TEXTUAL MISCONDUCT:
WHAT JUROR TEXTING MEANS FOR COURTS

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CONTENTS

INTRODUCTION

People v. Neulander, which was tried in Syracuse, New York, during the spring of 2015, had everything a Hollywood screenwriter would love: a wealthy doctor accused of murder,[1] previously hidden

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1. *Prominent Obstetrician Dr. Robert Neulander Charged with Murdering Wife, Evidence Tampering,* LOCALSYR.COM (June 23, 2014, 9:54 AM), http://www.localsyr.com/

details of a seemingly happy couple's life,[2] conflicting theories of the cause of death (Did she slip in the shower, as he claimed, or was something more sinister afoot?),[3] potential election-year implications for an incumbent district attorney,[4] current and former medical examiners criticizing each other's work,[5] and the attention of a region waiting anxiously to see how the case would turn out. Was it an accident or a homicide? Local television and radio stations, newspapers, and internet media outlets covered the story from seemingly every angle.[6] It even drew the attention of national network primetime newsmagazine shows.[7] Following closing statements, during the four-day jury deliberation, allegations of juror misconduct became the next twist in the story.[8] At the end of deliberations on April 1, 2015, the doctor's defense attorney

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news/prominent-obstetrician-dr-robert-neulander-charged-with-murdering-wife-evidence-tampering.

2. Douglass Dowty, *DA Fitzpatrick: Leslie Neulander Planned to Lease New Apartment the Day Husband Murdered Her*, SYRACUSE.COM (Apr. 6, 2015, 5:40 PM), http://www.syracuse.com/crime/index.ssf/2015/04/da_fitzpatrick_leslie_neulander_planned_to_lease_new_apartment_the_day_husband_m.html.

3. Douglass Dowty, *Dr. Neulander Video Recap: A Nearly 3-Year Saga Summed Up in 2 Minutes*, SYRACUSE.COM (July 30, 2015, 7:46 AM), http://www.syracuse.com/crime/index.ssf/2015/07/dr_neulander_recap_a_nearly_3-year_saga_summed_up_in_2_minutes.html.

4. Douglass Dowty, *Onondaga County DA William Fitzpatrick Will Sail to 7th Term Unopposed*, SYRACUSE.COM (Nov. 3, 2015, 9:45 AM), http://www.syracuse.com/news/index.ssf/2015/11/onondaga_county_da_william_fitzpatrick_sails_to_7th_term_unopposed.html.

5. Douglass Dowty, *Retired Medical Examiner Criticizes Current ME During Neulander Primetime Special*, SYRACUSE.COM (June 18, 2015, 10:05 PM), http://www.syracuse.com/crime/index.ssf/2015/06/retired_medical_examiner_sharply_criticizes_current_me_during_neulanders_datelin.html.

6. As of the time of publication, a general search for "Neulander" on each of the four most prominent Syracuse local media websites returned a total of more than 550 news items. Search Results for Neulander, LOCALSYR.COM, http://www.localsyr.com/ (search in search bar for "Neulander") (last visited Nov. 18, 2016) (*LocalSYR.com* is the website of the local ABC affiliate, and returned 46 results); Search Results for Neulander, SYRACUSE.COM, http://www.syracuse.com (search in search bar for "Neulander") (last visited Nov. 18, 2016) (*syracuse.com* is the Internet counterpart of the city's major newspaper, *The Post-Standard*, and returned 488 results); Search Results for Neulander, TWCNEWS.COM, http://www.twcnews.com/nys/central-ny.html (search in search bar for "Neulander") (last visited Nov. 18, 2016) (*twcnews.com* is a news website run by the local cable provider and returned 33 results). *CNYCentral.com*, the web presence for both the NBC and CBS affiliates in Syracuse, returned only 20 results; however, this number is almost assuredly low because the site was recently redesigned and the search function does not appear to capture all the stories. Search Results for Neulander, CNYCENTRAL.COM, http://cnycentral.com (search in search bar for "Neulander") (last visited Nov. 18, 2016).

7. *48 Hours: The Doctor's Daughter* (CBS television broadcast Oct. 3, 2015); *Dateline NBC: Secrets on Shalimar Way* (NBC television broadcast June 18, 2015).

8. Decision/Order at 1, People v. Neulander, No. 14-0737 (Onondaga Cty. Ct. July 27, 2015).

noticed a previously dismissed alternate juror waiting outside the jury room.[9] When the jury exited the room a few minutes later, he saw the dismissed juror "embrace" one of the sitting jurors and enter into an "animated" conversation with her.[10] The attorney reported this to the judge, who suspended deliberations for the next day and questioned both jurors about their relationship.[11] Satisfied that no misconduct had occurred, the judge ordered the jury to resume deliberations.[12] Finally, on April 2, 2015, the verdict came down, as a jury convicted Dr. Robert Neulander of murdering his wife, Leslie, shaking a family and the upscale Syracuse, New York, suburb of DeWitt to its core.[13]

Dr. Neulander possibly faced twenty years or more in prison, but sentencing was delayed when the defense moved for a new trial based on the grounds of juror misconduct.[14] A hearing took place on July 8, 2015, during which it was revealed that the sitting juror sent and received more than seven thousand text messages during the course of the three-week trial, a few dozen of which were related to the court proceedings.[15] Some were potentially prejudicial, including one from the juror's father at the start of trial saying, "Make sure he's guilty," and another from a friend saying, "I can't believe [the defendant's daughter] is not a suspect."[16] The judge found that the potentially prejudicial texts did not bias the juror's opinion or influence her in the jury room in any way, denied the motion for a new trial, and soon after sentenced the doctor to twenty years to life in a maximum-security prison.[17] His lawyers filed a notice of appeal

9. *Id.* at 7–8.

10. *Id.* at 2.

11. *Id.*

12. *Id.* at 3.

13. Douglass Dowty, *Dr. Neulander Juror Accused of Bias; Lawyer Asks to Throw Out Murder Verdict*, SYRACUSE.COM (May 14, 2015, 11:57 AM), http://www.syracuse.com/crime/index.ssf/2015/05/dr_neulander_juror_accused_of_bias_lawyer_asks_to_throw_out_murder_verdict.html.

14. Decision/Order, *supra* note 8, at 1.

15. Douglass Dowty, *7,000 Texts, a Biased Dad, Gossipy Friends: Enough to Toss Dr. Neulander Verdict?*, SYRACUSE.COM, (July 8, 2015, 2:25 PM), http://www.syracuse.com/crime/index.ssf/2015/07/7000_texts_a_biased_dad_gossipy_friends_enough_to_toss_dr_neulander_verdict.html.

16. *Id.*

17. Douglass Dowty, *Neulander Juror's 'Actions Were Imperfect, Her Intentions Were Pure,' Judge Rules*, SYRACUSE.COM (July 28, 2015, 11:30 AM), http://www.syracuse.com/crime/index.ssf/2015/07/while_neulander_jurors_actions_were_imperfect_her_intentions_were_pure.html [hereinafter *Neulander Juror's 'Actions Were Imperfect but Pure'*]. The juror was also questioned about receiving media alerts and accessing the internet during trial, though the crux of the motion focused on the prejudicial text messages. Decision/Order, *supra* note 8, at 8.

based on the trial court's refusal to grant a new trial.[18]

As *Neulander* demonstrates, the convergence of pretrial media hype, technology distractions, and juror misconduct can threaten the rights of a criminal defendant. The right to a fair trial, guaranteed by the Sixth Amendment of the Constitution of the United States, is one of the cornerstones of our nation's jurisprudence.[19] But in modern times, that traditional value is becoming harder and harder to deliver consistently.

