

Pace University

DigitalCommons@Pace

Elisabeth Haub School of Law Faculty
Publications

School of Law

Fall 2020

The Gen Z Juror

Leslie Y. Garfield Tenzer

Follow this and additional works at: <https://digitalcommons.pace.edu/lawfaculty>



Part of the [Courts Commons](#)

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Elisabeth Haub School of Law Faculty Publications by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

THE GEN Z JUROR

LESLIE Y. GARFIELD TENZER*

I. INTRODUCTION	174
II. THE JURY SYSTEM	177
A. Juror Misconduct Generally	185
B. Juror Misconduct in the Internet Age.....	189
III. THE GEN Z JUROR.....	197
IV. THE REALITY OF SUGGESTED JUROR REFORMS.....	201
A. Prohibitions Banning Smart Phones Completely	203
B. Admonitions: Strengthening Jury Instructions	207
C. Punishment: Increasing Sanctions for Juror Misconduct	210
V. TRADITIONAL REVIEW IN A MODERN WORLD	214
VI. CONCLUSION.....	217

The Magna Carta drafters did not contemplate Facebook, Twitter, or texting when they formalized the jury system, a system that remains mostly unchanged 800 years after its inception. Those primed for jury duty over the coming decades have grown up with a cell phone in their hand and news at their fingertips. It is unreasonable to expect Gen Zers to meet the “radio-silence” mandate of jury duty. As smartphones become the de facto method of communication, courts, legislatures, and scholars offer prohibitions, admonitions, and increased punishment to curtail juror misconduct. These reforms, however, do little to prevent the kind of harmful error they seek to avoid. Instead, jury reforms deter members of an already-reluctant jury pool and demonize communications that do not infringe on defendants’ due process rights. This Article explains why the presence of smartphones demands courts exercise flexibility and understanding when considering juror misconduct. Juror misconduct reforms are overreaching and unnecessary; harmless error review is all that is necessary to regulate juror smartphone use. In this instance, the presence of new technology demands change; failure to accommodate Gen Z communication will yield a breakdown in our jury system.

* James D. Hopkins Professor of Law, Elisabeth Haub School of Law at Pace University. The author thanks the Honorable Cathy Seibel (S.D.N.Y.) and Mark Berman, Esq. for their thoughtful engagements, Bridget Crawford for continued encouragement and thoughtful insights, and Richard Montalvo for his outstanding research assistance.

I. INTRODUCTION

The Magna Carta drafters did not contemplate Facebook, Twitter, or texting when they formalized the jury system, a system that remains mostly unchanged 800 years after its inception.¹ Those primed for jury duty over the coming decades have grown up with a cell phone in their hands and news at their fingertips.² It is unreasonable, therefore, to expect Gen Zers to meet the “radio-silence” demands of jury duty, regardless of jury instructions prohibiting technological communications. Our jury system must adapt to present-day realities.

Consider the following: In 2014, an upstate New York court seated twenty-three-year-old Johnna Lorraine on the jury of a high-profile murder trial.³ Despite the trial judge’s warning against cell phone use given at the beginning of the trial and forty-five more times,⁴ Lorraine exchanged over 7,000 texts during the trial.⁵ In response to the defendant’s request for a new trial, the trial judge ruled that while Lorraine committed misconduct, the texts themselves were not biased.⁶ The district attorney even advocated for Lorraine, saying she showed respect for the judicial system.⁷ Consequently, the trial court ruled that her conduct did not taint the process.⁸ Nor did it punish Lorraine for her loose fingers.⁹

The judge in the Harvey Weinstein trial found it almost impossible to select a jury.¹⁰ Potential jurors posted on Facebook,

1. See Thomas J. McSweeney, *Magna Carta, and the Right to Trial by Jury*, in *MAGNA CARTA: MUSE & MENTOR* 139, 145 (Randy J. Holland ed., 2014).

2. Heather Watson, *How Obsessed is Gen Z with Mobile Technology?*, CTR. FOR GENERATIONAL KINETICS, <https://genhq.com/how-obsessed-is-gen-z-with-mobile-technology/> (last visited Oct. 26, 2020).

3. Ed Shanahan, *After Juror Exchanged 7,000 Texts, Murder Verdict is Overturned*, N.Y. TIMES (Oct. 31, 2019), <https://www.nytimes.com/2019/10/31/nyregion/robert-neulander-wife-murdered.html>.

4. Christian Nolan, *The Juror Who Exchanged 7,000 Text Messages*, 91 N.Y. STATE BAR ASS’N J., Mar. 2019, at 24, 24.

5. Shanahan, *supra* note 3.

6. *Id.*

7. *Id.*

8. *See id.*

9. *Id.* Although the court chose not to punish her, both an appellate court and New York’s highest court, the Court of Appeals, ruled against the State and granted a new trial. *People v. Neulander*, 80 N.Y.S.3d 791, 797 (N.Y. App. Div. 2018) *aff’d*, 135 N.E.3d 302 (N.Y. 2019).

10. See Michael R. Sisak, *Weinstein Lawyers: ‘Circus’ Atmosphere, Juror Tweets Unfair*, U.S. NEWS & WORLD REP. (Jan. 15, 2020, 7:19 PM), <https://www.usnews.com/news/entertainment/articles/2020-01-15/lawyers-at-weinstein-trial-work-to-whittle-jury-pool>.

Twitter, and Instagram despite the judge prohibiting such conduct “a thousand times.”¹¹ One man purportedly in the running for Weinstein’s jury tweeted about leveraging “serving on the jury of a high-profile case” to promote a novel he wrote.¹² According to Weinstein’s lawyers, another potential juror responded with a laughing emoji when someone asked if she would be selected.¹³

The jury system grew out of a desire to prevent the accused from suffering punishment without “lawful judgment of [their] peers.”¹⁴ The importance of judgment by equals was paramount to our nation’s founders.¹⁵ The First and Second Constitutional Conventions, the Bill of Rights, and the Sixth and Seventh Amendments to the U.S. Constitution extend to citizens a right to trial by jury.¹⁶

Due Process guarantees jury deliberations free from harmful taint or misconduct.¹⁷ Juror misconduct occurs when jurors violate their oaths to the court and engage in improper conduct that affects their ability to remain impartial and unbiased.¹⁸ Proof that juror conduct prejudiced the defendant can, absent a showing of harmless error, result in a mistrial.¹⁹

Juror misconduct can range from refusing to deliberate to serving while intoxicated to communication or research outside of the courtroom.²⁰ It is the latter that is proving most problematic today. Google searches, social media, and text communications have virtually lured jurors outside the brick-and-mortar courtroom. Consequently, jurors at best vent their frustration with selection to a jury or their opinions on the case and, at worst, research constitutionally-barred evidence.²¹

11. *Id.*

12. *Id.*

13. *Id.*

14. *Duncan v. Louisiana*, 391 U.S. 145, 169 (1968) (Black, J., concurring).

15. *Id.* at 152.

16. U.S. CONST. amends. VI, VII.

17. *See State v. Martinez*, 896 A.2d 109, 113 (Conn. App. Ct. 2006) (appealing on grounds of jury “taint” and prosecutorial “misconduct” as violations of the right to due process).

18. *See, e.g., Bogue v. State*, 204 S.W.3d 828, 830 (Tex. App. 2006) (explaining the requirements of what constitutes jury misconduct).

19. *See id.* at 829 (explaining when jury misconduct will result in a new trial).

20. *5 Examples of Juror Misconduct that May Be Grounds for an Appeal*, LAURENT L. OFF. (Sept. 15, 2015), <http://llolegal.com/5-examples-of-juror-misconduct-that-may-be-grounds-for-an-appeal/>.

21. *See infra* notes 104–05, 107–09.

The federal government and all fifty states have tried to prohibit tainted technology from entering the jury deliberation room.²² Judges have issued prohibitive directives to empaneled jurors at the beginning, the end, and even the middle of a trial. Some courts have removed jurors' ability to communicate with the outside world.²³ Other courts have imposed sanctions on offending jurors.²⁴ There is no shortage of scholarship calling for stricter jury reform,²⁵ but such solutions are untenable given the demographics of today's jurors. Fifty-five percent of our eligible jury pool grew up in the information age.²⁶ This portion of the population regularly converses without voice communication, does not need to ask for directions or open an encyclopedia, and can engage in interactive gaming without leaving their house. If case law is any indication, it appears that both Millennials and Gen Zers are unwilling to part with their preferred form of information and communication when empaneled on a jury. Thus, cell phone prohibitions may further deter an already undesirable civic duty.

This Article explains why communication in the digital age demands the judiciary reframe the definition of juror misconduct. Part II of this Article details the history of our jury system and includes a discussion of juror misconduct both prior to and after the evolution of smartphones. Part III provides context for understanding Gen Z, our next generation of jurors, particularly how

22. See Eric P. Robinson, *Jury Instructions for the Modern Age: A 50-State Survey of Jury Instructions on Internet and Social Media*, 1 REYNOLDS CTS. & MEDIA L.J. 307, 309–11 (2011).

23. See David P. Goldstein, *The Appearance of Impropriety and Jurors on Social Networking Sites: Rebooting the Way Courts Deal with Juror Misconduct*, 24 GEO. J. LEGAL ETHICS 589, 597–98 (2011).

24. *Id.* at 596–97.

25. See, e.g., David Aaronson & Sydney M. Patterson, *Modernizing Jury Instructions in the Age of Social Media*, 27 CRIM. J. 26, 35 (2013); Christopher A. Powers, *Textual Misconduct: What Juror Texting Means for Courts*, 67 SYRACUSE L. REV. 303, 328 (2017); see also Leslie Y. Garfield Tenzer, *Social Media, Venue and the Right to a Fair Trial*, 71 BAYLOR L. REV. 421, 423 (2019) (previous work on the subject from this author). But see Patrick Brayer, *The Disconnected Juror: Smart Devices and Juries in the Digital Age of Litigation*, 30 NOTRE DAME J.L. ETHICS & PUB. POL'Y ONLINE 25, 47–48 (2016).

26. The internet debuted in 1991. Smartphones came into existence in 1992. Millennials, those born from 1981–1996, comprise 30% of the populations and Gen Zers, those born from 1995–2010, comprise 25% of the population. Michael Dimock, *Defining Generations: Where Millennials End and Generation Z Begins*, PEW RSCH. CTR. (Jan. 17, 2019), <https://www.pewresearch.org/fact-tank/2019/01/17/where-millennials-end-and-generation-z-begins/>; Mark J. Perry, *Beloit College Mindset List for the College Class of 2022*, AEI (Aug. 22, 2019), <https://www.aei.org/carpe-diem/beloit-college-mindset-list-for-the-college-class-of-2022/>.

this group communicates on a day-to-day basis. Part IV categorizes proposed juror reforms into three types: prohibitions, admonitions, and increased punishment, and it explains why all three fail to meet the demands of both our jury system and the contemporary juror. Part V makes the argument that full-scale prohibitions against smart phone communications in the jury box is an unattainable and indeed unnecessary goal. Gen Z's use of smart phones to communicate demands that we reframe judicial misconduct to include only those instances where a tweet, text, or post goes to the heart of defendant's guilt or innocence. Restricting cell phone use, strengthening jury instructions, or increasing juror sanctions for Gen Z communications is constitutionally forgivable, therefore, when the communication does not go to the heart of the defendant's guilt.

II. THE JURY SYSTEM

Our contemporary jury system is among America's premier principles of democracy and equality.²⁷ Its roots are planted in English nobility.²⁸ Historians can trace the right to have peers evaluate one's conduct to the reign of King Henry II, sometime before 1215.²⁹ The jury system's defining moment came with King John of England's publication of the Magna Carta.³⁰ Chapter 39 included a guarantee that no free man suffer punishment without "the lawful judgment of his peers."³¹ Although at the time, it was unclear as to just what "judgment of his peers" truly meant; many believed jury duty served as a protection from "arbitrary rule" and the power of the crown.³²

27. An ABA opinion poll found "[78%] of the public rate our jury system as the fairest method of determining guilt or innocence; [60%] consider juries to be the most important part of the justice system." Mark A. Behrens & M. Kevin Underhill, *A Call for Jury Patriotism: Why the Jury System Must Be Improved for Californians Called to Serve*, 40 CAL. W. L. REV. 135, 135 (2003) (citing AM. BAR ASS'N, PERCEPTIONS OF THE JUSTICE SYSTEM 6-7 (1998)).

28. See McSweeney, *supra* note 1, at 145.

29. *Id.* at 139.

30. *Id.* at 146-49.

31. *Id.* at 146 (quoting MAGNA CARTA June 15, 1225, ch. 29 (Eng.)) ("No free man shall be taken or imprisoned or disseized [i.e., deprived of his land] or outlawed or exiled or in any way ruined, nor will we go against or send against him, except by the lawful judgment of his peers, or by the law of the land."). Some commentators argue that this language is not an actual guarantee. *Id.*

32. See *Duncan v. Louisiana*, 391 U.S. 145, 151 (1968) ("It is sufficient for present purposes to say that by the time our Constitution was written, jury trial in criminal cases had been in existence in England for several centuries and carried impressive credentials traced by many to Magna Carta. Its preservation and proper

By the 1800s, William Blackstone cemented the notion that the Magna Carta is the jury trial's foundation. Blackstone wrote the following, which has been often quoted:

Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people and the prerogative of the crown. It was necessary, for preserving the admirable balance of our constitution, to vest the executive power of the laws in the prince: and yet this power might be dangerous and destructive to that very constitution, if exerted without check or control [T]he founders of the English law have, with excellent forecast, contrived that . . . the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterward be confirmed by the unanimous suffrage of twelve of his equals and neighbours, indifferently chosen and superior to all suspicion.³³

This English legal tradition traveled with America's founders across the Atlantic Ocean. John Adams wrote, "Representative government and trial by jury are the heart and lungs of liberty. Without them, we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle[,] and fed and clothed like swine and hounds."³⁴ Both the First and Second Continental Congress cited a trial by jury, as opposed to the Crown, as a "great and inestimable privilege."³⁵ The Second Continental Congress listed interference with the right to a trial by jury as one of the reasons for starting the American Revolution.³⁶

operation as a protection against arbitrary rule were among the major objective of the revolutionary settlement which was expressed in the Declaration and Bill of Rights of 1689." (internal citations omitted)); McSweeney, *supra* note 1, at 145.

33. McSweeney, *supra* note 1, at 151–52 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *349–50) (first omission added).

