidentiality extended to all of the participant surveys (judge, lawyers, and jurors), and both the judge and lawyers were required to sign an informed consent agreement indicating that they understood and agreed to abide

by the study protocols before they were permitted to participate in the study.

Moreover, the promise of confidentiality was strengthened by the protection of federal law. Because the study was funded in part by a grant from the Bureau of Justice Assistance of the U.S. Department of Justice, the provisions of 28 C.F.R. 22 prohibit the use of those responses in subsequent adjudicatory proceedings without the written consent of the individual who completed the survey. Even if the judges and lawyers could review the completed juror surveys, the responses could not be introduced as evidence in a post-trial challenge to the verdict, or in contempt proceedings against the juror, without the juror's written consent. In addition, because the surveys were anonymous, it would be extremely difficult, if not impossible, to identify the individual juror who completed the survey to obtain his or her written consent for the disclosure. These protections were designed to encourage judges to participate in the study because the likelihood of post-trial complications would be greatly reduced, if not completely eliminated. To obtain that protection under federal law, the NCSC's Institutional Review Board examined and approved the proposed procedures for ensuring confidentiality, as well as all instructions, forms, and survey instruments.

The research design ensured that although juror surveys were linked to a specific trial, all surveys were anonymous and the individual responses were kept confidential.

Participating judges and trial attorneys were required to complete an informed consent agreement indicating their understanding of the purpose of the study and the confidentiality provisions, and waiving their ability to review the juror survey responses or to use those responses in any post-trial proceedings. Jurors and alternates were provided with individual envelopes in which to seal their surveys, as well as a larger

juror envelope in which to place all the jurors' completed surveys. Each study package included the following materials:

- Judge Consent Agreement and Waiver.
- Case Information Sheet—documents information about the case and trial procedures including case type, numbers and types of litigants, jury panel size, key issues presented at trial, jury instructions concerning decision-making tools (note taking, juror questions, juror discussions), the specificity of jury instructions concerning new media, the timing and frequency of jury instructions concerning new media, the number of jurors deliberating, deliberation length, and the trial outcome.
- Judge Survey—solicits opinions about the legal and evidentiary complexity of the case, the relative weight of the evidence presented at trial, the judge's reactions to the jury verdict, and the judge's opinions about the severity of the problems related to juror use of communication technologies in the local jurisdiction.
- Attorney Consent Agreement and Waiver.
- Attorney Questionnaires—solicit information about use of the Internet to investigate the suitability of prospective jurors, reactions to the jury verdict and opinions about the adequacy of judicial admonitions related to juror use of communication technologies, attorney opinions about the legal and evidentiary complexity of the case, the relative weight of the evidence presented at trial, the attorneys' reactions to the jury verdict, and attorney opinions about the severity

of the problems related to juror use of communication technologies in the local jurisdiction.

- Prospective Juror Questionnaire—collects baseline information from the individuals who were assigned to the jury panel for voir dire but not ultimately selected as trial jurors or alternates. This survey inquires as to their initial propensity to conduct independent research or communicate with others about the trial, their views about the appropriateness of these actions, and their access to and familiarity with communication technologies.
- Alternate Juror and Juror Questionnaires—Solicits their opinions about the trial and deliberations, the desire for information to supplement the evidence presented at trial, the efforts to acquire that information, the extent to which they relied on any extraneous information when making their verdicts, whether they shared that information with other jurors, and whether they communicated with others about the case while the trial was underway.

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3 *Id.* at pp. 24-25.

4 *Id.* at p. 43.

5 *Id.* at p. 50.

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7 *Id.* The Alabama Supreme Court ultimately overturned the verdict, ruling that the juror's continued "tweets" about the trial and deliberations even after being specifically ordered by the trial judge to discontinue prejudiced the defendant's right to a fair trial. *Dimas-Martinez v. Arkansas*, 2011 Ark. 515 (Dec. 8, 2011).

