

Let's Talk: Addressing the Challenges of Internet-Era Jurorsⁱ

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Consider this pro-race integration excerpt from the lyrics to "You Can't Stop The Beat!" from the musical Hairspray:

*Cause you can't stop
The motion of the ocean
Or the sun in the sky.
You can wonder if you wanna
But I never ask why.
And if you try to hold me down
I'm gonna spit in your eye and say
That you can't stop the beat!*

*You can't stop today
As it comes speeding down the track.
Child, yesterday is hist'ry.
And it's never coming back.ⁱⁱ*

The courtroom sits squarely atop the Internet superhighway. Jurors carry Droids, iPhones, Blackberries, Treos, or other PDAs with them and turn to them frequently.ⁱⁱⁱ While some courthouses still confiscate personal electronic devices, many do not. In 2008, we wrote a paper triggered by a judge's stunned response to learning that prospective jurors had Googled a case over lunch, in the midst of voir dire.^{iv} Like all those grounded in the history of American jurisprudence, we took the position that precedent ought to prevail, and offered advice about how best to keep jurors off the Internet.

ⁱ We thank Elkan Abramowitz of Morvillo, Abramowitz, Grand, Iason, Anello & Bohrer, William Brodsky of Fox, Horan & Camerini and Marc Wolinsky of Wachtell Lipton Rosen & Katz for their comments on earlier drafts of this paper.

ⁱⁱ Lyrics by Marc Shaiman and Scott Wittman.

ⁱⁱⁱ "22 million U.S. cell phone users access the mobile Internet on a daily basis," in Gareth Lacy's *Should Jurors Use the Internet?* in the National Law Review, <http://www.natlawreview.com/article/should-jurors-use-internet>; citing Enid Burns, *Internet Usage Becomes the Norm for Many in U.S.*, Search Engine Watch, Mar 17, 2009, <http://searchenginewatch.com/3633213>.

^{iv} See Brickman, E., Blackman, J., Futterman, R., and Dinnerstein, J., *How Juror Internet Use Has Changed the American Jury Trial*, *Journal of Court Innovation*, Vol. 1, No. 2, Fall 2008, 287-302.

Like the song lyrics quoted above, however, we now wonder whether it is time to reconsider the simple, “just say no” position of the courts when it comes to jurors who feel the urge to go online. We now take the position that it is time to open a line of discourse based on the reality of jurors’ attachment to the Internet and the distinct sorts of information available on the Internet.

Now Jurors Are Accustomed To the Internet

Jurors are accustomed to integrating the Internet into their pursuits of knowledge, understanding and accuracy. To exclude the Internet from the sources of information upon which jurors may rely may be simply impossible. The question then would become not how best to forbid it, but how best to allow it – to give it its proper, acknowledged, and carefully constructed place. At the very least, we believe that a conversation about the place of the Internet in the courtroom is in order.

While our 2008 paper is less than three years old at this writing, a lot has changed since then. Our early paper about how jurors’ use of the Internet was changing the American jury trial illuminated the fact that some jurors were using the Internet to gain extrinsic information about a case, the dangers inherent in their doing so, and possible strategies to get them to stop.

A New and Costly Term in the Legal Lexicon: The “Google Mistrial”

In the intervening few years, this topic has garnered attention from attorneys, trial consultants and the mass media. Virtually every day the American Society of Trial Consultants’ Listserv includes postings about the intrusion of the Internet into the courtroom. The term “Google mistrial” has been coined to describe the mistrials declared because of jurors’ use of the Internet.^v Some examples of trial courts declaring a mistrial are a 2009 Federal drug trial in Florida in which nine of the 12 jurors admitted to researching the case on the Internet^{vi} and a 2011 murder case in Pennsylvania in which a juror researched the injuries suffered by the victim and relied on that information rather than on the medical testimony presented in court.^{vii} As judicial awareness of this issue grows, we are also seeing cases in which the trial judge denied a motion for a mistrial due to jurors’ Internet contact, but the appellate court reversed. For example, recent reversals have included a manslaughter conviction in New Jersey in which a juror researched the defendants, the victim, and the possible sentence before voting on a verdict, and a Maryland case in which a juror researched the psychological diagnosis given to a witness, to determine the witness’ credibility.^{viii}