34. *Founder Quotes*, ARK. TRIAL LAWS. ASS'N, <https://www.arktla.org/index.cfm?pg=FounderQuotes> (last visited Oct. 27, 2020) (quoting John Adams in 1774).

35. *The Declarations and Resolves of the First Continental Congress*, USHISTORY.ORG, <https://www.ushistory.org/declaration/related/decres.html> (last visited Oct. 27, 2020) ("That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.").

36. *Id.*

So important was the right to a trial by jury that the Framers included it twice in the U.S. Constitution. Article III, Section 2, sets forth: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed."³⁷ The Sixth Amendment provides, in part: "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"³⁸ The Seventh Amendment extends the right to a jury trial to civil cases.³⁹

From its inception in the United States, the constitutional right to a jury trial applied to cases where the government charged defendants with felonies or crimes punishable by two years of imprisonment or more.⁴⁰ The 1968 Supreme Court, in *Duncan v. Louisiana*, extended the Sixth Amendment right to crimes punishable by more than six months in prison and concluded that the right to a jury trial applies to all states under the Fourteenth Amendment.⁴¹ In that case, Justice White acknowledged the import of peer-based tribunals: "[T]he right to [a] jury trial in serious criminal cases is a fundamental right and hence must be recognized by the States as part of their obligation to extend [the] due process of law to all persons within their jurisdiction."⁴² Following *Duncan*, the Court extended the right to instances where sentence enhancements depend on a finding of fact⁴³ and, further, where a defendant faces possible revocation of his release and an additional prison sentence.⁴⁴ In *Alleyne v. United States*, the Court ruled that any fact that increases a mandatory minimum sentence is an element of the crime and must be submitted to a jury.⁴⁵

Historically, trial by jury meant trial by white men. As of 1719, "[e]very state limited jury service to men; every state except Vermont restricted jury service to property owners or taxpayers;

37. U.S. CONST. art. III, § 2.

38. *Id.* amend. VI.

39. *Id.* amend. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.").

40. See *Bloom v. Illinois*, 391 U.S. 194, 211 (1968).

41. 391 U.S. 145, 161–62 (1968).

42. *Id.* at 154.

43. *Blakely v. Washington*, 542 U.S. 296, 313 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 497 (2000).

44. *United States v. Haymond*, 139 S. Ct. 2369, 2380 (2019).

45. 570 U.S. 99, 117 (2013).

three states permitted only whites to serve; and one state, Maryland, disqualified atheists.⁴⁶ The Supreme Court eventually mandated that jury pools include women,⁴⁷ persons of color,⁴⁸ and those who did not own property.⁴⁹ In each instance, the relaxation of a discriminatory limitation was intended to bring the jury pool, and ultimately the petit jury, more in line with the Sixth Amendment's guarantee that a jury's composition represent a cross-section of a community.⁵⁰ Today, individuals qualify for jury service if they are U.S. citizens at least eighteen years of age, are adequately proficient in English,⁵¹ have no disqualifying mental or physical condition, are not currently subject to felony charges punishable by imprisonment of one year or more, and have never been convicted of a felony.⁵²

46. *Berghuis v. Smith*, 559 U.S. 314, 334 (2010) (Thomas, J., concurring) (alteration in original) (quoting Albert W. Alschuler & Andrew G. Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867, 877 (1994)). "In this country women were disqualified by state law to sit as jurors until the end of the [nineteenth] century." *Id.* (quoting *Taylor v. Louisiana*, 419 U.S. 522, 533 n.13 (1975)).

47. The Civil Rights Act of 1957 first gave women the right to serve on federal juries. See Civil Rights Act of 1957, Pub. L. No. 85-315, § 152, 71 Stat. 634. Wyoming first allowed women to serve on juries in the 1870s. See *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127, 131 n.2 (1994) ("There was one brief exception. Between 1870 and 1871, women were permitted to serve on juries in Wyoming Territory. They were no longer allowed on juries after a new chief justice who disfavored the practice was appointed in 1871."); see also *id.* at 131 n.3 ("In 1947, Woman still had not been granted the right to serve on juries in [sixteen] states."). By 1973, all fifty states passed legislation granting women the right to sit on juries. *History Made When Women Were Allowed to Serve on Jury*, AP NEWS (Nov. 16, 2018), <https://apnews.com/50fb651b7fb84221887f8a7534a87fff>.

48. *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880) (declaring West Virginia statute prohibiting persons from sitting as jurors unconstitutional because of color discrimination).

49. See, e.g., *Thiel v. S. Pac. Co.*, 328 U.S. 217, 223 (1946) (stating that a daily wage earner is fully competent to serve as juror).

50. See U.S. CONST. amend. VI; see also *Taylor*, 419 U.S. at 531 (holding that Louisiana violated the "fair-cross-section" requirement of the Sixth Amendment).

51. This requirement is defined by the ability to complete the juror qualification form. *Juror Qualifications*, U.S. CTS., <https://www.uscourts.gov/services-forms/jury-service/juror-qualifications> (last visited Oct. 20, 2020).

52. A juror must also reside in the judicial district for one year. *Id.* In 2017, the New York state legislature voted to allow convicted felons to sit on juries. See Bill Mahoney, *Senate Passes Bill to Let Felons Serve on Juries*, POLITICO (May 7, 2019, 6:30 PM), <https://www.politico.com/states/new-york/albany/story/2019/05/07/senate-passes-bill-to-let-felons-serve-on-juries-1009680>; see also *United States v. Wood*, 299 U.S. 123, 150-51 (1936) (finding that it is not permissible to create an absolute disqualification of government employees as jurors).

In order to impanel a jury, jurisdictions send notices to random members of the community, summoning them for jury duty.⁵³ Through these notices, the court assembles a jury venire, from which a jury is selected.⁵⁴ There is no constitutional requirement that the venire proportionally reflect the race, ethnicity, gender, or religion of the community. The Sixth Amendment's guarantee to a right to an impartial jury offers a "fair possibility" of representing a cross-section of the community, not a guarantee.⁵⁵

A jury is impaneled through *voir dire*, the examination of a witness by judge or counsel. While *voir dire* presents counsel with the opportunity to accept or reject particular jurors, the Constitution places certain safeguards on the process to assure that decisions do not unconstitutionally skew a jury population.⁵⁶ In *Batson v. Kentucky*, the Court overturned a conviction where the prosecutor used his peremptory challenges to strike all black jurors in the jury pool.⁵⁷ By striking the potential jurors, the prosecution forced Batson, a black man, to face an all-white jury. That jury convicted Batson of second-degree burglary.⁵⁸ In overturning Batson's conviction, Justice Powell wrote that the kind of racial

53. Those eligible to sit on a jury are called to "jury duty." See generally IND. R. CT.: JURY DUTY (2014). A group of potential jurors is selected from among the community using a reasonably random method. *Id.* R. 3. Jury lists are compiled from voter registrations and driver licenses or ID renewals. See *id.* R. 2. From those lists, summonses are mailed. *Id.* R. 4.

54. See, e.g., *Taylor*, 419 U.S. at 525 ("In this case, no women were on the venire from which the petit jury was drawn.").

55. *Williams v. Florida*, 399 U.S. 78, 100 (1970) ("To be sure, the number should probably be large enough to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community."); see *Castaneda v. Partida*, 430 U.S. 482, 493 (1977) ("Recent cases have established the fact that an official act is not unconstitutional solely because it has a racially disproportionate impact." (emphasis omitted)); *Taylor*, 419 U.S. at 527 ("It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." (quoting *Smith v. Texas*, 311 U.S. 128, 130 (1940))).

56. *Duren v. Missouri*, 439 U.S. 357, 360 (1979); see also *United States v. Jackson*, No. 17-5883, 2019 U.S. App. LEXIS 9807, at *8 (6th Cir. Apr. 3, 2019) ("[A] long-standing statistical disparity is not enough to establish systematic exclusion'" (quoting *Bates v. United States*, 473 F. App'x 446, 450 (6th Cir. 2012))); *Shelton v. King*, 548 F. Supp. 2d 288, 325-26 (S.D. Miss. 2008) ("With respect to the second and third factors, in order to demonstrate systematic exclusion, petitioner must show not only that the members of the allegedly unrepresented groups were not adequately represented on his jury, but also that this was the general practice in other jury venires in the community.").

57. 476 U.S. 79, 100 (1986).

58. *Id.* at 83.

discrimination the Kentucky prosecutors employed "undermine[s] public confidence in the fairness of our system of justice."⁵⁹

To assure fairness in jury selection, Congress adopted 28 U.S.C. § 1862, which is a codification of the *Batson* principle. Section 1862 provides "No citizen shall be excluded from service as a grand or petit juror in the district courts of the United States or in the Court of International Trade on account of race, color, religion, sex, national origin, or economic status."⁶⁰ Thus, courts regularly reverse decisions upon a defendant's showing that the jury selection discriminated based on race,⁶¹ color,⁶² religion,⁶³ gender,⁶⁴ national origin,⁶⁵ or socioeconomic status.⁶⁶ Neither the Constitution nor any statute extends protection against discrimination in jury selection to age⁶⁷ or student status.⁶⁸

59. *Id.* at 87. According to *Batson*, a defendant may establish a prima facie case of purposeful discrimination in the selection of the jury on the evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, defendants must show: (1) they are a member of a cognizable racial group, and the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race; (2) the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate;" and (3) that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. The decision, in this instance, to strike black voters without identifying a race-neutral reason for their dismissal, violated *Batson*'s right to a fair trial. *Id.* at 96, 100.

60. 28 U.S.C. § 1862 (2018).

61. *Foster v. Chatman*, 136 S. Ct. 1737, 1754 (2016) (noting that the focus on race in prosecution's file proved strikes of two prospective black jurors were motivated in substantial part by discriminatory intent); *Batson*, 476 U.S. at 82 (petitioner challenging jury selection on the basis of racial discrimination); *Carter v. Jury Comm'n*, 396 U.S. 320, 322 (1970) (petitioners challenged jury selection based on racial discrimination).

62. *Peters v. Kiff*, 407 U.S. 493, 494 (1972) (discrimination claimed against African Americans).

63. *United States v. Gelb*, 881 F.2d 1155, 1161 (2d Cir. 1989) (acknowledging Jews are a cognizable group but that the defendant failed to demonstrate that Jews were underrepresented in his venire).

64. *Duren v. Missouri*, 439 U.S. 357, 360 (1979) (exclusion of women).

65. *Castaneda v. Partida*, 430 U.S. 482, 496 (1977) (challenging the jury selection process on the basis of discrimination against Mexican Americans).

66. *Witcher v. Peyton*, 405 F.2d 725, 727 (4th Cir. 1969) (challenging the jury selection process on the basis of social and educational discrimination).

67. See, e.g., *Willis v. Kemp*, 838 F.2d 1510, 1516 (11th Cir. 1988) (finding that age, as a factor, is unreliable and not easily divided into groups); *United States v. Guzman*, 337 F. Supp. 140, 145 (S.D.N.Y. 1972) (rejecting defendant's contention that persons eighteen to twenty-one years of age form a cognizable group for purposes of jury selection because the defendant failed to establish that attitudes or

A court tasks the jury, once impaneled, with evaluating guilt or innocence and, in some instances, setting punishments.⁶⁹ To ensure a jury understands its role, the judge will read the jurors a series of instructions on procedure, conduct, and elements of the law.⁷⁰ The instructions can be lengthy. A judge reads instructions throughout the trial, generally at its beginning, middle, and before rendering a verdict.⁷¹ The Florida court system lists seventeen different pattern jury instructions a judge should read during a criminal trial.⁷² These instructions define permissible jury conduct, including the right to take notes, ask questions, and request transcripts.⁷³ The instructions also limit certain behaviors. Florida Pattern Jury Instruction 2.1 Preliminary Instructions reads:

I now instruct you not to communicate with anyone, including your fellow jurors, about this case. No communication includes no e-mailing, text messaging, tweeting, blogging, or any other form of communication. You cannot do any research about the case or look up any information about the case. If you become aware of any violation of any of these rules at all, notify court personnel of the violation.

During the course of the trial, the court may take recesses, and you will be permitted to separate and go about your personal affairs. During these recesses, you must not discuss the case with anyone nor permit anyone to say anything to you or in your presence about the case. If anyone attempts to say

experiences of these young people differ in any appreciable way from those of older people); *Johnson v. State*, 288 So. 3d 342, 345 (Miss. 2019) (providing an age- and race-neutral reason for a peremptory challenge).

68. Students are not generally considered to be a cognizable group. *See, e.g., United States v. Fletcher*, 965 F.2d 781, 782–83 (9th Cir. 1992) (college students do not qualify as a cognizable group).

69. Although jurors also sit on civil cases, this Article focuses on juries in a criminal context. Note also there are petit and grand juries.

70. *See The Judge and the Jury*, JUD. LEARNING CTR., <https://judiciallearningcenter.org/the-judge-and-the-jury/> (last visited Oct. 31, 2020).

71. *Id.*

72. *See Criminal Jury Instructions Chapter 2: Instructions During the Trial*, SUP. CT. OF THE STATE OF FLA., <https://jury.flcourts.org/criminal-jury-instructions-home/criminal-jury-instructions/sji-criminal-chapter-2/> (last visited Oct. 28, 2020).

73. *See generally id.* (Section 2.1(a) permits note taking. Section 2.1(c) permits questions. Section 2.2 permits requests for transcripts).

anything to you or in your presence about this case, tell him or her that you are on the jury trying the case and ask that person to stop. If he or she persists, leave that person at once and immediately report the matter to the [court deputy] [bailiff], who will advise me.⁷⁴

Failure to follow the rules comes with the threat of consequences.

Any juror who violates these restrictions jeopardizes the fairness of these proceedings[,] and a mistrial could result that would require the entire trial process to start over. . . . If you violate these rules, you may be held in contempt of court, and face sanctions, such as serving time in jail, paying a fine, or both.⁷⁵

In reality, a mistrial is the most significant consequence of juror misconduct. A comprehensive survey published in *Michigan Law Review* found judges rarely punish individual jurors whose misconduct is discovered before the verdict.⁷⁶ Punishment, some judges argue, is problematic as it deters too many potential jurors from serving.⁷⁷ Most courts seem to limit punishment to fines.⁷⁸ Some judges, however, have taken a creative approach. In one instance, a Michigan judge ordered a juror to write a five-page paper on the defendant's constitutional right to a fair trial.⁷⁹ Only a

74. See generally *id.* (Section 2.1 provides these preliminary instructions).

75. See generally *id.* (Section 2.1 provides this instruction).

76. Nancy J. King, *Juror Delinquency in Criminal Trials in America: 1796-1996*, 94 MICH. L. REV. 2673, 2741 (1996); Dennis Sweeney, *Social Media and Jurors*, MD. BAR J., Nov.-Dec. 2010, at 44, 48 ("Most judges . . . are loathe to impose sanctions upon jurors even when 'misconduct' has occurred.").