8 Chris Greenwood, *Woman Juror Faces Jail After Facebook Chat with Female Defendant Stopped Trial*, MAILONLINE, Jun. 15, 2011, <http://www.dailymail.co.uk/news/article-2003448/Joanne-Fraill-faces-jail-contempt-court-Facebook-chat-Jamie-Sewart.html>.

9 Brian Grow, *As jurors go online, U.S. trials go off track*, THOMAS REUTERS NEWS & INSIGHT, Dec. 8, 2010, <http://www.reuters.com/article/2010/12/08/us-internet-jurors-idUSTRE6B74Z820101208>.

10 Because the Reuters-Legal study focused only on written court opinions, the results may represent only the tip of a very large iceberg comprising cases in which juror misconduct was not discovered or, if discovered, was addressed without the need for a written opinion. On the other hand, although the discovery of juror and jury use of new media may have a substantial impact on the finality of the verdict, it is not at all clear that this behavior occurs on a frequent basis.

11 See Michael C. Bromby, *The Temptation to Tweet – Jurors' Activities Outside the Trial 2-7* (Inst. for Advanced Studies, Glasgow, Jury Research Symposium Working Paper, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1590047 (USM1: "just give everyone a gun instant justice"; USM4: "That guy looks so guilty.").

12 Meghan Dunn, *Jurors' Use of Social Media During Trials and Deliberations: a Report to the Judicial Conference Committee on Court Administration and Case Management* (Nov. 22, 2011) (available at [http://www.fjc.gov/public/pdf.nsf/lookup/dunnjuror.pdf/\\$file/dunnjuror.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dunnjuror.pdf/$file/dunnjuror.pdf)).

13 Christopher J. Davey, Karen Salaz & Thomas Hodson, *New Media and the Courts: The Current Status and a Look at the Future*, CONFERENCE OF COURT PUBLIC INFORMATION OFFICERS (2010) (available at <http://ccpio.org/wp-content/uploads/2012/06/2010-ccpio-report.pdf>).

14 *Id.* at 79.

15 Cheryl Thomas, *Are Juries Fair?* BRITISH MINISTRY OF JUSTICE, 43-44 (2010), <http://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/are-juries-fair-research.pdf>.

16 Nicole L. Waters & Paula Hannaford-Agor, *Jury News: The Googling Juror Redux*, 27(2) Ct. MGR. 62 (2012).

17 Dram shop liability refers to the body of law governing the liability of bars, restaurants, liquor stores, and other commercial establishments that sell alcoholic beverages. Most state dram shop liability statutes provide for a private cause of action for individuals who are injured as a result of negligence by the establishment in selling alcohol to an obviously intoxicated person or to a minor.

18 All community demographic characteristics for the participating communities were obtained from the U.S. Census Bureau. U.S. CENSUS BUREAU, 2005-2009 AMERICAN COMMUNITY SURVEY 5-YEAR ESTIMATES: SELECTED SOCIAL AND ECONOMIC CHARACTERISTICS (2009), available at <http://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/are-juries-fair-research.pdf>.

19 See, e.g., PEW INTERNET AND AMERICAN LIFE PROJECT, <http://www.pewinternet.org/> (last visited Dec. 1, 2011) (83% of Americans own cellular telephones, 65% of online adult use social networking sites).

20 Both types of juror misconduct—premature discussions among jurors, and ex parte discussions with family and friends—have been acknowledged as commonplace occurrences in jury trials. See Paula L. Hannaford, Valerie P. Hans & G. Thomas Munsterman, *Permitting Jury Discussions During Trial: Impact of the Arizona Reform* 24 LAW & HUM. BEHAV. 359 (2000); Natasha K. Lakamp, *Deliberating Juror Predeliberation Discussions: Should California Follow the Arizona Model?* 45 UCLA L. REV. 845 (1998); Elizabeth F. Loftus & Douglas Leber, *Do Jurors Talk?* 22 TRIAL 59 (1986).

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