The growing number of mistrials has staggering implications. With trials costing many thousands of dollars a day, a mistrial declared after several weeks could represent millions of dollars of wasted funds. Non-monetary costs include the time and emotional toll for all parties. Recognizing this, courts across the country have taken steps to address it, largely through ever-increasing efforts to stop jurors from turning to the Internet to aid in their understanding and decision-making. Other remedies suggested (by us and others) have included barring handheld devices from the courtroom, questioning jurors about their Internet use during voir dire, making jurors responsible for each others’ adherence to rules pertaining to Internet use^{ix}, threatening to hold jurors in contempt over their Internet use^x, and

^v John Schwartz, *As Jurors Turn To Web, Mistrials Are Popping Up*, *New York Times*, 3/17/09.

^{vi} See Deirdra Funcheon, *Jurors And Prosecutors Sink A Federal Case Against Internet Pharmacies*, *Broward-Palm Beach New Times*, April 23, 2009. <http://www.browardpalmbeach.com/2009-04-23/news/jurors-and-prosecutors-sink-a-federal-case-against-internet-pharmacies/2/>.

^{vii} Michael R. Sisak, *Judge Dismisses Juror, Declares Mistrial*. Citizensvoice.com, January 14, 2011. <http://citizensvoice.com/news/update-judge-dismisses-juror-declares-mistrial-1.1090158#axzz1DgawoYP1>.

^{viii} Cases cited at: <http://www.citmedialaw.org/blog/2010/courts-colorado-maryland-new-jersey-florida-declare-mistrials-after-juror-internet-research>.

^{ix} See, for example, Amanda McGee, *Juror Misconduct In The Twenty-First Century*. *Loyola Of Los Angeles Entertainment Law Review*, May 2010, 30 (10), 301-326. <http://elr.lls.edu/documents/08.McGee.pdf>; see also John G. Browning, *When All That Twitters Is Not Told: Dangers Of The Online Juror*. *Texas Bar Journal*, March 2010. http://www.texasbar.com/flashdrive/materials/open_government_forum/WhenAllThatTwittersisnotTold_DangersoftheOnlineJuror.pdf

seeking to get their online IDs and track their Internet use during the trial. As to this last idea, the fact that jurors' Internet use can be traced – unlike reading the newspaper or talking to a friend about the case – gives courts the opportunity for the first time to monitor the extent to which an admonition not to go on the Internet is obeyed. On the other hand, whole new issues are raised about jurors' privacy rights.^{xi} Surely, this tension is grist for the mill in considering how to address the challenges posed by Internet-era jurors.

Things Have Changed and New Instructions For Jurors May Be Needed

As reports of jurors using the Internet come ever more frequently, even amid the widespread adoption of jury instructions that explicitly forbid such behavior, our thinking on this issue has changed. In particular, we wonder if our conclusions and recommendations – while perhaps appropriate at the time when the recognition of this problem was in its infancy – may have been somewhat naïve given the pull of the Internet. Can even the best and most explicit of instructions, coupled with the harshest of consequences and penalties for violation, stop jurors from taking advantage of the vast resources that the Internet has to offer as they try to make sense of what they are hearing in court each day? And equally important, is this an effort worth making? Or, is it time to acknowledge that the world has irrevocably changed, and that it is no longer feasible to expect jurors to quell their impulses to seek information outside the courtroom?

While we had a draft of this paper in the works, Gareth Lacy, a third year law student at the University of Washington won the Fall 2010 student legal writing contest with his paper, "Should Jurors Use the Internet?"^{xii} Like the lyrics that open this paper, Lacy also spoke to the inevitability of change with reference to the image of an irresistible tidal wave:

"A major question is whether the protective cocoon we want to preserve of the courtroom trial, where jurors calmly and dispassionately receive only relevant and reliable information based on evidentiary rules. . . can viably be maintained in the face of the informational tsunami pressing against it."^{xiii}

Lacy went on to challenge the view that extrinsic information is inherently problematic: "This assumption behind the restrictive policies – that external information is always harmful – should be questioned" (p. 3). Lacy recommended that, "Courts ought to focus on the content and quality of the information jurors receive, rather than on outright bans" (p. 3). That said, as defense attorney Doron Weinberg commented, it is undeniably true that, "The problem with the Internet is that anybody can post anything. Jurors can get information that is partisan and hateful."^{xiv}

In this push-pull world of jurors' attraction to the Internet in all its complexity, we believe it is time to open the door wide to the discussion.