Individually, the issues that converged in this case—trial publicity, potential juror misconduct, and the perils of modern communications—are not new.[20] What is new, however, is the frequency with which they come together, and that confluence is increasingly causing problems for courts. Much of the recent commentary on this issue has focused on jurors obtaining extrajudicial information or communicating with people not involved with the trial through the use of internet and social media resources—*Google*,[21] *Facebook*,[22] *Twitter*,[23] and blogs[24] in particular. However, these sorts of public forums make it somewhat easier to ferret out a juror who is engaging in misconduct. The use of hashtags along with photos and information easily identifying the user allow tracking of this type of misconduct.[25] While internet-based resources are used for

18. Notice of Appeal at 1, People v. Neulander, No. 2014-0737 (N.Y. App. Div. 2d Dep't July 29, 2015). Before the case was seen on appeal, Neulander sought new counsel that then filed a motion before the original trial court to have the verdict overturned. Memorandum of Law in Support of Defendant M. Robert Neulander's Motion to Vacate the Judgment of Conviction Pursuant to C.P.L. § 440.10(H), *Neulander*, No. 14-0737 (Onondaga Cty. Ct. Jan. 22, 2016). On June 27, 2016, the trial court denied the instant appeal for a new trial and a traditional appeal process is underway as of this writing. *See* Decision/Order at 13, *Neulander*, No. 14-0737 (Onondaga Cty. Ct. June 27, 2016).

19. In relevant part, the text of the Sixth Amendment reads, "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." U.S. CONST. amend. VI.

20. All were present in, for example, *Irvin v. Dowd*, 366 U.S. 717 (1961). *See infra* Part II.

21. *See, e.g.*, Thaddeus Hoffmeister, *Google, Gadgets and Guilt: Juror Misconduct in the Digital Age*, 83 U. COLO. L. REV. 409, 422 (2012); J. Brad Reich, *Inexorable Intertwinement: The Internet and the American Jury System*, 51 IDAHO L. REV. 389, 422, 424, 451 n.281 (2015).

22. *See, e.g.*, Marcy Zora, Note, *The Real Social Network: How Jurors' Use of Social Media and Smart Phones Affects a Defendant's Sixth Amendment Rights*, 2012 U. ILL. L. REV. 577, 587 (2012).

23. *See, e.g.*, 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, 943 (2010); Laura Whitney Lee, Note, *Silencing the "Twittering Juror": The Need to Modernize Pattern Cautionary Jury Instructions to Reflect the Realities of the Electronic Age*, 60 DEPAUL L. REV. 181, 184 (2010).

24. *See, e.g.*, Hoffmeister, *supra* note 21, at 432; Fallon, *supra* note 23, at 943–44.

25. Adam S. Nelson, *Tweet Me Fairly: Finding Attribution Rights Through Fair Use in*

behavior that is certainly concerning, the literature has overlooked private messaging, a medium whose ubiquity and ease of use poses even greater risk to the fairness of future court proceedings.[26]

As this Note will illustrate, text messaging ("texting") is poised to become the newest frontier in the battleground between freedom and fairness. Texting presents a unique problem for courts. Like other forms of communication, texting allows instant access to a variety of influencers from a wide range of geographic places and of various relationships to the juror.[27] Unlike some of the other media, texting is a private communication method that is harder to monitor; is more likely to be with a trusted, influential outside source, thus increasing the risk of prejudice; and can be done more discreetly without others finding out.[28]

This Note will explore the inherent conflicts presented when a smartphone-enabled juror sends and receives text messages during trial and why courts should prepare to face this problem more frequently in the near future. Part I of this Note will discuss the basic standards for juror misconduct and why it is so difficult to monitor and prevent. Part II will examine the history of technology in the courtroom and the concessions that courts have made over time to attempt to ensure defendants' rights to fair trials while simultaneously accommodating public access, freedom to disseminate news, and advances in technology. Part III will explain what texting is and how the technology, along with the rise of citizen journalism and microblogging, enables jurors and other court observers to report on the happenings at a trial. Part IV will analyze courts' historical responses to juror misconduct and how the *Neulander*

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the Twittersphere, 22 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 697, 707 (2012) ("[T]he hashtag symbol [is] used to indicate that a tweet refers to a particular topic and to allow for searchability by topic.").

26. Only 59 search results are returned from a *Westlaw* search of law reviews and journals using the terms "(text +1 message) & (juror +1 misconduct)" without quotations, as of the time of publication. Search Results for Articles on Juror Misconduct and Text Messaging, WESTLAW, https://1.next.westlaw.com/Search/Home.html (follow "Secondary Sources" hyperlink under "All Content"; then follow "Law Reviews & Journals" hyperlink under "By Type"; then search in search bar for "(juror +1 misconduct) & (text +1 message)" without quotation marks) (last visited Nov. 18, 2016). The vast majority of articles that talk about text messages at all are about telemarketing, privacy, or texting while driving statutes. Meanwhile, a similar search for "(internet) & (juror +1 misconduct)" returns 239 results. Search Results for Articles on Internet Use and Juror Misconduct, WESTLAW, https://1.next.westlaw.com/Search/Home.html (follow "Secondary Sources" hyperlink under "All Content"; then follow "Law Reviews & Journals" hyperlink under "By Type"; then search in search bar for "(internet) & (juror +1 misconduct)" without quotation marks) (last visited Nov. 18, 2016).

27. *See* Tracy McVeigh, *The Text Message Turns 20*, GUARDIAN (Dec. 1, 2012, 11:22 PM), https://www.theguardian.com/technology/2012/dec/01/text-messaging-20-years.

28. *See infra* notes 177–92.

case might be decided on appeal. Part V provides reasons that the texting-related misconduct present in the *Neulander* trial will soon become much more common and why the judiciary must be prepared to confront this issue more frequently. Texting is a private, one-on-one communication with someone the texter trusts and is difficult to prevent. Texting-related misconduct is about to become the courts' next frontier in the quest to ensure defendants' rights.

I. JUROR MISCONDUCT DEFINED

Juror misconduct is not a new concept in the law,[29] and yet the definition remains surprisingly unsettled. Generally speaking, a finding of juror misconduct requires only a showing of juror behavior that exhibits "substantial prejudice to a criminal defendant."[30] Misconduct covers "a wide range of occurrences, from the trivial to the serious, and from matters personal to one juror to objective acts engaged in by several jurors."[31] The commonly accepted definition is limited to "situations in which the juror intentionally performed the act in question, regardless of whether the juror specifically knew that the particular act was improper."[32]

There is not, however, a uniform statement of the exact proof of prejudice that must be shown.[33] The trial court is vested with broad discretion in determining whether a juror's actions were prejudicial, and "the presence or absence of prejudice necessarily depends on the particular facts of the case, . . . [and] must be determined largely on the basis of its own circumstances."[34] Among the factors the courts consider are the particular type of misconduct involved, the type of case (criminal or civil), the cumulative effect of any other incidents of misconduct within the same case, where the conduct occurred (inside or outside the courtroom), and whether the misconduct was particular to one juror or affected the whole jury.[35]

Examples of juror misconduct include seeking extrajudicial information, improper communication with outside parties, and

29. Juror misconduct is ingrained enough and occurs frequently enough that it was contemplated by the framers of the Federal Rules of Evidence, which were adopted in 1975. *See* FED. R. EVID. 606(b).

30. 75B AM. JUR. 2D *Trial* § 1301 (2007).

31. 24 AM. JUR. PROOF OF FACTS 2D *Jury Misconduct Warranting New Trial* § 1 (1980).

32. 24 *Id.*

33. 24 *Id.* § 2. *See also* 105 N.Y. JUR. 2D *Trial* § 468 (2015) ("No ironclad rule concerning juror misconduct has been formulated . . . .").

34. 24 AM. JUR. PROOF OF FACTS 2D, *supra* note 31, § 2.

35. 24 *Id.* §§ 2–3.

inappropriate interaction with court personnel or other jurors.[36] Specific to juror misconduct based on communications with a person unconnected to the case, which is the primary concern of this paper, some courts have established a rebuttable presumption of prejudice.[37] That presumption is applied more stringently in a criminal case than in a civil case.[38]

A finding of juror misconduct may result in a mistrial, although it often does not.[39] Generally, "[t]he mere fact that a juror and a third person engaged in some social intercourse during the progress of a trial ordinarily will not support a new trial."[40] For example, one report noted that three-quarters of juror misconduct challenges found that misconduct did occur, but did not result in new trials because the misconduct did not prejudice the juror against the defendant.[41] Therefore, a finding of misconduct is not enough; the key is to somehow show that the misconduct influenced the particular juror's thinking.[42]

Recognizing juror bias and outside influence is not easy. Deliberations are kept secret, and, even if they weren't, a juror's personal opinions are totally subjective.[43] As one researcher has noted, every juror "has a unique life outside the courtroom that influences the way he or she will view the issues during trial."[44] The best way to try to identify juror bias is during voir dire, which is not foolproof either.[45] Potential jurors often say that they can maintain an open mind, and, strangely, this may be both true and false. One study, for example, claims that most jurors cannot make such a promise because jurors are generally unaware of their

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36. LILLIAN B. HARDWICK & B. LEE WARE, JUROR MISCONDUCT: LAW & LITIGATION 6-1, 7-2 to -3 (1989).

