

The Social Network: American Jurors Reaching out of the Courtroom and Into Trouble

By: *Mark Dreher*

A United States congressman, confronted with his own sexual exhibitionism, surrenders his office.¹ A popular entertainer, frustrated with a concert review from a local column, utters incendiary, homophobic accusations.² A well-known critic's wry remark following a tragic automobile accident sparks controversy.³ And it all happens in the same week.

That's right. In the span of just four days (June 16-20, 2011), Rep. Anthony Weiner, singer Cee Lo Green, and film critic Roger Ebert were front-page news and late-night talk show fodder. Their public careers were marred — or even derailed — as a result of “140 characters or less” postings on their personal microblog (Twitter) accounts.



These increasingly common indiscretions highlight a disturbing trend, one that reaches all the way to the jury box. Was it really two years ago that popular Today show personality Al Roker came under fire for publishing photographs of his jury duty experience on his Twitter account?⁴ Mr. Roker's postings were limited to initial selection and the jury lounge. Unfortunately, many others are not. They have seeped into the courtroom itself, compounding problems with the integrity of an embattled judicial process. In December 2010, Reuters Legal, working in conjunction with Westlaw, described the following:

“The data show that since 1999, at least 90 verdicts have been the subject of challenges because of alleged Internet-related juror misconduct. More than half of the cases occurred in the last two years. Judges granted new trials or overturned verdicts in 28 criminal and civil cases — 21 since January 2009. In three-quarters of the cases in which judges declined to declare mistrials, they nevertheless found Internet-related misconduct on the part of jurors.”⁵

WHAT'S AT STAKE

Trial by jury is one of the foundational rights Americans enjoy.⁶ Our legal tradition holds that an impartial jury is one free from outside influence and that its deliberations are limited to evidence introduced in the proceedings; however, the near-limitless capacity of the internet generally, and the ubiquitous presence of social networking like Twitter and Facebook specifically, challenge these time-honored tenets. Here's how:

“John Boy” Legal Research

The enduring cultural image of the 1970s television show *The Waltons* is the “good night” scene. Viewers saw the façade of the Waltons' home, lights in the windows were extinguished one by one, and the interminable litany began: “Good night, children. Good night, Momma. Good night, Elizabeth. Good night, John Boy....”⁷ Flash forward to the internet age. Jurors are admonished in courtrooms across America to refrain from independently researching the cases they will be deciding. They are told to avoid the evening news, to forego the newspaper; occasionally, they are even expressly instructed to avoid internet research. Nonetheless, the allure of anonymous, instant-access information with a mouse click is a powerful one. Google Earth can pull up a crime scene, and any number of medical websites can describe medical conditions in great detail. But when jurors conduct these searches on their own, often with incomplete information or assumptions, it resembles that scene from *The Waltons*; it is, essentially, calling out blindly in the dark. More importantly, the resulting prejudice can overturn an entire trial:

- In Florida, an eight-week trial in which the defendant was accused of illegally selling prescription drugs through internet pharmacies ended in mistrial when a juror admitted to conducting independent research, including research into evidence that had been excluded. The court considered excusing the juror and

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continuing — until learning that eight other jurors had done the same thing.⁸ A separate Florida conviction was overturned (and a new trial granted) when a juror used his smartphone to look up the meaning of the term “prudent” from the jury instructions.⁹

- In Maryland, the Court of Special Appeals found that a juror’s independent internet research into a psychological condition attributed to a key witness — with symptoms including lying — “constituted egregious misconduct.”¹⁰
- In New Hampshire, a juror disclosed to his fellow members that the accused in a sexual assault trial was a convicted sex offender, defying the court’s directive against such research and thwarting one of the case’s pivotal evidentiary rulings. The juror was charged with contempt and levied with a fine for the cost of the proceedings.¹¹
- In Pennsylvania, a juror in a capital-murder trial conducted internet research on the victim’s injuries, then volunteered that information in the midst of the jury’s deliberations, prompting a partial mistrial and contemplated criminal contempt charges against the juror.¹²
- In Georgia, a juror performed internet research in a rape case. The case ended in mistrial; the juror was fined \$500 for violating specific jury instructions prohibiting such research.¹³

The Digital Soapbox

This all-access phenomenon is not limited to jurors’ bringing inappropriate information into their deliberations. With social networking platforms like Facebook and Twitter, there is the equally troubling risk of jurors documenting and publishing their thoughts and deliberations inappropriately outside the confines of the courtroom.