77. King, *supra* note 76, at 2748.

78. See, e.g., Marcy Zora, *The Real Social Network: How Jurors' Use of Social Media and Smart Phone Affects a Defendant's Sixth Amendment Rights*, 2012 U. ILL. L. REV. 577, 604 n.214 (2012) (citing an instance where a judge held a juror in contempt for posting a picture of the murder weapon on the internet).

79. *Id.* at 601-02; see also Brian Grow, *Juror Could Face Charges for Online Research*, REUTERS (Jan. 19, 2011, 1:14 PM), <http://www.reuters.com/article/2011/01/19/us-internet-juror-idUSTRE70I5KI20110119> ("Criminal sanctions against jurors are rare. When judges do penalize jurors for internet misconduct, they almost always opt for fines. In February, a Superior Court judge in Georgia fined a juror \$500 for Googling information about a rape case.").

handful of judges are finding jurors in contempt for violating court rules.⁸⁰

The rules and proscriptions regarding juror conduct, like those contained in the Florida pattern jury instruction above, illustrate the degree to which juror misconduct threatens the integrity of our justice system. A single juror's act of acquiring evidence in a manner not regulated by constitutional safeguards can lead to a conviction that violates due process. Courts, as a result, have wrestled with the practical difficulties that come with empaneling and policing a jury of twelve living, breathing human beings.

A. Juror Misconduct Generally

Juror misconduct occurs when jurors violate their oaths to the court and engage in improper conduct that affects their ability to remain impartial and unbiased.⁸¹ Technically, any conduct that contravenes a judge's jury instruction constitutes jury misconduct. Deliberating under the influence of drugs or alcohol,⁸² visiting a

80. Zora, *supra* note 78, at 601–02; *see also id.* at 604 n.213 (discussing a case where a judge denied a mistrial but held a juror in contempt after the juror posted a picture of the murder weapon on the internet); Grow, *supra* note 79 (“In July, a U.S. District Court judge in South Carolina decided against charging a juror with contempt after he looked up the definitions of “exhibit” and “sponsor” on Wikipedia and brought printouts of his findings to the jury room. The judge found that the research was not sufficiently prejudicial to the case, which involved illegal cock-fighting.”); *Juror Theodora Dallas Jailed for Contempt of Court*, BBC NEWS (Jan. 23, 2012), <https://www.bbc.com/news/uk-england-beds-bucks-herts-16676871> (discussing a case in England where a juror was jailed for six months for researching the previous convictions of the defendant).

81. For a discussion of jury bias, see generally Richard Lorren Jolly, *The New Impartial Jury Mandate*, 117 MICH. L. REV. 713 (2019) (discussing the effects of Peña-Rodriguez on the development of impartial jury mandate jurisprudence); Anna Roberts, *(Re)Forming the Jury: Detection and Disinfection of Implicit Jury Bias*, 44 CONN. L. REV. 827, 829 (2012) (“This Article conducts the first comparison of the recent rash of proposals relating to the use of the IAT to address jury bias.”); Mikah K. Thompson, *Bias on Trial: Toward an Open Discussion of Racial Stereotypes in the Courtroom*, 2018 MICH. ST. L. REV. 1243 (2018) (arguing that the safeguards recognized by the Court in Peña-Rodriguez to assist trial courts in identifying racial bias among jurors must be improved); Jessica L. West, *12 Racist Men: Post-Verdict Evidence of Juror Bias*, 27 HARV. J. RACIAL & ETHNIC JUST. 165 (2011) (proposing an amendment to Federal Rule of Evidence Rule 606(b) to allow a juror to testify about “whether, during voir dire or other questioning under oath, a juror misrepresented a material bias”).

82. *See Tanner v. United States*, 483 U.S. 107, 133 (1987) (affirming trial judge's refusal to open post-verdict investigations into jurors use of alcohol and drugs, noting “drugs or alcohol voluntarily ingested by a juror seems no more an ‘outside influence’ than a virus, poorly prepared food, or lack of sleep”); Ken

crime scene without court supervision,⁸³ and reading newspaper accounts⁸⁴ are all violative of standard jury instructions and, therefore, constitute jury misconduct.

Not all jury misconduct rises to a violation of a defendant's constitutional rights. A court will not grant a defendant's motion for a mistrial due to juror misconduct absent harmful error,⁸⁵ and the burden on the defendant is high.⁸⁶ The Court in *Smith v. Phillips* observed, "[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable."⁸⁷ Consequently, juror misconduct justifies a new trial in only limited instances.⁸⁸

Courts generally consider whether knowledge jurors acquired outside the courtroom amounted to a discovery of the kind of extraneous information that exposed them to evidence not

Armstrong, *Drinking While Jurying: What Happens when Juries Decide to Tie One on*, MARSHALL PROJECT (Apr. 16, 2017, 10:00 PM), <https://www.themarshallproject.org/2017/04/16/drinking-while-jurying> (noting a few state court cases where jurors engaged in alcohol consumption).

83. See *United States v. Morrow*, 412 F. Supp. 2d 146, 164 (D.C. Cir. 2006) (noting two jurors each visited crime scenes and brought extraneous information to the table during deliberations); *Sherman v. Smith*, 89 F.3d 1134, 1143 (4th Cir. 1996) (holding that a juror's unauthorized visit to the crime scene during a murder trial where he observed the house where victims were found as well as a tree where the weapon was recovered constituted harmless error).

84. See *Taus v. Senkowski*, 134 F. App'x 468, 470 (2d Cir. 2005) (holding a juror's alleged exposure to newspaper accounts was found to be harmless error); *United States v. Martinez*, 14 F.3d 543, 551–52 (11th Cir. 1994) (holding a juror's use of a dictionary during deliberations and her watching news accounts as well as the jury's awareness of publicity that surrounded her participation on the jury was enough to entitle defendant to a new trial).

85. *Estrada v. Scribner*, 512 F.3d 1227, 1235 (9th Cir. 2008) ("[T]rial errors—such as extraneous information that was considered by the jury—are generally subject to a 'harmless error' analysis, namely, whether the error had 'substantial and injurious' effect or influence in determining the jury's verdict."); *Hawkins v. Commonwealth*, No. 2018-CA-001361-MR, 2020 WL 4723724, at *4 (Ky. Ct. App. Aug. 14, 2020) (holding that jurors texting during trial about a subject other than defendant's case did not cause harmful error).

86. For examples of juror misconduct occurring during communications between jurors while involved in the deliberative process, which were held not to justify a new trial, see *State v. Gardner*, 371 P.2d 558, 558–59 (Or. 1962).

87. 455 U.S. 209, 217 (1982). In *McClesky v. Kemp*, Justice Powell wrote that, "Individual jurors bring to their deliberations 'qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.'" *McClesky v. Kemp*, 481 U.S. 279, 311 (1987) (quoting *Peters v. Kiff*, 407 U.S. 493, 503 (1972)).

88. See *Phillips*, 455 U.S. at 217.

introduced at trial.⁸⁹ Even in such cases, this exposure to outside evidence only constitutes jury misconduct if the court finds it to have prejudiced the verdict.⁹⁰

In *Estrada v. Scribner*, the Ninth Circuit highlighted the litany of factors courts should consider when determining whether to declare a mistrial based on a juror's outside research:

[A court] look[s] to the following factors to determine whether a defendant has suffered prejudice from juror misconduct: (1) whether the material was actually received, and if so, how; (2) the length of time it was available to the jury; (3) the extent to which the juror discussed and considered it; (4) whether the material was introduced before a verdict was reached, and if so at what point in the deliberations; and (5) any other matters which may bear on the issue of the reasonable possibility of whether the extrinsic material affected the verdict.⁹¹

Courts have not found juror misconduct to be prejudicial where a juror looked out of the tinted windows of her van to test the credibility of a police officer's testimony that he could see the defendant clearly through the tinted windows of a van.⁹² Nor where a juror brought a dictionary into deliberations and read the definition of "reasonable" to fellow jurors.⁹³ Nor where a juror deliberating a criminal case for manufacturing and possessing with intent to distribute marijuana told her fellow jurors that the defendant used to look like "a fat old hippie who probably smoked

89. See, e.g., *United States v. Montes*, 628 F.3d 1183, 1186, 1191 (9th Cir. 2011) (holding that a juror's reading an online summary article did not prejudice the defendant).

90. See *id.* at 1188.

91. 512 F.3d 1227, 1238 (9th Cir. 2008).

92. *Reed v. State*, 547 So. 2d 596, 597–98 (Ala. 1989); see also *United States v. Foy*, 641 F.3d 455, 468 (10th Cir. 2011) (holding allegedly improper extrinsic evidence that was introduced through misconduct of a juror, who conducted an experiment outside the deliberation room and presented results of the experiment to the rest of the jury, did not relate to the charge against the defendant and could not have affected jury's consideration of evidence relating to charges against him, so denial of the defendant's motion for new trial was not an abuse of discretion).

93. *United States v. Gillespie*, 61 F.3d 457, 458–60 (6th Cir. 1995) (holding a juror's bringing a dictionary into deliberations and reading aloud the definition of "reasonable," while an error, was not prejudicial and thus did not warrant a new trial because the jury ultimately relied on the definition of "reasonable" in "reasonable doubt," which was given in the jury charge).

marijuana.”⁹⁴ In one instance, a juror conducted an experiment to demonstrate whether it was possible to hear a kind of “metallic sound” that was crucial to conviction.⁹⁵ The court ruled that the juror’s conduct did not rise to the level of reversible error because the charged officers “either benefitted from the improper experiment or the demonstration had no effect on the jurors.”⁹⁶

Conversely, a court found a juror’s conduct harmful to the defendant when she allegedly committed a crime during the course of the trial, similar to the crime charged in the trial on which she was serving, and then related the incident to other members of the jury.⁹⁷ The Supreme Court reversed a conviction where a juror in a tax evasion case learned that he could profit from rendering a guilty verdict.⁹⁸ A federal court found juror misconduct to be prejudicial where jurors learned from a newspaper article outside the courtroom that the defendant retracted his guilty plea and allegedly tried to escape.⁹⁹ A civil court found juror misconduct where a juror failed to

94. *United States v. Mills*, 280 F.3d 915, 922 (9th Cir. 2002) Though a juror in *Mills* improperly introduced extrinsic evidence to other jurors during deliberations—in a prosecution for manufacturing and possessing with intent to distribute marijuana—when she told them that defendant used to look like a “fat old hippie who probably smoked marijuana,” the court held the extrinsic evidence did not substantially and injuriously affect the verdict to require a mistrial because: (1) the prejudicial statement was “ambiguously phrased;” (2) “[a]s soon as [the juror] made the statements, the other members of the jury recognized that the comments were inappropriate and sent a note to the judge requesting advice,” and “[t]he judge promptly instructed them to ignore the information in reaching their verdict;” (3) there was substantial physical evidence of defendant’s guilt; and (4) “[p]opular culture has prepared jurors for the idea that defendants tend to be “cleaned up” in time to go to court.” *Id.* at 920–23.

95. *Davis v. Velez*, 15 F. Supp. 3d 234, 242 (E.D.N.Y. 2014).

96. *Id.* at 245–46 (holding an experiment conducted by juror who attempted to demonstrate that the police officer could hear a “metallic sound” did not produce serious miscarriage of justice or create sufficient probability of prejudice to the police officers to require a new trial in an arrestee’s 42 U.S.C. § 1983 action because the “[officers] either benefited from the improper experiment, or the demonstration had no effect on the jurors,” and the experiment “would not [have] generate[d] any information or data that would have been novel for an average juror.”). *But see* *Konkel v. Bob Evans Farms Inc.*, 165 F.3d 275, 282 (4th Cir. 1999) (quoting *United States v. Beach*, 296 F.2d 153, 158 (4th Cir. 1961)) (“Experiments performed by juries, ‘which have the effect of putting them in possession of evidence not offered at trial,’ constitute jury misconduct requiring a new trial, unless no prejudice results.”).

97. *State v. Ingram*, 47 So. 3d 1127, 1134 (La. Ct. App. 2010), *rev’d*, 57 So. 3d 299 (La. 2011).

98. *Remer v. United States*, 347 U.S. 227, 228–30 (1954).

99. *United States ex. rel. Doggett v. Yeager*, 472 F.2d 229, 231–32, 239 (3d Cir. 1973).

disclose during *voir dire* that she had a separate trial pending against the same defendant.¹⁰⁰

B. Juror Misconduct in the Internet Age

The internet, social media, and cell phone technology pose particular challenges to the integrity of the jury process. Instances of jurors using search engines such as Google, networking sites like Twitter and Facebook, and cell phone text communication all compromise the constitutional limitations on evidence on which juries can base their decision.

The internet has birthed a new type of juror misconduct: a reckless level of communication by jurors through social media and texting. As a result, jurisdictions have adopted whole new sets of jury instructions to curb this type of behavior and to regulate it in such a way that violation of the instructions sets a foundation for juror misconduct.

New York law requires that a judge provide specific admonitions to assure a fair trial.¹⁰¹ New York's Unified Court System amended its rules in 2009 to include a reference to the internet and social media. The rules currently read:

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.

You must not provide any information about the case to anyone by any means whatsoever, and that includes the posting of information about the case, or what you are doing in the case, on any device, or internet site, including blogs, chat rooms, social websites[,] or any other means.

100. *Barton v. Chi. & Nw. Transp. Co.*, 757 N.E.2d 533, 549, 553–54 (Ill. App. Ct. 2001).