37. 24 AM. JUR. PROOF OF FACTS 2D, *supra* note 31, § 8.

38. *See* Remmer v. United States, 347 U.S. 227, 229 (1954) (citing Mattox v. United States, 146 U.S. 140, 148–50 (1892)) ("In a criminal case, any private communication . . . with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial . . . . [T]he burden rests heavily upon the Government to establish, after notice to and hearing of the defendant, that such contact with the juror was harmless to the defendant.").

39. 75B AM. JUR. 2D, *supra* note 30, § 1302.

40. 24 AM. JUR. PROOF OF FACTS 2D, *supra* note 31, § 8.

41. Reich, *supra* note 21, at 394.

42. HARDWICK & WARE, *supra* note 36, at 7-1 to -2 ("[W]hat constitutes actual influence from extraneous sources depends in large part on the source and the extent to which the trial judge investigates potentially influencing events or provides a record for their review.").

43. JEFFREY T. FREDERICK, MASTERING VOIR DIRE AND JURY SELECTION 14 (2011) ("Opinions that jurors hold are shaped by numerous events and experiences in their lives. . . . [J]urors' experiences influence their opinions, beliefs and values.").

44. RICHARD WAITES, COURTROOM PSYCHOLOGY AND TRIAL ADVOCACY 39 (2003).

45. *See* FREDERICK, *supra* note 43, at 2 (discussing the goal of jury selection is to select an impartial jury where the parties attempt to prevent having jurors with bias or prejudice against the clients).

own preexisting prejudices.[46] Despite this, research also tends to show "that juries almost always vote with the evidence when it clearly favors a particular verdict," indicating that jurors are capable of leaving aside any pretrial biases that do exist.[47]

II. HISTORY OF CONFLICT BETWEEN COURTROOM COMMUNICATIONS AND THE FAIR TRIAL RIGHT

Concern about juror bias has manifested itself differently throughout time. "The legal community has long questioned whether a defendant can receive a fair trial in the face of pervasive publicity about the crime."[48] Indeed, the conflict between a defendant's right to a fair trial and the First Amendment guarantees of freedom of speech and freedom of the press have been confounding courts in the United States for centuries.[49] In the words of the Supreme Court, "[I]t is inconceivable that the authors of the Constitution were unaware of the potential conflicts between the right to an unbiased jury and the guarantee of freedom of the press."[50]

One of the first famous cases where the potential for jury bias cast suspicion over the fairness of a defendant's trial was the matter of Aaron Burr, who was tried for treason in 1807.[51] In selecting the jury for that case, Chief Justice John Marshall set an early standard by saying a juror was impartial if "free from the dominant influence of what was heard or read outside the courtroom. If jurors were able to base a decision on the testimony offered, the trial was not tainted by prejudice."[52] That standard for the definition of juror impartiality remains essentially the same today.[53] As the Supreme Court said in *Murphy v. Florida*, qualified jurors are allowed to have awareness of the case as long as they are not extrinsically influenced.[54]

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46. JEFFREY T. FREDERICK, THE PSYCHOLOGY OF THE AMERICAN JURY 29 (1987) ("Only 26% of those exposed to damaging pretrial publicity recognized their biases.").

47. SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES 208 (1988).

48. T. BARTON CARTER, MARC A. FRANKLIN, & JAY B. WRIGHT, THE FIRST AMENDMENT AND THE FOURTH ESTATE 498 (8th ed. 2001).

49. Bruce W. Sanford, *No Contest*, *in* COVERING THE COURTS: FREE PRESS, FAIR TRIALS & JOURNALISTIC PERFORMANCE 3, 3 (Robert Giles et al., eds., 1999).

50. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 547 (1976).

51. *Id.* at 548 ("The trial of Aaron Burr . . . presented . . . acute problems in selecting an unbiased jury.").

52. CARTER, FRANKLIN, & WRIGHT, *supra* note 48, at 498.

53. *See supra* notes 30–38.

54. 421 U.S. 794, 799–800 (1975) ("The constitutional standard of fairness requires that a defendant have 'a panel of impartial, "indifferent jurors."' Qualified jurors need not, however, be totally ignorant of the facts and issues involved.") (quoting Irvin v. Dowd, 366 U.S. 717, 722 (1961)).

A. The Effect of Pretrial and Trial Publicity

The concern over a defendant's right to a fair trial came into the forefront as new methods of communication became more prevalent in American life.[55] As news organizations began to cover courtroom proceedings more extensively, the scrutiny on juror bias intensified.[56] Rightly so, as research shows that "[j]urors and other fact finders tend to believe news reports unless there exists some fundamental reason to mistrust them."[57] Pretrial information has been found to influence jurors' evaluation of a litigant's likability, sympathy for a litigant, perception of culpability, and final decision.[58]

Perhaps sensing the potential for bias, the Supreme Court began confronting the effects of pretrial publicity with some regularity in the 1960s.[59] The first such case was *Irvin v. Dowd*, where serial killer Leslie Irvin was granted a new trial because a "pattern of deep and bitter prejudice" after his confession was widely publicized and caused a Sixth Amendment violation of his right to a fair trial.[60]

Two years later, the Supreme Court overturned the conviction of Wilbert Rideau, who had been arrested for bank robbery, kidnapping, and murder.[61] The sheriff allowed a television station to televise his interrogation of Rideau, during which Rideau confessed.[62] The broadcast was believed to have reached, at a minimum, one-third of the local population, potentially influencing the jury pool.[63] Rideau was, perhaps not surprisingly, thereafter convicted and given a death sentence.[64] In reversing his conviction, the Supreme Court noted that, following his televised confession, "[a]ny subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality."[65]

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55. CARTER, FRANKLIN, & WRIGHT, *supra* note 48, at 497.

56. *Id.*

57. WAITES, *supra* note 44, at 256.

58. *See id.* at 252–53 (discussing the influences of pretrial publicity on jury verdicts).

59. *See generally Irvin*, 366 U.S. at 719–21, 728 (vacating and remanding the Seventh Circuit's decision to sentence the defendant to death due to pretrial publicity and the court's failure to change the venue for the defendant, which violated his Sixth Amendment right).

60. *Id.* at 719, 725, 727–28 (citing Stroble v. California, 343 U.S. 181, 192–95 (1952)). In the retrial, Irvin was convicted again. *Leslie Irvin, Murderer In a Landmark Ruling*, N.Y. TIMES (Nov. 12, 1983), http://www.nytimes.com/1983/11/12/obituaries/leslie-irvin-murderer-in-a-landmark-ruling.html.

61. Rideau v. Louisiana, 373 U.S. 723, 724–25, 727 (1963).

62. HARDWICK & WARE, *supra* note 36, at 8-2.

63. *See id.*

64. *Id.*

65. *Rideau*, 373 U.S. at 726.

After these initial forays into the issue of how technology—broadcast media technology specifically—could affect a defendant's trial rights, the Supreme Court again faced the issue a few years later in the famous case *Sheppard v. Maxwell*.[66] Many people believe that the facts of this case, in which a prominent Cleveland doctor was accused of murdering his wife despite his proclamations of innocence, were dramatized for both television and cinema as "The Fugitive," although that may be more urban myth than fact.[67] Either way, when the case came to trial, it garnered heavy public interest and was highly publicized in the news media.[68] Sheppard was convicted and sent to prison.[69] After spending twelve years in jail, he filed a writ of habeas corpus claiming his constitutional rights had been violated at trial.[70] The district court agreed and granted the writ, but the circuit court overturned.[71] The Supreme Court reversed the circuit court and remanded the case to the district court to grant the writ; subsequently, the state recharged the defendant and placed him on trial again.[72] In the words of the Court, "[B]edlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom. . . . [T]he judge lost his ability to supervise that environment."[73] The crux of the Court's concern was stated in another part of its opinion, where it condemned the news media for broadcasting information that "was never heard from the witness stand" and said that "the newspapers summarized and interpreted the evidence, devoting particular attention to the material that incriminated Sheppard, and often drew unwarranted inferences from testimony. . . . [There is no] doubt that this deluge of publicity reached at least some of the jury."[74] Driving home the message, the Court stated the key point that has made the subsequent technology cases problematic: "Due process requires that the accused receive a trial by an impartial jury free from outside

66. 384 U.S. 333, 335 (1966).