^x See Ginny LaRoe, *Barry Bonds Trial May Test Tweeting Jurors*, *The Recorder: Essential California Legal Content*, February 15, 2011: "Last month, Bonds' defense attorney, Cristina Arguedas, told [U.S. District Judge] Illston that she plans to propose that . . . before voir dire, potential jurors sign a questionnaire agreeing they won't search the internet on Bonds. What she'd like. . . is for jurors to agree, 'I don't go on Facebook, I don't Twitter, I don't tweet, I don't read anything between the time that I sign this questionnaire and the end of this process. And if I did, the court has indicated that I would be in contempt of court and subject to a fine or a jail sentence.'" (p. 2).

^{xi} LaRoe, *ibid.*, With regard to having judges collect online IDs to detect and deter internet use, concerns emerge about the "balance that must be struck between restrictions on internet use and privacy and First Amendment rights." (p. 2).

^{xii} Gareth Lacy, *Should Jurors Use the Internet?* *The National Law Review*, Fall 2010 Student Writing Competition; <http://www.natlaw-review.com/article/should-jurors-use-internet>, 1-7.

^{xiii} Michael Hoenig, *Juror Misconduct On The Internet*, *N.Y.L.J.*, Oct. 8, 2009.

^{xiv} Quoted in LaRoe, *op. cit.*

Reckoning With Reality

Perhaps, it is time to link practice with reality, and while it is hard to set precedent on its ear, it may be that the time has passed when people can be kept from the Internet. It was one thing when computers sat on our desks at home, when we picked up newspapers at newsstands. Now, a world's worth of information is in our pockets and targeted searches may be completed in seconds.

Given the long history of the court's efforts to require jurors to refrain from discussing or investigating anything of relevance to the case, it feels somewhat treasonous even to imagine this new world. Certainly, it feels safer to "just say no." Providing a place for outside information or sources of influence in the courtroom feels like a violation of long-established rules designed to promote the pursuit of truth and justice. Many years of trial practice (almost all of which predate the advent of the Internet) have led to the popular belief that fairness can only be found when judges require that the courtroom environment be pristine, untouched by outside sources of information or others' opinions.

Treason notwithstanding, we feel moved to ask those concerned with trial practice to consider the possibility that we are in the midst of a paradigm shift. As Thomas Kuhn suggested in his Structure of Scientific Revolutions, paradigm shifts are preceded by the growing awareness that the existing paradigm is not working.^{xv} We already know that sitting jurors are blogging and tweeting about cases.^{xvi} We know that they are turning to the Internet to research aspects of what they are hearing, sometimes in direct defiance of judicial orders. We already know that the segregation of the trial from other information sources is deeply imperiled.

Advocacy For A New Task Force To Study Jury Instructions

Here, then, we begin by advocating for a new and extended conversation about the role of the Internet in courtroom life, and particularly, for the development of a Task Force comprised of judges, attorneys and social scientists to study this issue and make recommendations about the most effective ways to address it. This Task Force could consider alternatives to the current practice of trying to deter jurors from turning to the Internet by relying almost entirely on judicial instructions and threatened sanctions.

An intensive multi-disciplinary exploration of the issue and the development of a set of recommendations would have multiple goals: To introduce uniformity into the ways that courts handle this issue, to prevent mistrials caused by juror use of the Internet, and ultimately, to promote justice by ensuring that jurors make decisions based on factors recognized and permitted by the laws of our country.

Below, we review some of the substantive issues this Task Force might choose to consider in its pursuit of justice in our new, high-tech world. We consider two broad subsets of issues: The first relates to Internet-era jurors themselves, and the second relates to the nature of the information these jurors may seek out.