101. N.Y. CRIM. PROC. LAW § 270.4 (McKinney 2014).

You must also not Google or otherwise search for any information about the case, or the law which applies to the case, or the people involved in the case, including the defendant, the witnesses, the lawyers, or the judge.¹⁰²

New York's jury instruction is representative of jury instructions in most jurisdictions.¹⁰³ Most jurisdictions include instructions on smart phones and cell phones as well. Texas Pattern Jury Charge 200.1 includes an instruction to turn cell phones off.¹⁰⁴ Pattern Jury Instruction 7.01 for the Seventh Circuit prohibits communication with anyone other than members of the jury through "telephone, cell phone, smart phone, iPhone, Blackberry, computer, text messaging, instant messaging, the [i]nternet, chat rooms, blogs, websites, or services like Facebook, MySpace, LinkedIn, YouTube, Twitter[], or any other method of communication."¹⁰⁵

The standard for mistrial founded on communications made through the internet, social media, or texting is identical to that for violations in the pre-internet world.¹⁰⁶ Where a juror acquires information relating to the defendant's guilt that neither party offered into evidence and where the information prejudicially affected the outcome of the trial, the court will overturn the defendant's guilt.¹⁰⁷ Courts have overturned a verdict where a juror's internet research in a medical malpractice case provided evidence not introduced at trial;¹⁰⁸ where a juror researched an old

102. N.Y. STATE UNIFIED CT. SYS., MODEL PRELIMINARY INSTRUCTIONS 39 (2019).

103. See, e.g., PA. R. CRIM. P. § 626(C) (2015); CONN. JUD. BRANCH, CONNECTICUT JUDICIAL BRANCH CRIMINAL JURY INSTRUCTIONS 1.1-5 (2013); U.S. CTS. FOR THE NINTH CIR., NINTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS 1.12 (2007).

104. *In re Atun*, No. 09-16-0034-CV, 2016 WL 7242819, at *1 n.1 (Tex. Ct. App. Dec. 15, 2016) (citing STATE BAR OF TEX., TEXAS PATTERN JURY CHARGES: FAMILY AND PROBATE 200.1 (2016)).

105. COMM. ON FED. CRIM. JURY INSTRUCTIONS OF THE SEVENTH CIR., PATTERN CRIMINAL JURY INSTRUCTIONS OF THE SEVENTH CIRCUIT 7.01 (2018).

106. See *Baird v. Owczarek*, 93 A.3d 1222, 1228–29 (Del. 2014) (applying the inherently prejudicial "egregious circumstances" test to a juror's use of internet research during trial).

107. *Reed v. State*, 547 So. 2d 596, 597 (Ala. 1989) ("The test for determining whether juror misconduct is prejudicial to the defendant and, thus, warrants a new trial is whether the misconduct might have unlawfully influenced the verdict rendered.").

108. *Baird*, 93 A.3d at 1228–31.

encyclopedia entry and read it to other jurors;¹⁰⁹ and where a juror conducted an internet search on Paxil, a prescription drug the defendant had ingested at the time she committed child abuse resulting in death.¹¹⁰

The advent of social media and text communications brought a new type of juror misconduct. In addition to sharing findings with fellow jurors, they now share information about their own state of mind; their opinion on the case; and general observations with friends, family, and even casual acquaintances, all of whom are generally not present at the trial. These “external communications” are distinguishable from research-related conduct in that they do not threaten the constitutionally protected introduction of evidence at trial.¹¹¹ Nevertheless, jurors’ continued communication with the outside world can pose a threat.

For the most part, judges seem to shrug their shoulders and accept as given that jurors today, particularly Millennials and Gen Zers, are going to engage in some kind of prohibited conduct. An Illinois court dismissed the defendant’s charge of jury misconduct based on a juror’s Facebook posts regarding her obligation for jury duty.¹¹² In reaching its decision, the court relied on the following communication:

“As if one day of jury duty was not enough smh day 2
I’m soooo over it already!!!!

* * *

Lolol oh by the way this is goin n the fact that I gotta
keep showin up theren missin wrk...just cuz Ima vote
guilty lol. #impetty #PettyLinda.”

109. *Steele v. State*, 454 S.E.2d 590, 592–93 (Ga. Ct. App. 1995).

110. *People v. Wadle*, 77 P.3d 764, 769–71 (Colo. App. 2003).

111. See *Smith v. Phillips*, 455 U.S. 209, 217 (1982) (“Due process means a jury capable and willing to decide the case solely on the evidence before it . . .”). While external communications can of course be prejudicial to the defendant, they do not inherently involve introducing extrinsic evidence into jury consideration in the way that research-related conduct does. Compare *Wadle*, 77 P.3d at 769–71 (finding that juror’s internet research about the drug Paxil may have influenced the verdict), with *People v. Daily*, No. 1-16-0813, 2018 WL 6920110, at *2, *5 (Ill. App. Ct. Dec. 31, 2018) (finding that a juror’s conduct was not prejudicial when she posted to Facebook her frustration with jury service but not any details of the case).

112. *Daily*, 2018 WL 6920110, at *2, *5.

Defendant's motion also described Swint's interaction with a third party who responded to her Facebook posts:

"[THIRD PARTY]: It's your civic duty! Lol.

[JUROR]: Well, I'm over this duty lol."¹¹³

In another instance, a juror blogged about his pending jury duty.¹¹⁴ He posted that, as a juror, he will get to "listen to the local riff raff try to convince [him] of their innocence;" in the post he also stated his views on a Supreme Court decision ruling against the death penalty for juveniles and referenced an unrelated shooting incident in Atlanta.¹¹⁵ The New Hampshire Supreme Court ruled that the blog was not prejudicial because it was unclear to whom the term "local riff raff" referred and there was no evidence that the other jurors knew of the violating juror's blog.¹¹⁶ Such rulings reflect the Supreme Court's philosophy that trials happen in the real world and that judicial error based on the human condition without proof of harm is not sufficient to justify declaring a mistrial.¹¹⁷

The recent case *People v. Neulander* illustrates the problem of selecting jurors who grew up texting.¹¹⁸ Dr. Robert Neulander was a highly respected gynecologist in Syracuse, New York at the time he was charged with the murder of his wife Leslie.¹¹⁹ The case drew significant media attention, in large part because of Dr. Neulander's prominence in the community.¹²⁰

Johnna Lorraine was among the twelve jurors and two alternates empaneled for the *Neulander* trial.¹²¹ At the commencement of trial, Judge Thomas Miller instructed the jury

113. *Id.* at *2.

114. *State v. Goupil*, 908 A.2d 1256, 1262 (N.H. 2006).

115. *Id.* at 1262-63.

116. *Id.* at 1266.

117. *See Smith v. Phillips*, 455 U.S. 209, 217 (1982) ("[D]ue process does not require a new trial every time a juror has been placed in a potentially compromising situation. . . . [I]t is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote.").

118. *See* 80 N.Y.S.3d 791, 795 (N.Y. App. Div. 2018) *aff'd*, 135 N.E.3d 302 (N.Y. 2019); Shanahan, *supra* note 3.

119. Shanahan, *supra* note 3.

120. *Accident or Murder? Investigating the Death of Leslie Neulander*, CBS NEWS (Nov. 16, 2019), <https://www.cbsnews.com/news/accident-or-murder-48-hours-investigates-death-of-leslie-neulander/>.

121. Shanahan, *supra* note 3.

that it “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 media sites, such as Facebook or Twitter.”¹²² Though the jurors were allowed to keep their smart phones, Judge Miller continued to instruct the jurors—over forty-five times—not to engage in third-party communications.¹²³

During the trial, Lorraine exchanged over 7,000 texts with family and friends.¹²⁴ Among the most notorious of these texts is one she received from her father after she was selected to serve, which read, “Make sure he’s guilty!”¹²⁵ One friend texted Lorraine, “Is he guilty?” to which she replied, “Can’t tell.”¹²⁶ In addition to her text communications, Lorraine also allegedly visited various websites and news organizations during the trial.¹²⁷

Following the trial, an alternate juror reported Lorraine’s conduct to Neulander’s attorney, who subsequently filed a motion to dismiss the case.¹²⁸ Judge Thomas Miller denied the motion finding that Lorraine had engaged in misconduct but not to the extent that it affected the outcome of the trial.¹²⁹ Neulander appealed the case to New York’s Fourth Department Appellate Division.¹³⁰

122. See N.Y. STATE UNIFIED CT. SYS., JURY ADMONITIONS IN PRELIMINARY INSTRUCTIONS 2 (2016) (setting forth the admonitions that statutory law requires be given to the jury as part of the court’s preliminary instructions).

123. Nolan, *supra* note 4, at 24.

124. Shanahan, *supra* note 3.

125. *People v. Neulander*, 80 N.Y.S.3d 791, 795 (N.Y. App. Div. 2018) *aff’d*, 135 N.E.3d 302 (N.Y. 2019). Juror Number 12, Johanna Lorraine, sent and received hundreds of text messages about the case. Individual text messages sent and received by Juror Number 12 were troublesome and inconsistent with the trial court’s repeated instructions not to discuss the case with any person and to report any attempts by anyone to discuss the case with a juror. Juror Number 12 also accessed local media websites that were covering the trial extensively. In order to hide her misconduct, Juror Number 12 lied under oath to the court, deceived the People and the court by providing a false affidavit and tendering doctored text message exchanges in support of that affidavit, selectively deleted other text messages she deemed problematic, and deleted her now-irretrievable internet browsing history. *Id.* at 795–96; see also Shanahan, *supra* note 3.

126. Shanahan, *supra* note 3.

127. See Nolan, *supra* note 4, at 25–26; Shanahan, *supra* note 3.

128. Douglass Dowty, *How Alleged Juror Misconduct in Dr. Neulander Murder Trial Came to Light*, SYRACUSE.COM, <https://www.syracuse.com/crime/2015/05/how-alleged-juror-misconduct-in-dr-neulander-murder-trial-came-to-light.html> (last updated Mar. 22, 2019).

129. *Neulander*, 80 N.Y.S.3d at 796.

130. *Id.* at 793.

The Appellate Division reversed the lower court's ruling and granted Neulander a new trial.¹³¹ In that three-to-two ruling, however, several judges suggested that they did not have a severe problem with Lorraine's conduct. The court seemed to accept the lower court's characterization of Lorraine's "intentions as pure."¹³² Even so, the appellate court concluded that the juror's conduct and texts received, particularly the one sent by her father imploring defendant's guilt, "created a significant risk that a substantial right of . . . defendant was prejudiced."¹³³

The State appealed the appellate court's reversal.¹³⁴ The Court of Appeals, New York's highest court, affirmed the intermediate court,¹³⁵ ruling that Lorraine's conduct of accessing available media through the internet and texting with those not empaneled resulted in "improper conduct" that "may have affected a substantial right of the defendant."¹³⁶

In upholding the Appellate Division's ruling, New York's highest court recognized that jurors do not exist in a bubble and seemed to acknowledge that to expect individuals to not engage in the stray text or internet search is unreasonable.¹³⁷ In this case, however, Lorraine's conduct "disregarded the court's plentiful instructions as to outside communications and when such conduct was brought to light, the juror was deliberately and repetitively untruthful."¹³⁸

In *Dimas-Martinez v. State*,¹³⁹ the Supreme Court of Arkansas declared a mistrial upon discovery that a juror tweeted that the jury had completed deliberations before it was announced in court.¹⁴⁰

131. *Id.* at 794.

132. *See id.* at 796–97; *Id.* at 797, 799 (Smith & Winslow, JJ., dissenting).

133. *Id.* at 797 (majority opinion) (quoting *People v. Giarletta*, 898 N.Y.S.2d 639 (N.Y. App. Div. 2010)). The court looked at the totality of the circumstances in determining that the defendant was prejudiced. *Id.*

134. *People v. Neulander*, 135 N.E.3d 302, 302 (N.Y. 2019).

135. *Id.* at 305.

136. *Id.* at 304 (quoting N.Y. CRIM. PROC. LAW § 330.30[2] (McKinney 1970)).

137. *See id.* at 305.

138. *Id.* at 304; *see also Giarletta*, 898 N.Y.S.2d at 639–40. In *Giarletta*, a New York appellate division court granted defendant's motion for a new trial based on juror misconduct where the offending juror communicated with her sister via cell phone and text message during trial. Some of the information discussed related to the defendant's guilt or innocence. The communications, according to the court, resulted in misconduct that created a significant risk that a substantial right of the defendant was prejudiced. *Id.* at 640. Although a mistrial was declared, the juror did not face any type of consequence. *See id.* at 639–40.

139. 385 S.W.3d 238 (2011).

140. *Id.* at 241, 246–49. The juror, Juror Number 2, tweeted throughout the trial, even after the judge had questioned and admonished him to stop. *Id.* at 247.

That same court revisited the issue of juror misconduct to different effect in *Finch v. State*.¹⁴¹ In *Finch*, the court affirmed the denial of the defendant's motion for a new trial despite proof that, during deliberations, Juror Number 4 used his cell phone to look up information and share it with other jurors.¹⁴² A majority of the court concluded that "a mistrial is a drastic remedy and should be declared when there has been an error so prejudicial that justice cannot be served by continuing the trial"¹⁴³ The court chose to replace Juror Number 4 with an alternate and continue deliberations.¹⁴⁴ In *United States v. Juror No. One*, however, the Eastern District of Pennsylvania ruled that a juror was guilty of criminal contempt for sending unauthorized emails to other jurors before deliberations but concluded that this was a violation punishable by fine, not imprisonment.¹⁴⁵

Facebook communications are also problematic. During Baltimore Mayor Sheila Dixon's trial, five jurors friended each other on Facebook.¹⁴⁶ The group, which was dubbed "the Facebook Five" in the media,¹⁴⁷ violated judicial prohibitions by communicating with each other about their jury experience on Facebook. In a Texas civil trial, a twenty-two-year-old juror sent a "friend request" to the defendant over Facebook.¹⁴⁸ When the defendant notified the judge in the case, presiding Judge Wade Birdwell dismissed the juror and sentenced him to community service, citing him with four counts of contempt.¹⁴⁹

In *People v. Daily*, an Illinois appellate court found a juror's series of Facebook posts, discovered post-verdict, did not violate

141. 542 S.W.3d 143, 146–49 (Ark. 2018).

142. *Id.* at 148–49.

143. *Id.* at 147. The dissent wrote that under *Dimas-Martinez*, "any access of the internet in the jury room constitutes jury misconduct regardless of demonstrated prejudice." *Id.* at 154 (Hart, J., dissenting).

144. *Id.* at 148 (majority opinion).

145. 866 F. Supp. 2d 442, 444, 453 (E.D. Pa. 2011).

146. Ben Holden, *Courts Must Be Prepared for Tech-Savvy Jurors*, BALT. SUN (June 23, 2011), <https://www.baltimoresun.com/opinions/bs-xpm-2011-06-23-bs-ed-courts-tech-20110623-story.html>.

147. Julie Bykowicz, *5 Dixon Jurors Recalled as Witnesses*, BALT. SUN (Dec. 30, 2009, 3:00 AM), <https://www.baltimoresun.com/maryland/baltimore-city/bal-md.dixon-30dec30-story.html>; Holden, *supra* note 146.