67. *Lawyer: New DNA Tests Point to Killer in Sheppard Case*, CNN (Mar. 5, 1998, 3:33 PM), http://www.cnn.com/US/9803/05/sheppard.case. *But see* Jonathan L. Entin, *Being the Government Means (Almost) Never Having to Say You're Sorry: The Sam Sheppard Case and the Meaning of Wrongful Imprisonment*, 38 AKRON L. REV. 139, 140 n.7 (2005) (explaining that the plot was first created for a Western).

68. PAUL SIEGEL, COMMUNICATION LAW IN AMERICA 295 (4th ed. 2014).

69. *Id.*

70. *Sheppard*, 384 U.S. at 335; SIEGEL, *supra* note 68, at 295.

71. *Sheppard*, 384 U.S. at 335; SIEGEL, *supra* note 68, at 295.

72. *Sheppard*, 384 U.S. at 363. *See also* Symposium, *Toward More Reliable Jury Verdicts?: Law, Technology and Media Development Since the Trials of Dr. Sam Sheppard*, 49 CLEV. ST. L. REV. 385, 386 (2001).

73. *Sheppard*, 384 U.S. at 355.

74. *Id.* at 356–57.

influences."[75]

Following *Sheppard*, many lower courts, fearful of creating a media frenzy, began to order the press not to report information that it obtained about certain cases.[76] Commonly known as gag orders, the Court addressed what it referred to as "prior restraint" of the press in 1976.[77] In *Nebraska Press Ass'n v. Stuart*, the Court said that "pretrial publicity[,] even pervasive, adverse publicity does not inevitably lead to an unfair trial."[78] The Court then outlined a three-part test to determine if a prior restraint on publication is justifiable.[79]

While *Nebraska Press Ass'n v. Stuart* gave the press certain rights to report on trials, courts found the test hard to apply, and many found the only truly effective means to prevent pretrial and trial publicity was to ban the press and the public from proceedings altogether.[80]

The Supreme Court struck down this practice in *Richmond Newspapers, Inc. v. Virginia*.[81] The Court said, "[A] presumption of openness inheres in the very nature of a criminal trial under our system of justice,"[82] and encouraged trial judges to "explore alternative solutions that preserve fairness before excluding the media and public from the courtroom."[83]

With these precedents in place, courts have attempted to strike a balance among allowing news operations to do their jobs freely, allowing the public to attend and disseminate information, and yet prevent that information from influencing a jury.

B. Technology in the Courtroom

Pretrial publicity and media coverage are not the only barriers to a defendant's right to a fair trial. As different types of technology have evolved, courts have been forced to evolve as well. As two scholars stated, "[T]he law of mass communications is continually overtaken by technological changes that confound those who attempt to contain its

75. *Id.* at 362.

76. Sanford, *supra* note 49, at 5.

77. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 556 (1976).

78. *Id.* at 554.

79. *Id.* at 562. The Court states a restraint must be evaluated on "(a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate [any harm from] publicity, and (c) how effectively a restraining order would [prevent the harm]." *Id.*

80. CARTER, FRANKLIN, & WRIGHT, *supra* note 48, at 520.

81. 448 U.S. 555, 581 (1980).

82. *Id.* at 573.

83. Emily Ittner, *Technology in the Courtroom: Promoting Transparency or Destroying Solemnity?*, 22 COMMLAW CONSPECTUS 347, 350 (2014).

dimensions."[84] The most common conflicts have historically arisen as a result of cameras in the courtroom. Throughout the 1930s, the Supreme Court reversed convictions of several high-profile defendants after finding that cameras had "'physically and psychologically' disrupted the proceedings."[85] The Court used similar reasoning to reverse a conviction in its first decision addressing the use of television cameras in court, *Estes v. Texas*.[86] The Court identified four major reservations about allowing cameras in courts: (1) intense publicity could influence jurors to match public opinion; (2) the effect on accuracy and quality of testimony, as some witnesses may be more hesitant to speak freely in the presence of a camera; (3) the burden on judges to manage proceedings fairly; and (4) the unknown impact on defendants.[87] The *Estes* court was sharply divided, and limited its holding to only analyzing "the effect of television on trials as the technology existed at that time."[88] In a prescient piece of writing, the Court foresaw the potential for less-invasive technologies, saying, "[W]e are not dealing here with future developments in the field of electronics. Our judgment cannot be rested on the hypothesis of tomorrow but must take the facts as they are presented today."[89]

The Court revisited the issue in the landmark case of *Chandler v. Florida*, and reversed course to say that allowing cameras in the courtroom does not automatically violate a defendant's right to a fair trial.[90] *Chandler* said that cameras had not actually prejudiced the trial, and the mere possibility that they might do so is not enough, from a constitutional perspective, to prohibit them.[91] Further, the *Chandler* decision essentially gave states the green light to experiment with cameras and see what they were willing to tolerate as acceptable.[92]

As forecasted by the *Estes* court, broadcasting technology has subsequently become less invasive, as cameras have become pocket-sized, quieter and easier to transport,[93] but cameras in courtrooms remain

84. Daniel L. Brenner & William L. Rivers, Free but Regulated: Conflicting Traditions in Media Law 4 (1982).

85. Ittner, *supra* note 83, at 353 (quoting Cathy Packer, *Should Courtroom Observers Be Allowed to Use Their Smartphones and Computers in Court? An Examination of the Arguments*, 36 Am. J. Trial Advoc. 573, 583–84 (2013)).

86. *Id.*

87. Estes v. Texas, 381 U.S. 532, 545–49 (1965).

88. Ittner, *supra* note 83, at 353, 355.

89. *Estes*, 381 U.S. at 552.

90. 449 U.S. 560, 574–75 (1981).

91. *Id.* at 581.

92. *Id.*

93. Manny Medrano, an "attorney and former television reporter," said, "Cellphones going off are a hundred times more disruptive than cameras, which these days are so quiet

generally frowned upon, especially in criminal cases.[94] The judiciary continues to wrestle with what technologies to permit in the courtroom—some courts ban smartphones[95] while others provide wireless internet networks[96]—and the speed of changing technology has, for the most part, kept courts behind the curve in responding.

III. THE INFORMATION TEMPTATION AND HOW TEXTING FITS IN

Modern technologies have the potential to wreak havoc on the notion of an impartial jury.[97] The proliferation of the internet and handheld smart devices generally have brought the issue of juror impartiality to the academic forefront in recent years.[98] Most of the concern about juror internet usage is rooted in the potential for exposing a juror to outside influences.[99] While this is certainly a valid concern, the internet is not the only potentially dangerous exposure source resulting from modern technology.[100] In particular, texting is its own distinct communication method that presents unique concerns.

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you barely know they are there." Michael Tarm, *Ringing Prompts Phone Ban at Hudson-Related Trial*, YAHOO NEWS (May 2, 2012), https://www.yahoo.com/news/ringing-prompts-phone-ban-hudson-related-trial-232110706.html.

94. *See* FED R. CRIM. P. 53 ("Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.").

95. *See, e.g.*, In the Matter of Courthouse Security and Limitations on the use of Electronic Devices, General Order No. 26 (N.D.N.Y. May 23, 2016) [hereinafter General Order No. 26] ("No one other than court officials and officers of the court engaged in the conduct of court business shall bring any cameras, video cameras, recording equipment, dictaphones, pagers, smart phones, personal data assistants (PDA's), tablet devices and computers into courtrooms.").

96. Press Release, Superior Court of Cal., San Diego Superior Court Offers Jurors Complimentary WiFi Access (Jan. 27, 2010).