The Problem of the Internet-Era Juror's Need To Know More

Jurors are not the same as they used to be. The current jury system is premised on a model of jurors as largely passive until the moment of deliberations. They listen in silence to what is presented to them. They cannot ask questions in real time (and only rarely can they raise questions that the judge might ask at the end of a specified portion of the trial) and are often discouraged by the judge

^{xv} Kuhn, T.S. (1962) The Structure of Scientific Revolutions, University of Chicago Press.

^{xvi} Keene, D.L. and Handrich, R. R., Online and Wired for Justice: Why Jurors Turn to the Internet, The Jury Expert, Vol. 21, Issue 6, November 2009.

from note-taking. They rely on the information they receive in the courtroom to inform their thinking, and they are wholly dependent on attorneys and judges to determine what information they can and cannot hear.

Now, we might think of these jurors as “Pre-Internet” jurors, locked in a system designed for days gone by. Today’s jurors – and particularly those who have grown up in the era of the Internet – are a different breed. They (we) have become accustomed to being active information-seekers, to having their every curiosity quickly satisfied. An essay in a campus newspaper by Akiva Bamberger, a Columbia student, captured this drive perfectly:

The familiar itch comes in surreptitiously, causing my hands to shake. All self-control goes out the window as I open Chrome and begin surfing the Web, moving from Google News to Twitter to Blog and back to Google News. I click links to stories faster than I can comprehend their content. Oh, the information is so good. But, after I read all the stories, I crash. Scared and sad, I force myself to go back to work. I am calm. The room stops spinning. Then, only two minutes later, the itch returns.

It’s a strange thing, this addiction to information. As a kid, I mailed a letter to a friend while in summer camp, and happily forgot about him until a postcard came a week or two later. Today, I get frustrated waiting more than 15 minutes for a text message response. With the proliferation of mobile devices that deliver all forms of peer-to-peer communication and news instantaneously, this phenomenon is becoming more and more widespread. We are becoming information junkies.^{xvii}

While Bamberger’s tongue-in-cheek characterization of his “addiction” might be extreme, the frustration he describes at having to wait for information is very real, and very pertinent to jurors. Information at trial is presented methodically and often slowly and even more often, feels incomplete to jurors. Generations of past jurors simply had to live with that frustration, but today’s jurors do not. They can remedy the situation in mere seconds by opening a search engine and typing in a question, a few words, a name or even just the first three letters of a search term. McGee, in her discussion of the challenges resulting from technology-addicted jurors being told not to seek extrinsic information, noted the dramatic contrast between the ease with which jurors are accustomed to getting information through technology and the long and laborious process of asking questions of the court. We share McGee’s conclusion about jurors relying on the court to answer questions: It would be *rare for jurors to engage in such a process – especially when they have the Internet, and the answers, at their fingertips.*^{xviii}

The combination of the ease of targeted searching, the accessibility of information via home computers, smartphones, PDAs or other mobile devices, and the psychological expectation that every question can be answered instantly, every “itch to know” can be scratched, have combined to create jurors who are not content to rely on what they hear in the courtroom to make decisions about a case. Judicial admonitions notwithstanding, they are taking matters into their own hands and doing research. They are questioning witnesses’ assertions, researching unfamiliar terms, and searching for background information to provide a context for what they have heard in the courtroom. In the Florida case we mentioned earlier, one juror’s Google searches were reported to the judge, whereupon further questioning of the jury revealed that eight others – that is, nine of the 12 jury members – had conducted Internet searches related to the case.^{xix} Clearly, the tide has turned and absent draconian measures that track jurors’ Internet use and punish infractions severely, there may be no going back.

^{xvii} Akiva Bamberger, *Information Junkie*, *Columbia Spectator*, 11/17/09.

^{xviii} McGee, *op cit.*, p. 310.

^{xix} Deirdra Funcheon, *Jurors and Prosecutors Sink a Federal Case Against Internet Pharmacies*, *Broward-Palm Beach New Times*, Apr. 23, 2009, <http://www.browardpalmbeach.com/2009-04-23/news/jurors-and-prosecutors-sink-a-federal-case-against-internet-pharmacies>.