148. *Tarrant County Juror Sentenced to Community Service for Trying to Friend Defendant on Facebook*, JUDGE WADE BIRDWELL (Dec. 4, 2011), <https://judgewadebirdwell.com/tarrant-county-juror-sentenced-to-community-service-for-trying-to-friend-defendant-on-facebook/>.

149. *Id.*

defendant's due process rights.¹⁵⁰ The juror's posts included comments in response to her complaint of jury duty that read "vote guilty," to which she responded, "LOL."¹⁵¹ After defense counsel examined her, the court concluded that, despite her Facebook posts, she was able to decide on the case impartially.¹⁵²

In one instance, a defendant appealed the court's decision to dismiss a juror for communicating with a judge's secretary during a case.¹⁵³ A Georgia jury heard the case of Robert Miller, who the State charged with malice murder, aggravated assault, and associated firearms charges.¹⁵⁴ During the trial, the judge's secretary communicated through texts with one of the jurors about the likelihood of the judge bringing donuts to court for the jury.¹⁵⁵ After reviewing the text messages and "out of an abundance of caution," the judge dismissed the juror.¹⁵⁶ The remaining jurors along with an alternate who replaced the dismissed juror convicted Miller.¹⁵⁷ On appeal, Miller argued that the judge committed plain error in excusing the juror without first conducting a hearing to determine the circumstances of the contact and whether it was prejudicial.¹⁵⁸ The Georgia Supreme Court rejected Miller's argument for failure to properly preserve the issue for appellate review.¹⁵⁹

Jurors tweeting has been similarly problematic at the *voir dire* level. During jury selection for Harvey Weinstein's New York trial for rape and sexual misconduct, Weinstein's defense attorneys alerted Justice James Burke that a member of the jury pool had posted on Twitter.¹⁶⁰ In the "tweet," the juror asked followers "how a

150. No. 1-16-0813, 2018 WL 6920110, at *5 (Ill. App. Ct. Dec. 31, 2018).

151. *Id.* at *2-3.

152. *Id.* at *5; see also Brian Grow, *As Jurors Go Online, U.S. Trials Go off Track*, REUTERS (Dec. 8, 2010, 1:56 PM), <https://www.reuters.com/article/us-internet-jurors/as-jurors-go-online-u-s-trials-go-off-track-idUSTRE6B74Z820101208>

(reviewing instances of jurors using the internet during trials and the respective consequences).

153. *Miller v. State*, 847 S.E.2d 344, 345 (Ga. 2020).

154. *See id.*

155. *Id.* at *2.

156. *Id.*

157. *Id.*

158. *Id.* at *1.

159. *Id.* at *3. ("Because Miller failed to seek any investigation into or hearing about the juror communication or its effect on other jurors before the trial court acceded to Miller's request to excuse the juror and seat an alternate, the error Miller now asserts was not preserved for ordinary appellate review.").

160. Elizabeth Wagmeister, *Weinstein Judge Lectures Would-Be Juror over Bad Tweet*, VARIETY (Mar. 10, 2020, 8:42 AM), <https://variety.com/2020/biz/news/harvey-weinstein-juror-howard-mittelmark-tweet-court-judge-1203528690/>.

person might hypothetically leverage serving on the jury of a high-profile case to promote their new novel”¹⁶¹ The judge, noting that he had instructed potential jurors not to use social media to discuss the case “a thousand times,” threatened to hold the juror in contempt.¹⁶²

A variety of juror behaviors involving social media use and other forms of digital communication are forcing courts into largely uncharted territories, requiring them to rule on issues at the heart of our justice system. While uniformity in how courts choose to rule in each situation is a long way away, there is at least one fact about which courts seem to inevitably be approaching a consensus: this new, digitally literate breed of juror is here to stay. Tweeting, texting, blogging, and “friending” are forces with which our justice system must reckon.

III. THE GEN Z JUROR

The next generation of jurors was born into the information age.¹⁶³ Members of Gen Z,¹⁶⁴ generally defined as the generation born between 1997 and 2012,¹⁶⁵ have never known a world without the internet.¹⁶⁶ The Gen Z generation grew into adolescents and

161. *Id.*

162. Sisak, *supra* note 10 (“The court was alerted recently that a few prospective jurors from last week went on Facebook and Twitter as if I hadn’t just said not to, what was it, a hundred times? A thousand times? Was anything I said ambiguous?”); Wagmeister, *supra* note 160; see also J. Clara Chan, *Prospective Harvey Weinstein Juror Who Tweeted About Trial Could Face Jail Time*, WRAP (Jan. 16, 2020 1:22 PM), <https://www.thewrap.com/harvey-weinstein-trial-prospective-jurors-tweet-jail-time/>. After being dismissed from the jury pool, one man wrote on Twitter, “Now that my jury service is officially over, I can say that telling Harvey Weinstein and his lawyers to their faces that I could NOT be impartial was a fucking JOY.” Chan, *supra*.

163. Emily Seymour, *Gen Z: Born to Be Digital*, VOA NEWS (Aug. 25, 2019, 2:37 AM), <https://www.voanews.com/student-union/gen-z-born-be-digital> (“Gen Zers are the first digital natives, born . . . into a world of vast technological advances and innovations.”).

164. *The Pew Research Center noted that, by 2019, “Gen Z” had taken hold as the name for the post-Millennial generation.* Dimock, *supra* note 26.

165. Baby Boomers refers to the generation of individuals born from 1946–1964; Generation X refers to the generation of individuals born from 1965–1980; Generation Y (Millennials) refers to the generation of individuals born from 1981–1996; and Gen Z refers to the generation of individuals born from 1997 to approximately 2012. *Id.*

166. *Id.* See generally *Am. C.L. Union v. Reno*, 929 F. Supp 824, 830–38 (E.D. Pa. 1996) (discussing the creation and evolution of the internet as of 1996).

teenagers in a post-Facebook world.¹⁶⁷ For them, communication and the sharing of knowledge flows in a constant stream across social media platforms.¹⁶⁸ They are used to having their curiosity satisfied instantaneously.¹⁶⁹ It is hard to suppress a Gen Zer's thirst for instant answers through the lengthy and detailed process of building a case.¹⁷⁰

Between texting, sharing, and researching, the average Gen Zer spends about three hours per day looking at a screen.¹⁷¹ So integral is screen time to our daily lives that it prompted Chief Justice Roberts to observe in *Riley v. California*, "[M]odern cell phones, which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy."¹⁷²

Gen Zers have been raised in the milieu of technology, thereby understanding social media and texting as acceptable, if not the primary forms of communication.¹⁷³ Teens prefer texting over in-person communication.¹⁷⁴ Thirty-nine percent of Gen Zers value

167. Facebook began in 2004. Sarah Phillips, *A Brief History of Facebook*, GUARDIAN (July 25, 2007, 5:29 EDT), <https://www.theguardian.com/technology/2007/jul/25/media.newmedia>.

168. See Dennis Green, *The Most Popular Social Media Platforms with Gen Z*, BUS. INSIDER (July 2, 2019, 10:57 AM), <https://www.businessinsider.com/gen-z-loves-snapchat-instagram-and-youtube-social-media-2019-6> (noting that 65% of Gen Zers check Instagram daily, 62% check YouTube daily, and 51% check Snapchat daily).

169. Alex Williams, *Move over, Millennials, Here Comes Generation Z*, N.Y. TIMES (Sept. 18, 2015), <https://www.nytimes.com/2015/09/20/fashion/move-over-millennials-here-comes-generation-z.html> (quoting a marketing consultant saying that "we tell our advertising partners that if they don't communicate in five words and a big picture, they will not reach this generation.").

170. *Id.* ("Generation Z takes in information instantaneously . . . and loses interest just as fast.").

171. Gretchen Livingston, *The Way U.S. Teens Spend Their Time Is Changing, but the Differences Between Boys and Girls Persist*, PEW RSCH. CTR. (Feb 20, 2019), <https://www.pewresearch.org/fact-tank/2019/02/20/the-way-u-s-teens-spend-their-time-is-changing-but-differences-between-boys-and-girls-persist/>.

172. 573 U.S. 373, 385 (2014).

173. A Center for Generational Kinetics study found that Gen Z is four times more likely than Millennials, Gen X, or Baby Boomers to say that age thirteen is the appropriate age to get your first smartphone. Older generations were more likely to suggest age eighteen. Brian Mastroianni, *How Generation Z Is Changing the Tech World*, CBS NEWS (Mar. 10, 2016, 6:00 AM), <https://www.cbsnews.com/news/social-media-fuels-a-change-in-generations-with-the-rise-of-gen-z/>; see Seymour, *supra* note 163.

174. Ivan Pentchoukov, *Texting Surpasses In-Person Communication as a Favorite Among Teenagers*, EPOCH TIMES (Sept. 10, 2018), https://www.theepochtimes.com/texting-surpasses-in-person-communication-as-favorite-among-teens_2656749.html.

having smartphones in their workplace,¹⁷⁵ and Gen Zers find texting the preferred method of workplace communication.¹⁷⁶ Today, those under twenty-three years old do not know life without social media or smartphones, have never purchased encyclopedias for research purposes, and “shar[e] music, photos, news, and opinions as easily as they breathe and eat.”¹⁷⁷ In his book *Gen Z @ Work*, then seventeen-year-old author Jonah Stillman wrote, “I am a classic Gen Zer, I love Snapchat and Twitter and think email is for my parent’s generation.”¹⁷⁸ Even the Sixth Circuit acknowledged that Gen Zers “increasingly turn to photos and videos to share information.”¹⁷⁹ A Maryland Court of Appeals, in discussing a victim who texted her thirteen-year-old friend as a means of waking her up, perhaps condescendingly noted that texting to wake another is, “[w]e suppose . . . how young Gen-Z individuals think these days.”¹⁸⁰

The 2010 U.S. Census reported that Gen Z made up about 24% of the U.S. population.¹⁸¹ Today that number has dwindled to around

175. Ryan Jenkins, *Statistics Exposing What Generation Z Wants from the Workplace*, RYAN JENKINS BLOG, <https://blog.ryan-jenkins.com/statistics-exposing-what-generation-z-wants-from-the-workplace> (last visited Oct. 30, 2020).

176. See Larry Alton, *Phone Calls, Texts or Email? Here’s How Millennials Prefer to Communicate*, FORBES (May 11, 2017, 8:00 AM), <https://www.forbes.com/sites/larryalton/2017/05/11/how-do-millennials-prefer-to-communicate/#78c0c3036d6f>; Kayla Matthews, *How Younger Employees Communicate in the Enterprise*, INFORMATIONWEEK (Aug. 19, 2019, 8:00 AM), <https://www.informationweek.com/strategic-cio/team-building-and-staffing/how-younger-employees-communicate-in-the-enterprise/a/d-id/1335543>.

177. CANDACE STEELE FLIPPIN, *GENERATION Z IN THE WORKPLACE* 6 (2017).

178. DAVID STILLMAN & JONAH STILLMAN, *GEN Z @ WORK: HOW THE NEXT GENERATION IS TRANSFORMING THE WORKPLACE* 13 (2018). In 2019, the Pew Research Center reported that 22% of U.S. adults use Twitter and 69% use Facebook. In the 18–24 range, 73% use Snapchat, 75% use Instagram, 44% use Twitter, and 76% use Facebook. In the 25–29 range, 47% use Snapchat, 57% use Instagram, and 84% Facebook. Andrew Perrin & Monica Anderson, *Share of U.S. Adults Using Social Media, Including Facebook, Is Mostly Unchanged Since 2018*, PEW RSCH. CTR. (April 10, 2019), <https://www.pewresearch.org/fact-tank/2019/04/10/share-of-u-s-adults-using-social-media-including-facebook-is-mostly-unchanged-since-2018/>.

179. *EMW Women’s Surgical Ctr., P.S.C. v. Beshar*, 920 F.3d 421, 432 (6th Cir. 2019) (noting that increasing use of photos and videos to share information underscores the relevance of sonogram images to giving informed consent to an abortion).

180. *Spencer v. State*, No. 131359C, 2019 WL 1077183, at *1 n.3 (Md. Ct. Spec. App. Mar. 7, 2019); see also James F. Holderman & S. Ann Walls, *As Generations X, Y, and Z Determine the Jury’s Verdict, What Is the Judge’s Role?*, 58 DEPAUL L. REV. 343, 347–49 (2009) (discussing the way that new generations of jurors think differently than preceding generations due to their immersion in technology).

181. U.S. CENSUS BUREAU, *AGE AND SEX COMPOSITION: 2010*, at 2 (2011).

20%.¹⁸² Starting in 2015, members of this large cohort began qualifying for jury duty.¹⁸³ Gen Zers, like all generational groups, have opinions on jury duty. According to a recent Pew Research poll, only 50% of those age eighteen to twenty-nine feel a civic obligation to jury duty.¹⁸⁴ This compares with 70% of older Americans.¹⁸⁵ Even those Americans who believe in the jury system share a reluctance to participate when called upon.¹⁸⁶ Some states report a 50% no-show rate among those called to jury duty.¹⁸⁷ And those who do report to jury duty often cite financial hardship, medical issues, or family care obligations as support for being excused.¹⁸⁸

Jurors raised in the computer age have a different way of thinking than do jurors born during the first ninety-five years of the twentieth century.¹⁸⁹ Constant technological immersion has

182. *Resident Population in the United States in 2017, by Generation*, STATISTA, <https://www.statista.com/statistics/797321/us-population-by-generation/> (last visited Nov. 1, 2020).