97. Fallon, *supra* note 23, at 937; *see also* CARTER FRANKLIN, & WRIGHT, *supra* note 48, at 497 ("[F]or several centuries, the courts have insisted that jurors be impartial. This has not meant that they must be totally ignorant of the events in their community, but, rather, that they be willing and able to reach a verdict solely on the basis of the evidence presented at the trial.").

98. *See* Eric P. Robinson, *The Wired Jury: An Early Examination of Courts' Reactions to Jurors' Use of Electronic Extrinsic Evidence*, 14 FLA. COASTAL L. REV. 131, 132–33 (2012).

99. *Id.* at 132.

100. *See* Sarah Moses, *Neulander Case Shows Perils of Texting During Jury Duty*, SYRACUSE.COM (July 10, 2015, 1:39 PM), http://www.syracuse.com/crime/index.ssf/2015/07/expert_jurors_must_disconnect_from_smartphones_during_trials.html (citing examples of mistrials declared after jurors used smart devices to email and tweet during their trials).

A. Texting as a Medium

The official name for "texting" is Short Message Service, or SMS.[101] The technology was developed in a European corporation in 1984 by Friedhelm Hillebrand and Bernard Ghillebaert.[102] SMS was designed as a way to send messages between mobile phones when the recipient was out of range or did not have the device on.[103] The message would be stored and then delivered to the recipient when she turned her device back on or came back into range.[104] Text messages are limited to 160 characters, a length that was chosen somewhat arbitrarily.[105] The developers determined that "[b]ecause of tight bandwidth constraints of the wireless networks at the time—which were mostly used for car phones—each message would have to be as short as possible."[106] They typed some representative sentences for the messages they expected users to send to each other, and almost all of them measured somewhere around 160 characters.[107]

Over the years, texting has exploded to become one of the most popular forms of communication in the United States.[108] As of October 2015, sixty-eight percent of Americans owned a smartphone.[109] Texting is the most widely and frequently used smartphone feature.[110] Ninety-seven percent of smartphone owners text at least once a week, and users are more likely to have texted "in the past hour" than to have used email or voice features in that time.[111] While texting is commonly believed to be an activity associated with teenagers, almost as many adults do it,

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101. Christine Erickson, *A Brief History of Text Messaging*, MASHABLE (Sept. 21, 2012), http://mashable.com/2012/09/21/text-messaging-history/.

102. *Id.*

103. Jennifer Hord, *How SMS Works*, HOWSTUFFWORKS: TECH, http://computer.howstuffworks.com/e-mail-messaging/sms.htm (last visited Nov. 18, 2016).

104. *Id.*

105. Mark Milian, *Why Text Messages Are Limited to 160 Characters*, L.A. TIMES: TECH. BLOG (May 3, 2009, 1:28 PM), http://latimesblogs.latimes.com/technology/2009/05/invented-text-messaging.html.

106. *Id.*

107. *Id.*; *see* Spiral, *From Verizon Text FAQ's: How Many Characters Can I Receive in My Text Messages?*, Comment to *What is The Maximum Length of Text Message?*, VERIZON (May 24, 2011, 4:44 PM), https://community.verizonwireless.com/thread/537870. Even today, a true SMS message is limited to 160 characters, which is why long messages are often broken up into multiple messages when received. Messaging services that allow longer messages to be sent between cellphones are technically using a different technology. *Id.*

108. Milian, *supra* note 105.

109. Monica Anderson, *Technology Device Ownership: 2015*, PEW RES. CTR. (Oct. 29, 2015), www.pewinternet.org/2015/10/29/technology-device-ownership-2015/.

110. AARON SMITH, U.S. SMARTPHONE USE IN 2015 8, 33 (2015).

111. *Id.*

though not as frequently.[112]

B. Temptations for Court Observers

The nature of texting as a medium creates the potential for it to affect a defendant's Sixth Amendment right to a fair trial.[113] As described above, texting is a smartphone-driven method of communication.[114] A smartphone in court gives observers of the proceedings an easy avenue to create distractions.[115] The ease of doing so, along with the increase in citizen journalism[116] over the last decade or so, has given more people the desire to participate in the newsgathering process, and the ability to break news as fast or faster than traditional reporters because it comes from people involved in the event.[117] Court proceedings are open to the public and, thus, are prime events for citizen journalists to cover.[118] Different courts have different rules about whether or not smartphones may be brought into courtrooms.[119] Even if the general public is not allowed to possess cellphones in the courtroom, the press can be given exceptions to report on the proceedings, opening the door to possible distractions.[120] The temptation to share knowledge is especially great when the case involves a celebrity, since the public's thirst for knowledge and details of

112. *Id.* at 33 ("For example, 100% of 18–29 year old smartphone owners used text messaging at least once over the course of the study, but so did 92% of those 50 and older.").

113. Michael Tarm, *Judges, Journalists Clash Over Courtroom Tweets*, ASSOCIATED PRESS NEWS SERV. (Apr. 17, 2012), *reprinted in* ACCESS WORLD NEWS, http://infoweb.newsbank.com/resources/doc/nb/news/13E39F25E0F66290?p=AWNB (last visited Nov. 18, 2016).

114. SMITH, *supra* note 110, at 8, 33 (2015); *see also* Tarm, *supra* note 113.

115. Tarm, *supra* note 113.

116. Citizen journalism is "[w]hen the people formerly known as the audience employ the press tools they have in their possession to inform one another." Jay Rosen, *A Most Useful Definition of Citizen Journalism*, PRESSTHINK (July 14, 2008), http://archive.pressthink.org/2008/07/14/a_most_useful_d.html.

117. *See Amateur Journalists Create Jobs for Professional Ones*, ECONOMIST (June 1, 2013), http://www.economist.com/news/international/21578662-amateur-journalists-create-jobs-professional-ones-foreign-correspondents (arguing that although initially ridiculed, citizen journalists have gained a measure of respect from professional journalists, particularly in times of civil unrest).

118. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 (1980) ("Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public.").

119. *Compare* MD. R. 16-208 (stating that electronic devices such as cell phones, cameras, personal computers, and other such devices may be brought into a court facility), *with* General Order No. 26, *supra* note 95 ("No one other than court officials and officers of the court engaged in the conduct of court business shall bring any cameras, video cameras, recording equipment, dictaphones, pagers, smart phones, personal data assistants (PDA's), tablet devices and computers into courtrooms.").

120. *See* Tarm, *supra* note 113.

the event is highest.[121]

C. Temptations for Jurors

Beyond the obvious distraction concerns, a connected courtroom can also affect the proceedings—and a defendant's Sixth Amendment right to a fair trial—themselves in a more concrete way. Connected jurors are commonly using technology for a number of purposes that threaten the sanctity of the impartial juror.[122] Among the most common infractions by jurors are (1) looking up unfamiliar legal definitions on the internet;[123] (2) using internet-based mapping software such as *MapQuest* or *Google Earth* to download a photo of a location being discussed at trial;[124] (3) finding news articles about the case;[125] (4) seeking out parties,[126] witnesses,[127] or other trial participants online;[128] and (5) using blogs[129] or social media to report on goings-on in the courtroom[130] or deliberation room.[131] Of course, jurors have engaged in similar types of improper behavior using traditional media as well, so the internet-based types of misconduct are simply just an extension of all the traditional ways that a

121. *See* Ittner, *supra* note 83, at 360–61 ("[D]uring the 2012 trial of Dr. Conrad Murray for the involuntary manslaughter of Michael Jackson, a judge permitted tweeting, and one local news station sent out nearly 1900 tweets to 3000 eager followers."); *see also* Julia Zorthian, *How the O.J. Simpson Verdict Changed the Way We All Watch TV*, TIME (Oct. 2, 2015), http://time.com/4059067/oj-simpson-verdict/ (discussing how fifty-seven percent of the country watched the verdict on live television).

122. Ittner, *supra* note 83, at 359.

123. Hoffmeister, *supra* note 21, at 418.

124. *Id.* at 412 n.10 (citing Robert Verkalik, *Collapse of Two Trials Blamed on Jurors' Own Online Research*, INDEPENDENT (Aug. 19, 2008), http://www.independent.co.uk/news/uk/home-news/collapse-of-two-trials-blamed-on-jurorsrsquo-own-online-research-902892.html).