The Current Solution: State and Federal Courts Forbid Internet Contact By Jurors

As more and more courts have recognized the challenges posed by jurors who engage in Internet research, they have developed more detailed instructions to forbid such research explicitly. As of September 2010, the U.S. Judicial Conference had sent suggested jury instructions to the entire federal judiciary (absent the U.S. Supreme Court) which included admonitions against conducting any independent research using the Internet (or traditional media). Similarly, twenty states reference juror Internet use in at least some of their standard jury instructions.^{xx} Thus, jurors who nonetheless conduct Internet research often do so in direct violation of judicial instructions. Jurors have been fined as a result and in some cases, judges have even contemplated charging them with contempt for their trial-related Internet activity.^{xxi}

Great Britain's court system takes this a step further: The website for Her Majesty's Court Service admonishes jurors not to speak to anyone about what they hear in court and not to post details of their jury service on any social networking site, and then adds:

You may also be in contempt of court if you use the internet to research details about any case you hear along with any other cases listed for trial at the court.^{xxii}

Clearly, the U.S. is not alone in struggling with the tension between the information superhighway and the highly controlled courtroom environment.

Some Jurors Go Online In the Belief That They Are Promoting Justice

There are those who, when contemplating jury service, believe that the pursuit of extra-courtroom information does not undermine justice, it promotes it. In response to a March 17, 2009 New York Times article about a "Google mistrial," many posted comments on the Times' website. One respondent (Bill, Camarillo, CA (Los Angeles), March 17th, 2009, 2:43 pm) wrote the following:

If evidence and testimony provided to jurors in the courtroom is incomplete, I feel that any rational and responsible juror would seek additional information on their own. The object of any court proceeding is to ascertain the facts and arrive at a fair judgment using ALL facts obtainable by any means available. If I am ever called and sit on a jury, you had better believe that everything said will be recorded and photographed so I can take it home and do whatever research is required to unravel the case using due diligence.^{xxiii}

Perhaps we need to consider the possibility that the straightest path to justice can no longer be found in the separation of the courtroom from the rest of the world, or in the requirement that jurors cut themselves off from outside information or from their own areas of expertise.^{xxiv} Perhaps once, it was possible. Once, the amount of work required to marshal case-relevant information was formidable and created its own barrier to access. The current reality may be that it is simply not realistic or possible to try to keep jurors off the Internet. All practical barriers to access are gone. And, once there, Internet searching will likely bring relevant information to jurors' instant attention.

^{xx} Eric P. Robinson, *Juror Use Of Social Media: A State-By-State Guide*. Blog Law Online, September 13, 2010. <http://bloglawonline.blogspot.com/2010/02/juror-use-of-social-media-state-by.html>.

^{xxi} *U.S. Juror Could Face Charges For Online Research*. Reuters, January 19, 2011. <http://in.reuters.com/article/2011/01/19/internet-juror-idINN1923805320110119>

^{xxii} http://www.hmcourts-service.gov.uk/infoabout/jury_service/contempt.htm, last visited February 11, 2010.

^{xxiii} New York Times Readers' Comments: *As Jurors Turn to Web, Mistrials Are Popping Up*, March 17, 2009; <http://community.nytimes.com/comments/www.nytimes.com/2009/03/18/us/18juries.html> (See Keene and Handrich (2009) for more on this comment).

^{xxiii} See the 2000 decision *People v. Maragh*, 94 N.Y. 2d 569 in which a conviction was overturned because nurses on the jury shared their expertise during deliberations.

*The Greatest Challenge:**Reckoning With Extrinsic Information That Is Not Subject To Cross-Examination*

The greatest challenge to information acquired by jurors over the Internet is that it circumvents the process of cross-examination that is at the heart of our country's adversarial trial system. Internet-derived information may or may not be true and without cross-examination its impact cannot be mitigated. In a criminal case, for example, in which jurors acquire information prejudicial to a defendant, the defendant loses his Constitutional right to confront his accusers. Any consideration of loosening the rules about extrinsic information must include an analysis of the implications of allowing unchallenged – and unchallengeable – information to enter into jurors' deliberations. Surely, this is by far the most serious problem the Task Force must address. It would be easy to say that this is an insurmountable problem, and maybe it is. And yet, "just say no" is not working.