183. Generation Z began in 1997 and became eligible for jury duty eighteen years later in 2015. See *supra* note 165.

184. John Gramlich, *Jury Duty Is Rare, but Most Americans See It as Part of Good Citizenship*, PEW RSCH. CTR. (Aug. 24, 2017), <https://www.pewresearch.org/fact-tank/2017/08/24/jury-duty-is-rare-but-most-americans-see-it-as-part-of-good-citizenship/>. A majority of Americans still see jury duty as part of being a good citizen. "Two-thirds of U.S. adults (67%) said serving on a jury 'is part of what it means to be a good citizen.'" *Id.*

185. *Id.*

186. Janet Stidman Eveleth, *Jury Service in the 21st Century*, MD. BAR J., May–June 2009, at 48, 49.

187. Maxine Bernstein, *Judges Cracking Down on People Who Snub Jury Duty*, AP NEWS (May 21, 2017), <https://apnews.com/article/62b279c38615469fb9bee505c9c66ff5>. Some states are being creative to encourage jurors to show up. In Franklin County Municipal Court in Ohio, "the jury commissioner has taken the unusual step of brewing fresh coffee for jurors and playing music from a James Taylor concert on a flat-screen TV in the jury assembly room as a way to help them relax. In Oregon's federal courts, jurors get \$40 a day for their service; it rises to \$50 a day after [ten] days of duty. They get 53.5 cents a mile for travel." *Id.*

188. Janet Stidman Eveleth, *Will Jury Reforms Attract More Jurors?*, MD. BAR J., May–June 2000, at 42, 44.

189. Holderman & Walls, *supra* note 180, at 348 ("A typical Generation X-er, before he or she reached the age of eighteen, spent 22,000 hours watching television. That is more than twice the time Generation X-ers spent in a classroom. Additionally, Generation X-ers have come of age with the widespread use of computers and the internet in our culture. Following in their footsteps is Generation Y. Members of Generation Y, also known as the Millennials, were born between approximately 1980 and 2000 and were raised with computers dominating their world. They 'are as comfortable with the [i]nternet as most [older] people are with the telephone' and 'use[] the [i]nternet for practically everything—for communication, news, research and entertainment.'" (alterations in original) (first

impacted the ability to remain focused for long periods of time—the average attention span of a Gen Zer is eight seconds.¹⁹⁰ A judge studying the issue suggested young jurors feel a “right not to be bored.”¹⁹¹ This new normal of concentration levels yields limited patience to the slow unfolding of the trial process without opportunity for minimal distraction.

Gen Zers’ documented shorter attention spans coupled with today’s communication habits make it unrealistic and perhaps even a bit unfair to compel Gen Zers to meet jury expectations that pre-date the age of social media. In the next Part, I explore the recommendations others have offered to accommodate the next generation of jurors.¹⁹² Each is designed to assure jurors remain technology-free while in jury boxes and deliberation rooms. None of these suggestions, however, acknowledge the present-day reality of technology as an extension of communication. As this next Part will show, the recommendations offered by others are ineffective to meet the concerns of juror misconduct, but, fortunately, the long-standing practice of judicial review for harmful error holds up as the best means of assuring defendants get a trial free from juror misconduct in this digital age.

IV. THE REALITY OF SUGGESTED JUROR REFORMS

Judges, bar organizations, and scholars have proposed prohibitions, admonitions, and increased punishment to accommodate Gen Z and indeed most jurors. These measures fall into three distinct groups: (1) banning smart phones,¹⁹³ (2)

quoting R. Rex Parris & James Wren, *Reaching Jurors Across the Generations*, TRIAL, Mar. 2008, at 19, 22; and then quoting Richard S. Enyon, *Four Generations of Lawyers: Bridging the Gaps*, RES GESTAE, Apr. 2007, at 5, 5)).

190. *The 11 Generation Z Statistics Advertisers Must Know*, MEDIKIX, <https://mediakix.com/blog/the-generation-z-statistics-you-should-know/> (last updated Nov. 12, 2018).

191. See Holderman & Walls, *supra* note 180, at 349 (quoting Tracy L. McGaugh, *Generation X in Law School: The Dying of the Light or the Dawn of a New Day?*, 9 LEGAL WRITING 119, 124 (2003)).

192. See, e.g., *id.* at 343 (suggesting courts offer jurors a more interactive experience); *Jury Service Reform*, ATRA, <http://www.atra.org/issue/jury-service-reform/> (last visited Oct. 30, 2020) (suggesting courts adopt a one-day trial system).

193. See *infra* Part IV.A; see also Anita Ramasastry, *Why Courts Need to Ban Jurors’ Electronic Communications Devices*, FINDLAW, (Aug. 11, 2009), <https://supreme.findlaw.com/legal-commentary/why-courts-need-to-ban-jurors-electronic-communications-devices.html>.

strengthening instructions;¹⁹⁴ and (3) increasing sanctions.¹⁹⁵ Whatever their merits, none of these suggestions will curtail the bigger issue of prohibiting *ex parte* communications and research by jurors through cell phone use. Going forward, a jury system must contemplate jurors who prefer to text rather than talk;¹⁹⁶ who do not share the kind of commitment to civic duty woven into the fabric of previous generations;¹⁹⁷ and who seek quick answers at a click, rather than measured research and reflection.¹⁹⁸ Additionally, any potential solutions must serve the due process demands of the U.S. Constitution.¹⁹⁹

Prohibiting access to smart phones during trials, strengthening jury instructions, and increasing sanctions are all reasonable responses. Each, however, will ultimately prove ineffective at prohibiting juror misconduct in the form of cell phone use.

Like so many other issues concerning technology and social media, the constitutional safeguards put in place by the U.S. Constitution work best to guarantee individual rights. In instances where jurors engage in posting, texting, and tweeting, judges must consider their conduct in the context of the harmful error standard. Judges should evaluate the circumstances and then invalidate jury verdicts only in instances where the juror's communications are so problematic that they infringed on the defendant's constitutional right to a fair trial.

Courts must recognize that not all cell phone use threatens liberty. In instances where jurors' communications reflect emotions or thoughts not likely to influence others, or where the juror can demonstrate that their communications did not influence their own decision-making process, courts must be content not finding a violation. In these instances, the Constitution does not demand judges set aside the verdict.

In the 2011 Arkansas Supreme Court case *Dimas-Martinez v. State*,²⁰⁰ the court ruled that any cell phone communication on the part of a juror had the potential to amount to a violation of the defendant's due process rights.²⁰¹ This standard places too high a burden on individuals and an unreasonable strain on the judicial

194. See *infra* Part IV.B.

195. See *infra* Part IV.C.

196. See Pentchoukov, *supra* note 174.

197. See Gramlich, *supra* note 184.

198. See *The 11 Generation Z Statistics Advertisers Must Know*, *supra* note 190.

199. See U.S. CONST. amend. XIV, § 1.

200. 385 S.W.3d 238 (Ark. 2011).

201. *Id.* at 249.

process. Where jury instructions prohibit any cell phone communication during the trial, outside research, pressure from outside sources, and other communications similar to traditional forms of juror misconduct are still violations.²⁰² Courts, however, must accept that the next generation of jurors is wired differently, and the system must bend to accommodate them.

Judicial process of evaluating juror misconduct need not be as difficult as it may first appear. The proposals discussed below are not worthwhile to achieve their intended goals. However, the systems that have been in place for as long as the U.S. Constitution still serve to preserve a defendant's due process rights. Judges must continue to evaluate for harmful error, but, in so doing, the error must be one that goes beyond violating a judge's instruction to refrain from any cell phone use to the level of error that affects the outcome of the trial so severely that it amounts to a violation of the defendant's rights.

A. Prohibitions Banning Smart Phones Completely

A condition of President Trump's impeachment was that Senators sitting as jurors were prohibited from bringing their smart phones into chambers.²⁰³ Countless news articles commented on the anxiety the cell phone ban caused.²⁰⁴ Many federal courts similarly prohibit access to smart phones while on jury duty.²⁰⁵ Because focus in the courtroom is paramount, bans on cell phone are implemented

202. *See id.*

203. Alexander Bolton, *Senate Begins Preparations for Trump Trial*, HILL (Jan. 15, 2020, 5:45 PM), <https://thehill.com/homenews/senate/477673-senate-begins-preparations-for-trump-trial>; Meg Wagner et al., *The Senate Impeachment Trial Has Officially Started*, CNN POLITICS (Jan. 19, 2020, 9:27 PM), https://www.cnn.com/politics/live-news/trump-impeachment-live-01-16-2020/h_84598252e14172cce93e5cb2c0446933 ("No use of phones or electronic devices will be allowed in the Chamber.").

204. *See, e.g.*, Peggy Drexler, *Psychologist: Senators May Suffer from Impeachment Cell Phone Withdrawal*, CNN (Jan. 22, 2020, 10:51 PM), <https://www.cnn.com/2020/01/22/opinions/senators-impeachment-digital-detox-drexler/index.html>. *See generally* Lindsay Wise & Natalie Andrews, *For Senators at Impeachment Trial, No Coffee, No Cellphones and No Talking*, WALL ST. J. (Jan. 22, 2020, 4:07 AM), <https://www.wsj.com/articles/for-senators-at-impeachment-trial-no-coffee-no-cellphones-and-no-talking-11579644399>.

205. *See, e.g.*, *Additional Federal Jury Duty Information*, U.S. DIST. CT.: DIST. OF MASS., <http://www.mad.uscourts.gov/jurors/federal-information-more.htm> (last visited Oct. 30, 2020); *Mobile Phone and Court Attire*, U.S. DIST. CT.: E. DIST. OF CAL., <http://www.caed.uscourts.gov/caednew/index.cfm/jury-info/mobile-phone-and-court-attire/> (last visited Oct. 30, 2020).

to remove distraction and assure complete attention to the matter at hand. However, asking jurors to abandon their phones may cause a different kind of distraction.²⁰⁶

The unavailability of smart phones can create the type of digital anxiety about which Patrick Brayer writes in his article *The Disconnected Juror: Smart Devices and Juries in the Digital Age of Litigation*.²⁰⁷ According to Brayer, national disasters like Hurricane Katrina created an emotional dependency on smart phones.²⁰⁸ “As survivors, evacuees, and concerned family and friends desperately attempted to connect, they found that their only mode of communication was digital. They also realized that their new lifeline of safety and comfort was no longer dependent upon the traditional act of speaking and listening.”²⁰⁹

This digital connection attaches to a need to feel safe.²¹⁰ Removing that safety can make for a distracted juror, and a distracted juror is not capable of focusing completely on the legal matter at issue.²¹¹

In an effort to regain control of their smart phones, some in the courtroom have pushed back against federal and state bans.²¹² Courts are justified in banning phones when they can demonstrate that their reason for so doing was rationally related to their goal of preventing infringement on due process rights.²¹³ Outside of the courtroom, courts have upheld cell phone bans put in place in the interest of both safety and decorum.²¹⁴ Many states prohibit

206. Brayer, *supra* note 25, at 27.

207. *Id.*

208. *Id.* at 33–34.

209. *Id.*

210. *Id.* at 34–35.

211. *Id.* at 34. For a full understanding of the psychological attachment to cell phones, see generally *id.*

212. See, e.g., *Price v. N.Y.C. Bd. of Educ.*, 855 N.Y.S.2d 530, 542 (N.Y. App. Div. 2008).

213. See *id.*

214. See, e.g., *Koch v. Adams*, 361 S.W.3d 817, 819, 822 (Ark. 2010); *Price*, 855 N.Y.S.2d at 542. See generally Nicole Thieneman Maddox, *Silencing Students' Cell Phones Beyond the Schoolhouse Gate: Do Public Schools' Cell Phone Confiscation and Retention Policies Violate Parents' Due Process Rights?*, 41 J.L. & EDUC. 261 (2012) (arguing that schools' prolonged confiscation of students' cell phones infringes on the students' parents' constitutional right to direct the upbringing of their child).

handheld phones while driving.²¹⁵ Airlines prohibit cellphone use to make voice communication or access cellular data.²¹⁶

Courts that have imposed cell phone bans in the courtroom have experienced little pushback. The Sixth Circuit bans phones and all recording devices inside the courtroom unless authorized by the judge.²¹⁷ States including Arizona, Georgia, Kansas, and Hawaii have adopted a ban on all phones.²¹⁸ Although these bans extend to anyone in the courtroom, the prohibition serves to meet the goals of prohibiting juror cell phone use during trials.²¹⁹

Bans on cell phone use in the courtroom have withstood constitutional challenges from those opposing the policies.²²⁰ In 2014, plaintiff Robert McKay sued Saginaw County officials, challenging the constitutionality of a Saginaw County Michigan order that banned, among other things, smart phones.²²¹ McKay argued that the prohibition violated his First Amendment right to record courtroom proceedings publicly.²²² The United States District Court for the Eastern District of Michigan summarily rejected the defendant's claim, reasoning that the Electronics Ban Order did not prevent anyone from disseminating to the public any information

215. *Cellular Phone Use and Texting While Driving Laws*, NAT'L CONF. STATE LEGISLATURES (May 29, 2019), <https://www.ncsl.org/research/transportation/cellular-phone-use-and-texting-while-driving-laws.aspx>.

216. 14 C.F.R. § 91.21 (2019). The FAA does not ban cell phone use but instructs the Secretary of Transportation to issue regulations prohibiting voice communications during flights. Matt Villano, *Are Cell Phone Calls on Airplane Flights Inevitable*, CNN TRAVEL, <https://www.cnn.com/travel/article/cell-phone-calls-airplanes/index.html> (last updated Dec. 20, 2019).

217. U.S. CT. OF APPEALS FOR THE SIXTH CIR., *ADMISSION TO THE POTTER STEWART COURTHOUSE* (n.d.).

218. Arizona, Georgia, Kansas, and Hawaii are some of the states that have all-court cell phone bans. See ARIZ. SUP. CT. R. 122.1; GA. UNIF. MUN. CT. R. 11; HAW. SUP. CT. R. 5.3; KAN. MEDIA R. 1002. For a full list of bans by state, see *Cell Phone and Electronic Device Policies*, NAT'L CTR. FOR STATE CTS., <https://www.ncsc.org/topics/media/social-media-and-the-courts/state-links5> (last visited Oct 30, 2020).

219. See, e.g., ARIZ. SUP. CT. R. 122.1(a) ("This rule specifies the permitted and prohibited uses of portable electronic devices in a courthouse. . . . A violation of this rule may be punishable as contempt.").

220. See *McKay v. Federspiel*, 22 F. Supp. 3d 731, 736 (E.D. Mich. 2014) (holding that there was no First Amendment right to record courtroom proceedings). But see *Chandler v. Florida*, 449 U.S. 560, 573–74, 582–83 (1981) (holding the Constitution does not bar entry of electronic media into judicial proceedings).