125. Robinson, *supra* note 98, at 150 ("[A judge] removed a juror who had researched the case online.").

126. Zora, *supra* note 22, at 584 ("[O]ne juror researched the defendant on the Internet and informed other jurors about his research.").

127. Fallon, *supra* note 23, at 941.

128. *See, e.g.*, United States v. Ganias, 755 F.3d 125, 128 (2d Cir. 2014) (discussing how a juror posted comments about jury service and "friended" another juror on social networking site during service).

129. *Compare, e.g.*, People v. McNeely, No. D052606, 2009 Cal. App. Unpub. LEXIS 1402, at *2 (Cal. Ct. App. Feb. 23, 2009) (finding no juror prejudice as a result of juror writing about case on his personal blog), *with* State v. Cecil, 655 S.E.2d 517, 520–21, 526–27 (W. Va. 2007) (finding misconduct warranted reversal of conviction when jurors went to and discussed content on website at issue in sexual abuse case).

130. *See, e.g.*, United States v. Fumo, 655 F.3d 288, 298 (3d Cir. 2011) (discussing how a juror posted messages about trial on *Facebook* and *Twitter*).

131. Lee, *supra* note 23, at 198–99.

juror could violate his duty of secrecy.[132] Digital communication, however, exacerbates the issue because of the ease with which such transgressions can occur.[133]

IV. How Courts Respond to Juror Texting

Courts historically have tried a number of practices to combat juror misconduct, including imposing penalties on the juror, banning electronic devices, sequestration, updating jury instructions, and more.[134] When it comes to internet-related conduct, most scholars agree that courts need to do a better job of being proactive and being more specific with jurors about what their expectations are.[135] Other measures proposed in the literature that would conceivably curb jurors' internet use—improved jury instructions, sequestration, a complete ban on electronic devices—may also work when applied to address texting as well, but, as noted above, it does not appear to this point that juror texting has captured the courts' attention to the extent that juror use of internet and social media resources has.[136]

A *Westlaw* search of all federal and state court cases using the search term "juror misconduct & text messaging" yielded only 191 cases.[137] A search of the Second Circuit and New York State revealed only two cases, prior to *Neulander*, where an allegation of juror misconduct arose from texting.[138]

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132. Robinson, *supra* note 98, at 136 ("[J]urors have obtained information about cases from sources such as telephone conversations, dictionaries, and personal visits to relevant locations.").

133. Zora, *supra* note 22, at 582 ("Due to technology, jurors can more readily obtain outside information and share real-time information. . . . Instantaneous communication . . . has further complicated the issue of juror impartiality.").

134. Robbie Manhas, *Responding to Independent Juror Research in the Internet Age: Positive Rules, Negative Rules, and Outside Mechanisms*, 112 Mich. L. Rev. 809, 815–16, 820, 822–23 (2014).

135. Fallon, *supra* note 23, at 956; Lee, *supra* note 23, at 208.

136. *See supra* note 26.

137. Search Results for Cases on Juror Misconduct and Text Messaging, Westlaw, https://1.next.westlaw.com/Search/Home.html. (follow "Cases" hyperlink under "All Content"; then search in search bar for "(juror +1 misconduct) & (text +1 message)" without quotation marks) (last visited Nov. 18, 2016). Of those 191 cases, only a fraction involved texting as a form of juror misconduct, whereas most referred to text messages as part of the evidence that was presented against the originally accused party, not against the juror. *Id.*

138. The search returned eleven cases, but nine of the eleven cases involved text messages not connected to the juror misconduct allegations. Search Results for Cases on Juror Misconduct and Text Messaging in the Second Circuit and New York State, Westlaw, https://1.next.westlaw.com/search/home.html (follow "Cases" hyperlink under "All Content"; follow "All State & Federal" hyperlink next to search bar; select both "New York" and "2nd Circuit"; follow "Save" hyperlink; search in search bar for "(juror +1 misconduct)

In *People v. Giarletta*, a child endangerment case, Juror No. 9 received a text message from her sister, which in essence stated that a trial witness was definitely telling the truth.[139] It was alleged that Juror No. 9 shared the substance of the message with the other jurors during deliberations, impugning the partial conviction of the defendant.[140] At an evidentiary hearing regarding the text message, two of the other jurors were "emphatic" that Juror No. 9 did not share the information until after the jury had reached a partial verdict.[141] A third juror testified that Juror No. 9 did "add information during deliberations that was not in evidence at trial," but could not remember the timing or source of such information.[142] Juror No. 9 herself admitted sharing the information but only after the verdict.[143] Based on this record, the trial court held that the misconduct did not create a substantial likelihood of prejudice because it likely occurred after the verdict was rendered.[144] The Second Department, however, reversed and ordered a new trial, saying without more explanation that "the misconduct here created a significant risk that a substantial right of the defendant was prejudiced."[145]

In *United States v. Nieves*, a defendant convicted of murder, racketeering, and drug and weapons possession requested a new trial in the Eastern District of New York based on a post-trial encounter between the defense attorney and Juror No. 11 during which Juror No. 11 "expressed his concerns that members of the jury . . . had sent cell phone text messages to alternate jurors during deliberations."[146] The court held an evidentiary hearing, at which Juror No. 11 testified that he had "heard one juror suggest that a text message be sent to an alternate juror," but had no knowledge if such a text had actually been sent.[147] The trial court denied the motion for a new trial on the grounds that the juror's testimony was "insufficient 'to overcome the presumption of jury impartiality.'"[148] The Second Circuit summarily affirmed the district court's decision,

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& (text +1 message)" without quotation marks) (last visited Nov. 18, 2016); *see also* People v. Giarletta, 856 N.Y.S.2d 25, 25 (N.Y. Sup. Ct. 2007); United States v. Nieves, 354 Fed. Appx. 547, 552 (2d Cir. 2009).

139. 856 N.Y.S.2d at 25.

140. *Id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Giarletta*, 856 N.Y.S.2d at 25.

145. People v. Giarletta, 898 N.Y.S.2d 639, 639–40 (N.Y. App. Div. 2d Dep't 2010) (citing People v. Romano, 8 A.D.3d 503, 504 (N.Y. App. Div. 2d Dep't 2004)).

146. 354 Fed. Appx. 547, 549–50, 552 (2d Cir. 2009).

147. *Id.* at 552.

148. *Id.* at 552–53.

calling it "well within the range of permissible decisions."[149]

Given this sparse case history and the fact that the outcome of every allegation of juror misconduct is judged on its own circumstances, it is virtually impossible to know how a court will rule in any given instance. Using the above two cases as a guide, however, there may be hope for Dr. Neulander's motion for reconsideration. In *Nieves*, there was no evidence that a text message was actually sent.[150] In *Giarletta*, a new trial was ordered on evidence of only one message that was discussed after the verdict was rendered.[151] In *Neulander*, there is no question that the messages were sent and received.[152] Further, there is no doubt that the juror received more than one message, at all stages of the trial prior to the verdict.[153] The likelihood of prejudice in *Neulander* is even higher than was present in *Giarletta*, signaling that a reversal may be warranted.[154]

On the flip side, however, the juror in *Neulander* presented in her defense several other texts she sent telling people that she "can't talk about it" and "cannot wait to tell you guys allll about it when I'm done."[155] The trial judge found that "while [the juror's] actions were imperfect, her intentions were pure and she took her role as a juror seriously."[156] The judge essentially laid down a five-part analysis for what constitutes juror misconduct in this situation: (1) the juror talks about trial details, (2) the juror indicates a pre-seated bias, (3) the extrajudicial information is seen by others, (4) the texts reveal that the juror is contemplating facts not presented in evidence at the trial, and (5) others have replied to the juror's commentary.[157] The judge here found none of these were present, and that the juror "never took the bait from her friends."[158] She came close, the judge said, at one point sidestepping a question about a key witness's testimony and responding with a comment about upcoming trial procedure.[159]

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149. *Id.* at 553.

150. *Id.* at 552.

151. People v. Giarletta, 898 N.Y.S.2d 639, 639–40 (N.Y. App. Div. 2d Dep't 2010).

152. *Neulander Juror's 'Actions Were Imperfect but Pure,' supra* note 17.