Further, we are currently especially aware of the power of the Internet to bring about justice. While Tihrer Square in Cairo, Egypt is no courtroom, it became a crucible for democratic principles thanks to the power of the Internet. Courtroom life is, in some respects, a microcosm for life in our culture. As such, it shares imperfections with the broader society that may well be worthy of Internet attention and redress. Surely people are unjustly accused and convicted in part because evidence is not handled fairly. In courtrooms, evidence may be unfairly hidden, suppressed or precluded. Perhaps the Internet, properly managed, could provide a justice-enhancing check on the otherwise greater power of those who might exclude relevant evidence for the wrong reasons.

Not All Information Is the Same

Courts have long recognized that not all extrinsic information is prejudicial, and this is true for information gleaned on the Internet just as for information obtained from other sources. For example, an Internet search on a defendant that uncovers prior convictions that had been ruled inadmissible at trial would likely pose greater problems than would Internet research on the meaning of a medical term. Thus, any discussion of whether and how to open the door to Internet research must consider where the line is between prejudicial information and harmless error.

The nature of the information that jurors might discover online relates broadly to five categories:

1. Media accounts of the case, which can vary widely in objectivity. This category might include anything from factual statements about the original incident or dispute to editorials advocating for a particular verdict.
2. Virtual physical or other factual evidence. For example, jurors might visit maps of a crime scene accessed on Google Earth, check the length of a trip on Mapquest, or examine fluctuations in the stock market during a pertinent period.
3. Expert opinions. For example, consider the recent cover article of the New York Times Magazine section on shaken-baby syndrome and the impact the corrective view might have had on trials at which experts were overly certain about the meaning of the three identified diagnostic criteria: subdural and retinal hemorrhaging and brain swelling. Recent research has revealed that infections and bleeding disorders can also cause these symptoms.^{xxv}

^{xxv} Emily Bazelon, *Shaken-Baby Syndrome Faces New Challenges In Court*, *New York Times Magazine*, February 2, 2011.

4. Personal and professional information on the parties involved, including the judge, attorneys, parties to civil litigation, or defendants in criminal cases. Such research might uncover prior bad acts, identify a plaintiff's or defendant's financial status that could affect damages awards, or – in the case of research on judges and attorneys – increase the likelihood that factors unrelated to the case at hand could influence jurors' judgments.

5. The law. In courtrooms, jurors are the judges of the facts, not the law and they are explicitly prohibited from knowing certain things, such as the sentences associated with conviction for the particular crime charged. Were jurors to know the sentencing parameters, this might affect their verdicts. Then again, one might argue that perhaps it should.^{xxvi}

Each of these categories of information should be considered in conjunction with the broader challenges considered here to see if the issues raised by Internet involvement are the same or different. For example, to the extent that individual experts' testimony might be countermanded by information available on the Internet, justice might be enhanced by the intrusion of the Internet-derived information into the jurors' deliberations. Even so, the role of the judge as sole arbiter of what may and may not come in at trial is wholly undermined. But, if judges get it wrong – and sometimes they do – perhaps it is simply so much more important to get it right, that it behooves us to figure out how to solve the problem of the Internet in nuanced ways that go far beyond our current, “just say no” posture. True justice may lie in reducing the power of the judge and in changing the laws that govern courtroom life.

*Questions for the Task Force to Address:
Setting Policies and Studying Their Impacts*

Identifying the relevant informational terrain is easy. Determining what to do about it, should the Task Force decide that the “just say no” policy is inadequate to the task, is formidable. Here, we offer a list of questions that could be the starting charge for the multidisciplinary Task Force we have envisioned. Some can be partially answered by looking to existing theories and research; others will require systematic study in the laboratory (with mock jurors) and/or in the real world of the courtroom. Here, then, are some starting questions:

1. Can be jurors be permitted to obtain extrinsic information with the condition that they will always give greater weight to what they learn in the courtroom? Is such a thing even psychologically possible?
2. Can attorneys incorporate Internet searches into courtroom procedures so that jurors' “itch to know” will be satisfied? This way, the justice-check that might come from Internet-derived information could be preserved, jurors could feel that the broader information available online had been explored, and individual searches might be more effectively prevented.
3. How would lifting a ban on Internet research change the pre-trial process for motions *in limine* and judicial rulings on such issues? Does it make sense to fight over excluding information that can then be found online by jurors? Would attorneys opt not to file motions *in limine*, so as to be better positioned to address all issues in the courtroom, rather than having jurors discover this information on their own?