221. *McKay*, 22 F. Supp. 3d at 733. The "Electronics Ban Order" read, in pertinent part, that "[e]xcept with a judge's permission, possession[,] and/or use of the following devices is prohibited in court-related facilities: audio and/or video recording and/or broadcasting devise[,] camera/photographic devices[,] [and] electronic communication devices." *Id.*

222. *Id.* at 734.

learned from attending courtroom proceedings.²²³ “The Saginaw County Court ha[d] not denied [the] right to attend and observe courtroom proceedings; it ha[d] only prohibited the use of electronic [recording] equipment inside the courtroom.”²²⁴

The *McKay* court, applying a four-part test to analyze the constitutionality of the restrictions, gave sound reasoning for its conclusion.²²⁵ Having applied this standard, the court found that the goals of limiting disruptions in judicial proceedings and preventing jurors from conducting research online are interests important to the judicial process.²²⁶ The Electronic Ban Order, according to the court, created order in the courtroom, an ideal paramount to the plaintiff’s right to 24/7 cell phone access.²²⁷

While banning cell phone use inside the courtroom is constitutional and undoubtedly permissible, that does not mean it will be effective in preventing the type of out-of-court social media communications that threaten defendants’ due process rights. Moreover, some argue that the cell phone ban, as it relates to jurors, might actually impede the effective administration of justice.²²⁸ Patrick Brayer argues that separating jurors from their smart phones will cause the kind of real-life discomfort and disconnection that may detract from jurors’ ability to listen to all the evidence and decide a case soundly.²²⁹

There are benefits to banning smart phones in the courtroom. It promotes courtroom decorum, protects against prohibited recordings, and limits distractions. Such bans, however, do not prevent jurors from tweeting, posting, or even researching when the court is not in

223. *Id.* at 735.

224. *McKay v. Federspiel*, No. 14-CV-10252, 2014 WL 7013574, at *3 (E.D. Mich. Dec. 11, 2014), *aff’d*, 823 F.3d 862 (6th Cir. 2016). The court later noted in the order: “Although access cases are rooted in First Amendment principles, they have developed along distinctly different lines than have freedom of expression cases.” *Id.* at *4 (quoting *S.H.A.R.K. v. Metro Parks Serving Summit Cnty.*, 499 F.3d 553, 559 (6th Cir. 2007)).

225. The court evaluated the ban under a four-pronged test. “First, a court must ‘ask what rule the government is invoking that prohibits the plaintiffs from access to information’ Second, the court must determine ‘whether that rule “selectively delimits the audience.”’ Third, a court must ‘inquire into the government’s stated interest for invoking the rule.’ [Fourth], a court must ‘apply the applicable test to determine whether the government’s stated interest is sufficiently related to the means of accomplishing that interest’” *Id.* at *5 (citations omitted) (quoting *S.H.A.R.K.*, 499 F.3d at 560–61).

226. *Id.* at *6.

227. *Id.* at *7.

228. See, e.g., Brayer, *supra* note 25, at 27.

229. *Id.* at 25–27, 47–48.

session. These bans, therefore, while constitutional, will never by themselves succeed in preventing juror misconduct.

B. Admonitions: Strengthening Jury Instructions

Another way to combat juror misconduct is to strengthen juror instructions. In 2009, the Judicial Conference Committee on Court Administration and Case Management, a group over which the Chief Justice of the United States presides, proposed model jury instructions that added a caution against social media use.²³⁰ They suggested that judges give the following instruction before trial:

Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end. I know that many of you use cell phones, Blackberries, the internet[,] and other tools of technology. You also must not talk to anyone at any time about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any blog or website, including Facebook, Google+, My Space, LinkedIn, or YouTube. You may not use any similar technology of social media, even if I have not specifically mentioned it here.²³¹

And the following instruction at the close of the case:

During your deliberations, you must not communicate with or provide any information to anyone by any means about this case. You may not use any electronic device or media, such as the telephone, a cell phone, smart phone, iPhone,

230. See generally JUD. CONF. COMM. ON CT. ADMIN. & CASE MGMT., PROPOSED MODEL JURY INSTRUCTIONS: THE USE OF ELECTRONIC TECHNOLOGY TO CONDUCT RESEARCH ON OR COMMUNICATE ABOUT A CASE 1–2 (2012).

231. *Id.* at 1.

Blackberry or computer, the [i]nternet, any [i]nternet service, any text or instant messaging service, any [i]nternet chat room, blog, or website such as Facebook, MySpace, LinkedIn, YouTube or Twitter, to communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict.²³²

Today such instructions are standard in both state and federal courts.²³³ The “new” instructions merely extend the long-standing prohibition against speaking about the case to others or researching the case on one’s own to include “technospeech”²³⁴ from the time of empanelment to verdict.²³⁵ In addition to refraining from face-to-face communication or book research, jurors are prohibited from engaging in the same conduct via an internet connection.

In reality, present-day instructions merely add another layer of prohibition to already prohibited conduct. Jurors are cautioned against using smart phones, social media, and even Googling in addition to face-to-face communicating about the case or engaging in pre-internet research. Courts must anticipate that some jurors will disregard these new instructions in much the same way that many jurors have disregarded instructions banning independent research via newspapers, radios, or even neighbors.²³⁶ Therefore, adding express language about social media use will continue to prohibit those whose behavior was already bound by the rules but provides no further impediment to those who might have violated previous court instructions.

Respect for the current instruction to refrain from social media use relating to the case on which a juror or prospective juror may sit is not quite as binary as it was pre-social media or even pre-internet. Today, information is much more accessible. No longer must a juror sneak into a library or go through the effort of finding and reading a newspaper. Instead, during an escape to a bathroom stall, jurors can pull out their smart phones and access more information than is contained in any library. In addition to greater access, the

232. *Id.* at 2.

233. See *United States v. Fumo*, 655 F.3d 288, 304–05 (3d Cir. 2011) (“We enthusiastically endorse these instructions and strongly encourage district courts to routinely incorporate them or similar language into their own instructions.”).

234. See Leslie Yalof Garfield, *The Death of Slander*, 35 COLUM. J.L. & ARTS 17, 17 (2011) (defining “technospeech” as digital communication).

235. JUD. CONF. COMM. ON CT. ADMIN. & CASE MGMT., *supra* note 229, at 1–2.

236. See, e.g., *Dimas-Martinez v. State*, 385 S.W.3d 238, 242 (Ark. 2011).

temptation is much higher than pre-internet days. A 2018 study conducted by Deloitte Consulting firm found that, on average, consumers check their phones over fifty-two times each day.²³⁷ A 2020 study found that the average smartphone owner unlocks his or her phone 150 times a day.²³⁸ Sixty percent of U.S. consumers age eighteen to thirty-four admitted they overuse their smart phones.²³⁹

Frequent phone use corresponds with connecting with others. In many instances, jurors are using their phone not to conduct research or solicit input about the trial on which they sit but rather to share their emotions and experiences. For example, the juror in *Neulander* texted a “see no evil, speak no evil, hear no evil” emoji.²⁴⁰ A juror on a murder and child abuse case for shaken baby syndrome tweeted: “Woke up early and knocked out at the gym before jury duty. Bout to spark one, throw in a load of laundry, and tidy up the kitchen.”²⁴¹ The judge rejected the trial court’s motion for a new trial finding that, while the juror had violated the judge’s rules, he had not tweeted about the case.²⁴² One jury in a federal California case posted the following on Facebook:

“Jury duty week three and we still don't have all the panel selected”; “After all the stupid excuses and people saying they hate police and black people to get off jury duty hmmm. ... Maybe [I] should have c[o]me up with a lame excuse also”; “my case was suppose[d] to last six weeks and we[']re on week three now and no end in sight[:] this sucks”; “[I]looks like a two week stay for me @ jury duty ...”; “Fourth week of jury duty and six weeks to go LUCKY

237. Todd Spangler, *Are Americans Addicted to Smartphones?*, VARIETY (Nov. 14, 2018, 12:36 PM), <https://variety.com/2018/digital/news/smartphone-addiction-study-check-phones-52-times-daily-1203028454/>.

238. Deyan Georgiev, *51+ Scary Smartphone Addiction Statistics for 2020 [Nomophobia on the Rise]*, TECHJURY, <https://techjury.net/blog/smartphone-addiction-statistics/#gref> (last updated July 2, 2020).

239. Spangler, *supra* note 236.

240. Nolan, *supra* note 4, at 26.

241. Jess Sullivan, *Judge: Juror's Twitter Messages During Trial Not Prejudicial*, DAILY REPUBLIC (Apr. 3, 2015, 8:31 PM), <https://www.dailyrepublic.com/all-dr-news/solano-news/crime-solano-county-courts/judge-jurors-twitter-messages-during-trial-not-prejudicial/>. Other tweets included “Are u kidding me? This jury duty s-t s NOT for me dude,” followed by “Oh they don't have snacks? Not even a small pack of peanuts or mini bottles of water? Pure fu-ery.” *Id.*

242. *Id.* In another instance, a juror friended a party to the case. The juror was dismissed the following day. *Tarrant County Juror Sentenced to Community Service for Trying to “Friend” Defendant on Facebook*, *supra* note 148.

ME ..."; "getting ready for jury duty"; "Week 5 of jury duty"; "Jury duty week six ..."; and "Back to jury duty can it get any more BORING than going over metro pcs phone records ... uuuggghhhhhh."²⁴³

In response to a motion to dismiss the case based on harmful error, a California appellate court found the above words non-prejudicial.²⁴⁴

Courts are beginning to acknowledge that a juror's smart phone use during trial does not necessarily correlate to a propensity to investigate trial matters to the extent of creating prejudice.²⁴⁵ In many instances, these communications are innocuous, at least in relation to a defendant's Sixth Amendment rights.²⁴⁶ As one California judge noted, "When we are used to broadcasting every waking moment of our lives, how are you supposed to stop that behavior when you're on a jury?"²⁴⁷ The answer is that "we" are not, nor should we. Prohibiting cell phone use as it relates to investigatory matters not presented in the courtroom should be prohibited. But mere use of a cell phone to share feelings are akin to sharing those same feelings through voice communications and should not be prohibited.²⁴⁸ Where such communications were not prohibited prior to the internet, the fact that the same type of communications are now more widely disseminated should not serve as grounds to prohibit them.²⁴⁹

C. Punishment: Increasing Sanctions for Juror Misconduct

Juror misconduct has serious consequences. Where it rises to the level of harmful error, misconduct can result in a mistrial. Declaring a mistrial is both timely and costly. It taxes the court system, which must hold another trial for a charge already litigated. Additionally,

243. *People v. Cornelius*, No. C073004, 2016 WL 5112052, at *12 (Cal. Ct. App. Sept. 21, 2016).

244. *Id.* at *12.

245. *See, e.g., id.*

246. *See, e.g., id.*

247. Sarah Moses Buckshot, *Neulander Case Shows Perils of Texting During Jury Duty*, SYRACUSE.COM, https://www.syracuse.com/crime/2015/07/expert_jurors_must_disconnect_from_smartphones_during_trials.html (last updated Mar. 22, 2019).

248. *See* Amanda McGee, *Juror Misconduct in the Twenty-First Century: The Prevalence of the Internet and Its Effect on American Courtrooms*, 30 LOY. L.A. ENT. L. REV. 301, 312 (2010).

249. *See id.*

it places an added emotional toll on the defendant and other parties to the case. There are significant financial consequences, too: the defendant must pay for additional lawyer's fees, and the state or federal government must bear the cost of a new trial. A mistrial causes hardship to everyone involved in the case except the juror whose misconduct caused it.²⁵⁰ In far too many instances, the court imposes on the juror little more than a slap on the wrist.

There are sanctions in place for jurors who disregard jury instructions. They range from contempt, which can lead to jail time or fines to warnings or dismissal from the jury (which quite often is not a sanction at all!). In a 2012 study, thirty federal judges discussed the actions they took when jurors used social media: nine judges removed the juror from the jury; eight cautioned the juror but allowed him or her to remain.²⁵¹ Only four judges declared a mistrial.²⁵² One held the juror in contempt, and one other fined the juror.²⁵³

The lack of enforcement against jurors who engage in misconduct is low when measured against the greater harm their misconduct can cause. In 2009, California attempted to pass legislation that criminalized juror misconduct in the form of social media use.²⁵⁴ The former § 166(a)(6) of the California Penal Code provided that a juror who is willfully disobedient of a court admonishment related to prohibitions on "electronic or wireless communication or research" was in contempt of court and, therefore, "guilty of a misdemeanor."²⁵⁵ The California Penal Code defines "willfully" as "a purpose or willingness to commit the [proscribed] act It does not require any intent to violate law, or to injure another, or to acquire any advantage."²⁵⁶ Therefore, a court could find any juror who purposefully disobeyed a judge's admonishment against using wireless or electronic devices in the prohibited ways in contempt and, thus, guilty of a misdemeanor.²⁵⁷

250. See *id.* at 306.

251. Steve Eder, *Jurors' Tweets Upend Trial*, WALL ST. J., <https://www.wsj.com/articles/SB10001424052970204571404577255532262181656> (last updated Mar. 5, 2012, 8:10 PM). (noting seven other judges gave an unspecified type of sanction).

252. *Id.*

253. *Id.*

254. Assemb. B. No. 2217, 2009–2010 Leg., Reg. Sess. (Cal. 2009). The bill passed both Houses of the Legislature before being vetoed by the Governor. See *id.*

255. CAL. PENAL CODE § 166(a)(6) (West 2012), amended by Assemb. B. No. 2683, 2013–2014 Leg., Reg. Sess. (Cal. 2014).

256. CAL. PENAL CODE § 7(1) (West 2017).

257. Consistent with this view, the California Legislature enacted Statutes 2011, chapter 181, clarifying that jurors may not use social media and the internet—such

Even without statutory mandates courts have held jurors in contempt. In Oregon, a judge held a juror in contempt after noticing his cell phone glow as it received a text.²⁵⁸ The juror spent the day in jail instead of in a courtroom.²⁵⁹ A Florida judge sentenced a juror to three days in jail after he friended a defendant in a jury trial.²⁶⁰ A North Carolina judge held a juror in contempt and declared a mistrial following discovery that the juror took notes on his phone.²⁶¹ Case law offers many other instances in which sanctions were the remedy of choice.²⁶² There is as of yet no data to show how often

as texting, Twitter, Facebook, and internet searches—to research or disseminate information about cases and can be held in criminal or civil contempt for violating these restrictions. The bill analysis highlighted that “[t]he use of [electronic and wireless] devices by jurors presents an ongoing challenge in preventing mistrials, overturned convictions and chaotic delays in court proceedings. In response, this common sense measure seeks to clarify and codify an informal practice among trial courts to authorize courts to appropriately admonish jurors against the use of electronic and wireless devices to communicate, research, or disseminate information about an ongoing case.” LINDA A. WENDLING, *ETHICS FOR PARALEGALS* 374 (2d ed. 2018) (alterations in original) (citation omitted); see Kimberly Chow, *Chapter 181: The End to Juror Electronic Communications*, 43 MCGEORGE L. REV. 581, 584–86 (2012).