- In Michigan, a juror was excused, fined \$250, and ordered to write a five-page essay on a defendant’s right to trial by jury under the Sixth Amendment after posting on her Facebook page that it was “gonna be fun to tell the defendant they’re GUILTY.”¹⁴
- In California, a post-conviction discovery that a juror in a gang-related assault case posted “Can it get any more BORING than going over piles and piles of [cell phone] records” on his Facebook page threatens not only the conviction but raises issues of disclosure and discovery into the records themselves.¹⁵
- In Pennsylvania, convicted state senator Vincent Fumo pursued a new trial, arguing that a juror improperly leaked information about the trial via his Facebook status.¹⁶
- In New York, a juror who e-mailed details of the jury’s deliberations in a rape case to a prosecutor friend caused a mistrial and incurred a \$1,000 fine.¹⁷

Dangerous Liaisons

Perhaps the most egregious act a juror can perform, though, is not gathering extrinsic evidence, broadcasting private deliberations into an anonymous blogosphere, or even e-mailing a friend about the trial. Rather, it is to inject themselves improperly into the dynamics of the trial itself. When jurors pull back the veil separating them from other jurors, witnesses, parties, or even the judge, their actions fundamentally taint the proceedings and compromise the integrity of any results:

- In Maryland, the former mayor of Baltimore was convicted of embezzlement. She discovered that five of the jurors in her case had become Facebook friends with each other during the course of the trial and challenged the rulings before ultimately settling prior to appeal.¹⁸

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- In West Virginia, a fraud conviction was overturned when it was discovered that a juror had posted to her MySpace page (another social networking site) the following message to the defendant: *“Hey, I dont know you very well But I think you could use some advice! I havent been in your shoes for a long time but I can tell ya that God has a plan for you and your life. You might not understand why you are hurting right now but when you look back on it, it will make perfect sence. I know it is hard but just remember that God is perfect and has the most perfect plan for your life. Talk soon!”*¹⁹
- In Georgia, a judge dismissed an entire panel amid allegations of jury tampering when a juror reported that she had been contacted via Facebook by a friend of the defendant’s.²⁰
- In New York, a state trial court determined that a juror breached her obligations by sending a “friend” request on her Facebook account to a government witness but rejected the challenge to the jury’s guilty verdict.²¹
- In England, a juror was convicted for contempt of court and sentenced to eight months in jail for exchanging Facebook messages with a defendant during a drug trial.²²

WHAT’S THE FIX?

With example after example of jurors unable or unwilling to “power down” their Web-based alter-egos to preserve the sanctity of the jury trial, where can courts (and parties) turn for solutions? Even as penalties for violations get stiffer and more creative, we cannot lose the fact that “a solution must focus on educating jurors before trial, as remedial measures after the fact are designed to preserve the finality of the verdict.”²³ Well-crafted pre-trial jury instructions, particularly those that identify the internet culprits with some specificity, are a good place to start. For example, pattern instructions in New York state:

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.²⁴

New Jersey’s pattern instruction builds on this specificity to explain to jurors the rationale of the restriction:

You should not review or seek out information about the issues in the case, the parties, the attorneys, or the witnesses, either in traditional formats such as newspapers, books, advertisements, television or radio broadcasts, or magazines or through the internet or other computer research. You also should not attempt to communicate with others about the case, either personally or through computers, cell phones, text messaging, instant messaging, blogs, Twitter, Facebook, Myspace [*sic*], personal electronic and media devices, or other forms of wireless communication. You should not go on the Internet or participate in or review any websites, Internet “chat rooms” or “blogs,” nor should you seek out photographs or documents of any kind that in any way relate to this case.

Why is this restriction imposed? You are here to decide this case based solely on the evidence — or lack of evidence — presented in this courtroom. Many of you regularly use the Internet to do research or to examine matters of interest to you. The information you are accessing is not evidence.²⁵

That is, jurors should be told not only what the specific prohibitions are, but why that is so. The deterrent effects of a fine or a constitutional essay pale in comparison to the costs associated with a mistrial or a reversal. The far

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better approach is to convince jurors to “buy in” to the judicial process from the outset. Nor is this concept limited to individual state approaches. In 2010, the Federal Judicial Conference Committee on Court Administration and Case Management adopted the following model instruction:

You, as jurors, must decide this case based solely on the evidence presented here within the four walls of this courtroom. This means that during the trial you must not conduct any independent research about this case, the matters in the case, and the individuals or corporations involved in the case. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case. Please do not try to find out information from any source outside the confines of this courtroom. 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 hope that for all of you this case is interesting and noteworthy. I know that many of you use cell phones, Blackberries, the internet, and other tools of technology. You also must not talk to anyone 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, through any internet chat room, or by way of any other social networking websites, including Facebook, MySpace, LinkedIn, and YouTube.²⁶

On July 5, 2011, Casey Anthony — a 25-year-old mother accused of murdering her two-year-old daughter — was acquitted in a high-profile Florida trial. Three months earlier, the Orlando Sentinel received a letter from a potential juror who was excused in the initial jury selection process. The May 10, 2011, letter stated, in part:

While I would like to believe that most potential jurors have good intentions, I also believe that most are clueless as to appropriate behavior while waiting to be selected/rejected. [...] I do not believe it is the media that will taint the jury in this or any other high profile case, but rather, the lack of proper instruction given to potential jurors/jurors about what can/cannot be discussed at various stages of the trial process. And if this means that a judge must admonish all potential jurors each morning prior to Voir Dire that they risk being held in contempt of court if they discuss the case with anybody prior to being excused from service, then so be it.²⁷

That admonishment is one that officers of the court of every stripe should take to heart, for every potential medium.