153. The *Neulander* trial judge said the juror should have reported the text messages she received to the court but otherwise fulfilled her duties as a juror as expected. Decision/Order, *supra* note 8, at 19, 23.

154. The judge, however, explicitly distinguishes *Giarletta* in his opinion because "there was no showing that [the juror] received external information pertinent to the case from an external source." *Id.* at 19.

155. *Neulander Juror's 'Actions Were Imperfect but Pure,' supra* note 17.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

If the appellate court adopts the five-part framework used by the trial judge as the new, concrete standard for juror misconduct, then Neulander's appeal will fail. If, however, the higher court uses the traditional *Giarletta* test that juror misconduct can result in a new trial if it "may have affected a substantial right of the defendant," then the appeal could succeed.[160] No matter which way the current case comes out, what seems clear is that courts are going to have many more opportunities to confront the issue.

V. WHY TEXTING IS THE NEXT FRONTIER FOR JUROR MISCONDUCT

The paucity of case law on this point may make it seem like the texting juror is not a big problem. And, upon superficial inspection of the issue, one may be led to believe that a juror having a conversation with a friend via text message is more akin to the traditional juror talking at home to a spouse or consulting traditional sources, behavior that is technically against the rules but is generally not alarming.[161] After all, when it comes to juror misconduct, just sending and receiving text messages is not enough; the juror must have been actually influenced by the outside conversation.[162] The likelihood of this is presumably low, because people tend to talk to people who share the same views they do.[163] As one author put it, "The human mind often acts like a filter, accepting those ideas that are consistent with preexisting attitudes and beliefs but rejecting those that are divergent."[164] Viewed from that perspective, the likelihood of someone actually changing a juror's mind with a text message may be very small.

That is probably why researchers have paid so much attention to other behaviors that courts do confront: the effects of internet usage and social media—particularly *Facebook* and *Twitter*—on juror behavior.[165] But texting potentially creates an even more troublesome issue for courts than other forms of digital-age communications. First, simple

160. People v. Giarletta, 898 N.Y.S.2d 639, 639 (N.Y. App. Div. 2d Dep't 2010). It is worth noting that the defense attorney in the *Giarletta* case, Gerald Shargel, was retained by Dr. Neulander for his appeal. *See Neulander Juror's 'Actions Were Imperfect but Pure*,*' supra* note 17.

161. *See* Robinson, *supra* note 98, at 136.

162. 75B AM. JUR. 2D, *supra* note 30, § 1301.

163. Nathan Eddy, *Facebook: Echo Chamber Is Real, But It's Your Fault*, INFO. WK. (May 8, 2015, 11:05 AM), http://www.informationweek.com/software/social/facebook-echo-chamber-is-real-but-its-your-fault/d/d-id/1320342 ("[I]ndividual choices . . . appear to limit exposure to attitude-challenging content.").

164. PAUL MARK SANDLER, THE ANATOMY OF A TRIAL: A HANDBOOK FOR YOUNG LAWYERS 2 (2d ed. 2014).

165. *See supra* notes 21–24.

demographics suggest that future jurors are going to be much savvier texters than current jurors are.[166] In addition, texting is usually person-to-person rather than to a network of followers, it can be done more discreetly, and it is more likely to be with a close confidant whose opinion the juror trusts.

A. Internet-Related Misconduct and Texting Are on the Rise

From 1999 to 2010, "at least ninety verdicts [were] challenged based on Internet-related juror misconduct. More than half of [which] occurred between 2008 and 2010."[167] Verdicts were overturned "in twenty-one trials during 2009 and 2010 alone."[168] Although there are no current definitive numbers readily available, the above pace suggests that the number of challenged cases may be as high now as ever.[169]

Furthermore, the issue of texting-related juror misconduct will only become more frequent as jurors are increasingly pulled from the Millennial generation,[170] since that age group is generally more familiar and comfortable with technology than previous generations of adults.[171] Text messages now outrank phone calls as the dominant form of communication among Millennials.[172] More than two-thirds (68%) of "18 to 29-year-olds say that they texted 'a lot' the previous day," a percentage

166. *See* Tanya Gazdik Irwin, *Millennials Most Digitally Connected Generation*, MARKETING DAILY (July 2, 2014, 4:54 PM), http://www.mediapost.com/publications/article/229241/millennials-most-digitally-connected-generation.html.

167. Reich, *supra* note 21, at 393.

168. *Id.* at 393–94.

169. *See* Daniel William Bell, Note, *Juror Misconduct and the Internet*, 38 AM. J. CRIM. L. 81, 83 (2010) ("While no substitute for empirical research, a cursory glance at Westlaw search results is thought provoking . . . a search of all state and federal cases for the term 'juror misconduct' yields 2701 results for the years 1980–1990, 3990 results for the years 1990–2000, and 8755 results for the years 2000–2010."). A search for the term "juror misconduct" from 2010–2016 in state and federal cases conducted as of the time of publication, yielded 4148 results. Search Results for Cases on "Juror Misconduct" 2010–2016, WESTLAW, https://1.next.westlaw.com/search/home.html (follow "Cases" hyperlink under "All Content"; follow "All State & Federal" hyperlink next to search bar; select both "All States" and "All Federal"; follow "Save" hyperlink; search in search bar for '"juror misconduct" & DA(aft 12-31-2009 & bef 01-01-2017)' without single quotation marks) (last visited Nov. 18, 2016).

170. Richard Fry, *Millennials Overtake Baby Boomers as America's Largest Generation*, PEW RES. CTR. (Apr. 25, 2016), http://www.pewresearch.org/fact-tank/2016/04/25/millennials-overtake-baby-boomers/ ("Millennials, whom we define as those ages 18–34 in 2015, now number 75.4 million, surpassing the 74.9 million Baby Boomers (ages 51–69).").

171. Irwin, *supra* note 166 ("Millennials spend so much time on their smartphones that they account for 41% of the total time that Americans spend using smartphones, despite making up just 29% of the population.").

172. Frank Newport, *The New Era of Communication Among Americans*, GALLUP (Nov. 10, 2014), http://www.gallup.com/poll/179288/new-era-communication-americans.aspx.

that dips to "47% among 30- to 49-year-olds and 26% among 50- to 64-year-olds."[173]

B. Texting Is Private

Text messages, more so than blogs or social media posts, are meant to be a private communication.[174] *Facebook*, *Twitter*, and other social media platforms are open to the public, and hashtags and other simple search aids make it relatively easy to find such a posting. In addition, the public nature of these sites make it more easily policed by other users. For instance, other users can easily reprimand a juror who posts about his or her case on *Facebook*. Texting, on the other hand, is more often one-on-one, much like a phone call.[175] Unless the person to whom one is talking is likely to turn him or her in, a text conversation is more likely to go unnoticed and unpunished.

C. Texting Is for Close Relationships

Further, texts are more often sent to someone who is more likely to influence the juror than the recipient of a social media post.[176] To text with a person, one needs the person's cell phone number, indicating a close relationship.[177] Plus, spending time to hold a conversation via text implies that you are someone with whom the texter has a close relationship, someone whose opinion matters to the texter. On the other hand, social media posts often go unanswered,[178] or can be answered by a person who the original poster does not know or is far down the social chain.[179] A blind post on social media is much less likely to be received by an influencer.[180]

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173. Neil Howe, *Why Millennials Are Texting More and Talking Less*, FORBES (July 15, 2015, 11:00 AM), http://www.forbes.com/sites/neilhowe/2015/07/15/why-millennials-are-texting-more-and-talking-less/#4f4421055761.

174. *See* Hord, *supra* note 103.

175. *Id.*

176. Because of text messaging's intimate, one-on-one nature, it reasonably can be assumed that the people one texts the most would be the people one talks to most often generally, such as spouses, relatives, and close friends.

177. *See* Hord, *supra* note 103.

178. Zora, *supra* note 22, at 589.

179. *Id.* at 590.

180. Of course, a *Facebook* post that read, "Should I say the defendant is innocent or guilty?" and then solicited opinions would be one extreme example of a social media post designed to generate an influential response. However, such an instance would be rare and pretty obvious grounds for sanctions against the juror because of its obvious likelihood of biasing the juror.