258. *Juror Held in Contempt for Texting During Trial*, NPR (Apr. 19, 2013, 12:15 PM), <https://www.npr.org/2013/04/19/177946415/juror-in-oregon-held-in-contempt-for-texting-during-trial>.

259. *Id.*

260. See Eder, *supra* note 250.

261. Jeff Welty, *Holding Jurors in Contempt for Cell Phone Use*, N.C. CRIM. L. (Jun. 15, 2015, 11:07 AM), <https://nccriminallaw.sog.unc.edu/holding-jurors-in-contempt-for-cell-phone-use/>.

262. See, e.g., *Richey v. McLeod*, 188 So. 228, 229 (Fla. 1939) (fining a juror twenty-five dollars); *Hawkins v. Commonwealth*, No. 2018-CA-001361-MR, slip op. at 10 (Ky. Ct. App. Aug. 14, 2020) (removing a phone from a juror). In one case, a trial judge held a spectator in contempt when her cell phone rang while the court was in session. See *McRoy v. State*, 31 So. 3d 273, 274 (Fla. Dist. Ct. App. 2010). The Florida appellate court reversed the charge, noting that “[c]ontempt is an act tending to embarrass, hinder, or obstruct the court in the administration of justice, or to lessen the court’s authority or dignity.” *Id.* In one federal district court case, the court punished the defendant rather than the juror who committed the misconduct. *United States v. Parse*, 789 F.3d 83, 86 (2d Cir. 2015). In that case, attorneys for the defendant discovered through internet research that one of the jurors had possibly lied during *voir dire*. *Id.* at 86, 94. Rather than alert the court at the time he discovered the juror’s potential misinformation, the defendant’s counsel raised their suspicions after the court found the defendant guilty and the government introduced a letter from the juror at issue, at which point the attorney asked for a mistrial. *Id.* at 94. The court granted the mistrial against the defendant’s co-defendants, none of whom had participated in the concealment, but, knowing that a court would likely reverse the decision, the trial judge did not grant the mistrial for the defendant. *Id.* at 86. The district court concluded that Parse, by not speaking up sooner, had waived his right to a new trial despite not personally knowing of the omission. *Id.* The court

courts declare mistrials due to juror misconduct. One scholar suggests that mistrials due to juror misconduct have decreased in recent years, despite the many opportunities for juror misconduct available during the digital age.²⁶³

Contempt, however, is a harsh punishment, and it may be that its greatest effect is to deter potential jurors from serving on a trial. The sense of civic responsibility for jury duty diminishes with each generation post-WWII, with Gen Z showing the least amount of enthusiasm to the obligation.²⁶⁴ The additional threat of sanctions, contempt, fines, or otherwise is most likely to serve as further impetus for potential jurors to evade their responsibility.²⁶⁵ As Judge Brian Walsh of Santa Clara, California thoughtfully observed, “You want to present the jurors’ obligations to serve as an inviting opportunity to participate in the democratic process One could consider it counterproductive to be laying out all the penalties a juror can incur if they blow it.”²⁶⁶

Where Gen Z jurors are concerned, there is the additional issue of intent. Although intent is not an element of juror misconduct, the juror’s purpose in tweeting or posting their feelings or even location while on jury duty often lacks the goal of undermining defendant’s Sixth Amendment rights.²⁶⁷ Violating a judge’s prohibition against social media use or texting, however, is more akin to a strict liability offense. Merely engaging in the prohibited conduct is wrong in the eyes of the law. For instance, does a juror’s post that reads “another

stated that it “bears noting at the outset that a defendant can waive certain rights through the actions of his attorneys, even if the defendant himself was unaware of the circumstances and actions giving rise to the waiver.” *Id.* at 101 (quoting *United States v. Dagerdas*, 867 F. Supp. 2d 445, 476 (S.D.N.Y. 2012)). The Court of Appeals reversed, granting Parse a new trial. *Id.* at 120.

263. Timothy J. Fallon, Note, *Mistrial in 140 Characters or Less? How the Internet and Social Networking Are Undermining the American Jury System and What Can Be Done to Fix It*, 38 HOFSTRA L. REV. 935, 936, 945 (2010).

264. See Gramlich, *supra* note 184.

265. Sudhin Thanawala, *California Jurors Misusing the Internet Could Face Fines*, AP NEWS (Apr. 24, 2016), <https://apnews.com/article/47a337400517448f8e58b4aba4ce1d41>. Judges are also not beyond reproach. A Suffolk County judge texted prosecutors from the bench and faced sanctions. David M. Schwartz & Andrew Smith, *Suffolk Judge Texted Prosecutors from Bench, Could Face Sanctions*, NEWSDAY (Dec. 8, 2017, 10:29 PM), <https://www.newsday.com/long-island/suffolk/suffolk-judge-recuses-texting-1.15355271>.

266. Thanawala, *supra* note 264.

267. See, e.g., Brayer, *supra* note 25, at 26 (noting jurors use technology primarily as a link to their community); Douglas L. Keene & Rita R. Handrich, *Online and Wired for Justice: Why Jurors Turn to the Internet (the “Google Mistrial”)*, JURYEXPERT (Nov. 1, 2009), <http://www.thejuryexpert.com/2009/11/online-and-wired-for-justice-why-jurors-turn-to-the-internet-the-google-mistrial/>.

day of jury duty, glad it is raining out” mean the juror tweeted about the case? Such tweets fall short of the archetypical forms of misconduct like researching Paxil or driving past the scene of a crime.²⁶⁸

Increased sanctions would be detrimental to our jury system in a way that is different than the presence of smart phones. It would deter future jurors and skew an already skewed system. As one commentator wrote, “Somewhere between our founding fathers and our palm pilots, jury duty became a bad ex-boyfriend—disrupting and better if avoided.”²⁶⁹ Harsh punishments for jurors will only serve to limit the jury pool even further.

V. TRADITIONAL REVIEW IN A MODERN WORLD

Technological threats to juror misconduct do not demand tighter regulatory control. Bans on smart phone use, increased sanctions, or more stringent jury instructions will not remedy the proliferation of smart phone communication among Gen Z jurors. Proposed reforms are more likely to chill juror participation. Going forward, courts must forgive juror smart phone communication generally and only limit such use to instances in which a text, tweet, or post prejudices defendant’s constitutional rights to due process of the law.

Florida’s model jury instructions are similar to most. They prohibit fellow jurors from “communication includ[ing] . . . e-mailing, text messaging, tweeting, blogging, or any other form of communication” about the case.²⁷⁰ Communications about feelings or status are not “communications about the case.” Labeling these innocuous communications as harmful is overreaching and unreasonable.

Gen Z, and indeed members of almost all generational cohorts, communicate differently than in the pre-social media age. In the past, one might have gone home and confided in a parent or partner following a long day of jury duty; today, many citizens vent via more public means.²⁷¹ Today, younger individuals are more likely to use

268. See *Sherman v. Smith*, 89 F.3d 1134, 1135–36 (4th Cir. 1996); *United States v. Morrow*, 412 F. Supp. 2d 146, 164, 167 (D.D.C. 2006); *People v. Wadle*, 77 P.3d 764, 766, 769–70 (Colo. App. 2003).

269. K.B. Battaglini et al., *Jury Patriotism: The Jury System Should Be Improved for Texans Called to Serve*, 35 ST. MARY’S L.J. 117, 120 n.11 (2003) (citation omitted).

270. See *Criminal Jury Instructions Chapter 2: Instructions During the Trial*, *supra* note 72 (Section 2.1 provides this instruction).

271. See Brayer, *supra* note 25, at 26.

social media as their platform of communication.²⁷² Texts like “[a]s if one day of jury duty wasn’t enough smh day 2 I’m soooo over it already!!!!”²⁷³ are innocuous and do not justify granting a mistrial. Gen Z jurors, unlike those of a generation ago, use social media to put into print words that prior jurors spoke to their neighbors or friends.²⁷⁴ A February 2020 New York Times headline proclaimed, “On College Campuses, Social Media Provides Private Spaces for Thousands.”²⁷⁵ The article made clear that today social media posts are akin to face-to-face conversations.²⁷⁶ Professor Katie Davis found Gen Z students have two parallel forms of communication, the face-to-face experience and an experience happening on social media.²⁷⁷ Today, Gen Zers subscribe to social media feeds “that offer them ‘private’ conversations—with thousands.”²⁷⁸

Defining communications about a juror’s status, feelings, or emotions regarding their obligation for jury duty as juror misconduct will place an unnecessary burden on the court system. As the number of Gen Z jurors increases, so, too, will defendants’ demands to dismiss jurors or grant new trials because of juror misconduct due to smart phone communication. Judges must dismiss words that go to the juror’s own emotion or general state of mind as non-prejudicial. The trial judge in the *Neulander* case ruled that texts from a parent reading, “[m]ake sure he is guilty”²⁷⁹ were not sufficient to support a mistrial. The judge correctly observed that

272. *Global Digital Communication: Texting, Social Networking Popular Worldwide*, PEW RSCH. CTR., <https://www.pewresearch.org/global/2011/12/20/global-digital-communication-texting-social-networking-popular-worldwide/> (last updated Feb. 29, 2012). See generally Katie Davis et al., “Everything’s the Phone”: *Understanding the Phone’s Supercharged Role in Parent-Teen Relationships*, 227 CHI 1 (2019) (analyzing the relationship between modern phone use and parent-teenager relationships).

273. *People v. Daily*, No. 1-16-0813, 2018 WL 6920110, at *2 (Ill. App. Ct. Dec. 31, 2018).

274. See Brayer, *supra* note 25, at 28.

275. Laura Pappano, *On College Campuses, Social Media Provides Spaces for Thousands*, N.Y. TIMES, <https://www.nytimes.com/2020/02/20/education/learning/social-media-college.html> (last updated Feb. 21, 2020).

276. See *id.*

277. *Id.*; see also Davis et al., *supra* note 271, at 3–4 (describing different ways technology creates new avenues of communication and topics for families to discuss):

278. Pappano, *supra* note 274.

279. *People v. Neulander*, 80 N.Y.S.3d 791, 795–96 (N.Y. App. Div. 2018) *aff’d*, 135 N.E.3d 302 (N.Y. 2019).

receiving the text did not compromise the juror's impartiality in the case or their respect for the jury system.²⁸⁰

As many courts have noted, "[t]here is no bright line test for determining whether a defendant has suffered prejudice from an instance of juror misconduct."²⁸¹ Judges must continue to weigh juror misconduct against the likelihood that the defendant received an impartial evaluation from the offending juror or jurors.²⁸² Where a defendant asserts harmful error because of juror misconduct via smart phone communication,²⁸³ the judge must continue to apply the long-standing harmful error test, but the judge must do so with a slight modification.

Where social media or texting is at issue, it is incumbent upon judges to conduct a two-pronged review. Judges must first ask whether the text violated the judge's instruction to refrain from smart phone communication. Under this prong, the judge cannot presume that all texting, tweeting, or posting while on jury duty is harmful to defendant's due process rights. Rather, the judge must pay particular attention to whether the challenged communications were "about the case."²⁸⁴ In defining "about the case," judges are cautioned to draw a narrow definition. Only those communications that reflect a juror's inability to remain impartial justify a finding of juror misconduct.

Once judges determine that the offended language could be prejudicial, the judge must then consider whether that information so compromised the juror or his or her fellow jurors as to prevent the defendant from receiving unbiased jury consideration.²⁸⁵ This two-pronged inquiry will weed out those innocuous digital

280. See *id.* at 798 (Smith & Winslow, JJ., dissenting). In overturning the case, the Supreme Court, Appellate Division ruled that conduct beyond mere communication (e.g., lying and outside research) supported its finding. *Id.* at 797.

281. *United States v. Montes*, 628 F.3d 1183, 1188 (9th Cir. 2011) (quoting *Sassounian v. Roe*, 230 F.3d 1097, 1109 (9th Cir. 2000)); *State v. Christensen*, 929 N.W.2d 646, 671 (Iowa 2019) (quoting *Sassounian*, 230 F.3d at 1109).

282. See *Montes*, 628 F.3d at 1188.

283. In instances where a juror Googles a related legal or factual issue or receives news or other information relating to the case from those outside the trial, the Ninth Circuit's four-part test for harmful error due to juror misconduct serves as an ideal mode for evaluating misconduct in the form of Google searches or other electronic research. *Id.* Courts must weigh matters like the extent to which the information was discussed and considered and the point at which the information was introduced. *Id.*

284. See, e.g., *Criminal Jury Instructions Chapter 2: Instructions During the Trial*, *supra* note 72 (Section 2.1 provides this instruction).

285. See *Montes*, 628 F.3d at 1188.

communications that would have been permissible had they occurred in face-to-face conversations.

VI. CONCLUSION

The Harmful Error Test, already in place, seems the most logical response to juror misconduct via social media abuse. Banning cell phones entirely is impractical and ineffective.²⁸⁶ It is unlikely a court will allow a permanent ban during the duration of a trial, and bans while court is in session merely postpone individual smartphone use. Strengthened jury instructions pose a similar problem.²⁸⁷ Most courts already caution against smartphone use. Despite warnings “in the hundreds,” according to the Judge in the *Neulander* case, a juror still engaged in 7,000 communications while court was in session.²⁸⁸ A third option, increasing sanctions, offers the most reasonable route to curtailing juror misconduct,²⁸⁹ but those sanctions would likely have an impact beyond deterring juror misconduct; they would deter individuals from jury duty altogether.

Some argue that the prevalence of smartphones and the ease with which they are used lead to an increase in mistrials.²⁹⁰ Much of the communications shared through text, tweets, and posts, however, are innocuous and are not of the kind that threaten a defendant’s due process rights. It remains the role of a judge to discern between constitutionally threatening and non-threatening digital communications, finding harmful error in those limited instances where the communication goes directly to the jurors’ ability to remain impartial during deliberations.

Fortunately, even in the face of all these changes, pre-internet laws survive and adapt alongside new technologies. Though the threats that infringe defendants’ rights take on new forms, the best way to safeguard those rights remains for courts to apply the harmful error test to instances of juror misconduct.²⁹¹ The presence of new technology demands change; failure to accommodate Gen Z communication will yield a breakdown in our jury system.

286. See *supra* Part IV.A.

287. See *supra* Part IV.B.

288. Nolan, *supra* note 4, at 24.

289. See *supra* Part IV.C.

290. See *supra* Part IV.

291. *Estrada v. Scribner*, 512 F.3d 1227, 1235 (9th Cir. 2008).