¹ Hernandez, R., *New York Times*, June 16, 2011, “Weiner Resigns in Chaotic Final Scene.”

² Swenson, A., *CityPages Blogs*, June 17, 2011, “Cee Lo Green Calls Me Gay, Asks if His Masculinity Offends Me.” Available at: <http://blogs.citypages.com/gimmenoise/2011/06/cee_lo_green_gay_twitter_homophobic.php>. Last accessed July 29, 2011.

³ Nededog, J., *Hollywood Reporter*, June 20, 2011, “Film Critic Roger Ebert Enrages Fans with ‘Insensitive’ Ryan Dunn Tweet.” Available at <<http://www.hollywoodreporter.com/live-feed/film-critic-rogerebert-enrages-203413>>. Last accessed July 29, 2011.

⁴ Weiss, D., *ABA Journal*, May 29, 2009, “Media Atwitter over Al Roker’s Twitter Photos from Jury Duty Wait.”

⁵ Grow, B. *Reuters Legal*, December 8, 2010, “As Jurors Go Online, Trials Go Off Track.”

⁶ U.S. Const., 6th Amendment (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury . . .”); id at 7th Amendment (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . .”).

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⁷ To see the ongoing cultural relevance of this image, consider this automobile insurance commercial: <<http://www.youtube.com/watch?v=KajIm9lgImw>>.

⁸ Schwartz, J., *New York Times*, March 17, 2009, "As Jurors Turn to Web, Mistrials are Popping Up."

⁹ *Tapanes v. State*, 43 So.3d 159 (Fla. App. 4 Dist. 2010).

¹⁰ *Wardlaw v. State*, 185 Md. App. 440, 453, 971 A.2d331, 338 (Md. App. 2009).

¹¹ Timmins, A., *Concord Monitor*, March 26, 2009, "Juror Becomes a Defendant."

¹² Grow, B., *Reuters Legal*, January 19, 2011, "Juror's Online Research Prompts Mistrial and a Criminal Probe."

¹³ Simmons, A., *Atlanta Journal-Constitution*, March 30, 2010, "Georgia Courts to Bar Jurors from Internet."

¹⁴ *Standard-Examiner*, September 2, 2010, "Facebook Juror Gets Homework Assignment from Judge."

¹⁵ Egelko, B., *San Francisco Chronicle*, March 31, 2011, "Juror's Facebook Postings an Issue in Appeal."

¹⁶ Snyder, A., *South Philly Review*, December 16, 2010, "Fumo Seeks New Trial."

¹⁷ Zambito, T., *New York Daily News*, June 15, 2011, "Juror Gets \$1000 Fine for Sending Email During Rape Case, Causing Mistrial."

¹⁸ Holden, B., *Baltimore Sun*, June 23, 2011, "Courts Must be Prepared for Tech-savvy Jurors."

¹⁹ *State v. Dellinger*, 225 W.Va. 736, 696 S.E.2d 38 (W.Va. 2010).

²⁰ Purser, B., *The Sun News*, June 23, 2011, "Alleged Jury Tampering Halts Start of Shooting Trial of Fort Valley Man." Available at <<http://www.macon.com/2011/06/23/1606284/alleged-jury-tamperinghalts-start.html>>. Last accessed July 29, 2011.

²¹ Walter, N., N.Y.L.J., March 3, 2010, "Access to Internet, Social Media by Jurors Pose Challenges for Bench."

²² Deans, J., *The Guardian*, June 16, 2011: "Facebook Juror Jailed for Eight Months."

²³ Fallon, T., 38 *Hofstra L.R.* 935, 953, Spring 2010, 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."

²⁴ New York Pattern Criminal Jury Instructions 2d, *Jury Admonitions*, No. 6.

²⁵ New Jersey Model Civil Jury Instructions, 1.11C.

²⁶ Judicial Conference Committee on Court Administration and Case Management Model Jury Instruction, *The Use of Electronic Technology to Conduct Research or Communicate about a Case*.

²⁷ Saracino, L. *Orlando Sentinel*, May 10, 2011, "Sentinel Exclusive: Letter from Potential Casey Anthony Juror Who was Dismissed from Case."

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