D. Texting Is Hard to Accurately Observe

Finally, texting is discreet.[181] The maximum length of a text message is 160 characters,[182] and the duration of the typing is about four to five seconds.[183] Short of constantly monitoring a juror's behavior, it would be hard to catch someone sending a text. Even if one had the inclination to monitor a person's smartphone use, it would be difficult to catch. People use smartphones for many tasks. Periods of short bursts of typing may indicate texting, but it could just as easily be that the person is sending email, tweeting, gaming, or even just leaving themselves innocuous notes. Beyond an obvious tell like a notification (which is easy to turn off) or by closely observing the person's behaviors, reactions, and responses, there is no way to tell with certainty that a person is texting. It takes keen observation skills and, more important, the time to make those observations in order to be certain that a smartphone user is using his or her phone to text. Observations of younger users will demonstrate that many younger users are so adept at texting that they can hold a text conversation with one hand or without even looking at their phones.[184] In addition, both Apple and Microsoft have developed a one-handed keyboard for their most recent smartphone models, though neither company actually has released it yet, perhaps indicating an expectation that discreet one-handed texting will become even more popular.[185] A *Google* search of "texting with one hand" yields several thousand results, suggesting that such smartphone use is not uncommon.[186]

Even so, at the heart of the matter, sending a text is not even the real issue. So long as a juror is not sending the text to someone

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181. *See* Hord, *supra* note 103.

182. Milian, *supra* note 105.

183. This oft-cited statistic comes from a distracted driving study from the Federal Motor Carrier Safety Association that found that a person sending a text while driving takes his or her eye off the road for 4.6 seconds. *See* FED. MOTOR CARRIER SAFETY ASS'N, DRIVER DISTRACTION IN COMMERCIAL MOTOR VEHICLE OPERATIONS 99 (2009), http://www.distraction.gov/downloads/pdfs/driver-distraction-commercial-vehicle-operations.pdf. For the purposes of the discussion here, the actual time is likely less for a stationary juror who is not a distracted driver.

184. An experiment designed to study the "posture and typing style of college students typing on mobile devices" discovered that nearly thirty-three percent typed using just one thumb. Ewa Gustafsson et. al., *Texting on Mobile Phones and Musculoskeletal Disorders in Young Adults: A Five-Year Cohort Study*, 58 Applied Ergonomics 208, 208 (2017).

185. Sarah Perez, *Developer Finds a One-Handed Keyboard Hidden in iOS Code*, TECHCRUNCH, https://techcrunch.com/2016/10/20/developer-finds-a-one-handed-keyboard-hidden-in-ios-code/ (last visited Nov. 18, 2016).

186. Search Results for "texting with one hand" (with quotation marks), GOOGLE, https://www.google.com/?gws_rd=ssl#q=%22texting+with+one+hand%22 (last visited Nov. 18, 2016).

inappropriate—a party, attorney, reporter, et cetera[187]—it does not matter if she is sending out information. The potential for prejudice comes in if a juror *receives* a text message and thus acquires information from outside the court proceedings.[188] Short of confiscating jurors' phones and noting every text that comes in, there is no accurate way to monitor when a juror receives a text message. Plus, such a step does not even contemplate how to effectively and legally prevent a juror from receiving a text on their own time when they are not under the watchful eye of the court.[189]

E. Privacy Concerns Related to Texting

As texting-related juror misconduct does become more prevalent, it will also raise more than simple evidentiary concerns. Privacy of texting and cell phones raise further complex constitutional issues. Should a text be treated as written communication, like a letter?[190] Or should it be treated more like a phone conversation?[191] The Supreme Court has not yet confronted the issue, but a text message is an intriguing form of communication. It has elements of both written communication and telephone calls, so a court confronted with the privacy issue would need to decide how to approach it.[192] If deemed to be more like a letter, then a texter's right to privacy disappears upon delivery because of the third-party doctrine, which states that a person who voluntarily gives items or information over to a third party (such as the post office or a cellular service provider) is not protected from having them searched because the person exhibited no "reasonable expectation of privacy."[193] If more like a phone call, then a text message may be protected by the reasonable expectation of privacy standard.[194] At least one academician has argued

187. *See* Porsha M. Robinson, Note, *Yes, Jurors Have a Right to Freedom of Speech Too! . . . Well, Maybe. Juror Misconduct and Social Networks*, 11 FIRST AMEND. L. REV. 593, 603–04 (2013) ("[T]he concern over [juror] journalism, where jury members attempt to profit by giving their account of what happened during a trial . . . is that jurors will be motivated by the potential profit they may gain . . . .").

188. *Id.* at 600.

189. Lee, *supra* note 23, at 206.

190. For an excellent discussion of this issue, see Joseph C. Vitale, Note, *Text Me, Maybe?: State v. Hinton and the Possibility of Fourth Amendment Protections Over Sent Text Messages Stored in Another's Cell Phone*, 58 ST. LOUIS L.J. 1109, 1123 (2014).

191. *Id.* at 1124.

192. *Id.* at 1123–24.

193. *See* Smith v. Maryland, 442 U.S. 735, 743 (1979); Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring).

194. Vitale, *supra* note 190, at 1125. For an in-depth discussion of this question, see Katharine M. O'Connor, *:o OMG They Searched My Txts: Unraveling the Search and Seizure of Text Messages*, 2010 U. ILL. L. REV. 685 (2010).

that "because the average person is both unwilling to allow others to have access to his or her cell phone and maintains a belief that text messages will be for the recipient's eyes only, communications via text message have a privacy expectation."[195] Such a case might also implicate the provisions of the Electronic Communications Privacy Act, which regulates some stored communications like email.[196]

There is one more interesting constitutional issue raised by texting jurors and a possible court response. Would confiscating a juror's cell phone to prevent texting be considered a prior restraint in violation of the First Amendment?[197] A prior restraint, recall, is when the government attempts to prevent objectionable speech before it occurs, a practice that is prohibited by the First Amendment of the Constitution.[198] Some scholars believe that any attempt to sever people from their phones, and thus prohibit them from texting, would possibly open the door to a constitutional violation.[199] In *City of Ontario v. Quon*, the Supreme Court said in dicta that "[c]ell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification."[200] If lower courts adopt this view, it would raise an interesting question of what rights people expect to be protected in the modern, digital age.

CONCLUSION

It is a general rule of trial practice that "due 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 . . . . [I]t is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote."[201]

While that remains true, juror texting is poised to put that theory to the test. Juror texting is really a new version of an age-old issue aimed at

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195. Emily D. Roman, *Privacy Surrounding Text Messages: An Uphill Battle for Courts*, ST. LOUIS U. L.J. (Mar. 6, 2015), http://www.slu.edu/colleges/law/journal/privacy-surrounding-text-messages-an-uphill-battle-for-courts/ (discussing Vitale, *supra* note 190).

196. Vitale, *supra* note 190, at 1126.

197. *See generally* City of Ontario v. Quon, 560 U.S. 746 (2010) (holding that obtaining and reviewing an employee's pager messages did not violate the Fourth Amendment because the search was reasonable).

198. SIEGEL, *supra* note 68, at 42.

199. Reich, *supra* note 21, at 411; *see also* Eric P. Robinson, *Web Restrictions Not the Answer to Juror Online Research*, DIGITAL MEDIA L. PROJECT (Nov. 15, 2013, 8:40 AM), http://www.dmlp.org/blog/2013/web-restrictions-not-answer-juror-online-research.

200. *Quon*, 560 U.S. at 760.

201. Smith v. Phillips, 455 U.S. 209, 217 (1982).

maintaining the sanctity of the impartial juror and the fairness of a jury trial. It raises significant concerns, which a multitude of legal scholars have addressed in the context of jurors' exposure to outside influences via the internet. However, these same scholars have overlooked the fact that many of the same concerns apply to jurors sending text messages as well. Text messaging, in fact, is a unique form of communication that implicates additional complex issues, including the potential for juror bias through extrinsic sources, the complications of technology in the courtroom, the level of privacy enjoyed by senders and receivers of text messages, and the speech freedoms that a texter has.

As jurors increasingly come from the younger texting-prolific generation, courts will be more frequently confronted with the issue of juror misconduct resulting from texting. As this Note has outlined, the trouble a texting juror can cause could be substantial. Courts need to begin preparing for such an eventuality.