^{xxvi} After Pietro Pollizzi was convicted of viewing child pornography – which called for a mandatory minimum sentence of five years – EDNY Judge Jack Weinstein told the jurors about this sentencing requirement. Four of the jurors then said that had they known this, they would not have convicted Mr. Pollizzi. 549 F. Supp. 2d 308 at 339 (E.D.N.Y. 2008).

4. Would a lifting of the ban on Internet research disproportionately empower younger, more Internet-savvy jurors who will then have access to more and different information than their older and lower-tech peers?
5. Would there be any benefit to instructing jurors that they may conduct some types of Internet research (e.g. looking up unfamiliar terms) but not others (e.g. reading media coverage of the trial)?
6. Would there be value in allowing jurors to be more active in the fact-finding process by, for example, allowing them to share their questions and concerns about what they have heard with the Judge? Would this alleviate the natural curiosity and frustration that presumably accounts, at least in part, for jurors taking things into their own hands and conducting Internet searches?
7. Would jurors' urge to search the Internet be assuaged if all of the trial evidence (e.g., transcripts of witnesses' testimony, documents) were placed on a website that the jurors could peruse? Would it be possible to limit their case-related Internet activity to this website?

Complexity Notwithstanding, A Call for Exploration

The questions listed above are just a beginning. Surely many other questions will emerge as the Task Force undertakes its mission. One might say that a minefield of questions must be addressed as we move forward in thinking about how to handle juror Internet use. The increasingly frequent reports of juror internet research and Google mistrials suggest that the Googling juror is here to stay. One of the open questions is whether these jurors can be stopped by more stringent judicial instructions or the threat of sanctions. Another question about jurors' privacy rights is waiting to be addressed as courts consider asking jurors for their online ID's and the chance to track their internet activity.

We cannot avoid reckoning with this new reality. If we do not rise to meet this challenge, if we bury our heads in the sand, jurors' choices alone will shape the landscape and trials will be modified *ad hoc* and *de facto*. Serving justice is the ultimate goal and in some ways the Internet may facilitate this goal. That said, it is surely easier to imagine the many ways in which the Internet may subvert it. It is reasonable to believe, though, that the Internet is here to stay. It is time for those of us who make our livings in the well of the courtroom to step up, ask the questions and test the answers that will bring the reality of the Internet-era and the laws on trial practice together.

Rather than increasing the threat-level of the court's instructions (something that might well have other unintended consequences in terms of jurors' sense of the government's reach and power in their personal lives), this may be the time to begin the conversation that will seek ways to encourage jurors to put information from the Internet, from the media more broadly, or from others in its proper place.

Perhaps, judges could instruct jurors to put extrinsic information in its place – a place of less weight -- like this:

As you may be aware, it has been the practice in courtrooms to ask jurors not to follow media accounts of the case outside the courtroom, not to read about the case online, and not to discuss it with others. The reason why this has long been the practice is that literally centuries of experience have taught that the surest way to search for the truth is to subject it to scrutiny in court, subject it to the process of cross-examination. This tradition is enshrined in the Bill of Rights to our Constitution, which requires that a criminal defendant has the right to confront each and every witness against him or her in open court.

The practice of the courts is changing, and we are now asking something different of you. We are asking that you give the information you learn here in the courtroom paramount weight. To the extent that you gather general information that may have some relevance to this case outside the

courtroom, we ask that you consider this information to be secondary in importance – to be of lesser weight. Any specific information about this case discovered outside of the courtroom, however, may not be considered.

What is specific information? Any account of what happened, any comments on the testimony or on evidence that was presented or that was excluded would be specific information that you should not consider at all. You should not consider comments about the case whether you happen upon them in the newspaper or on the internet in the form of articles, blogs, or postings about the case. The reason that I am instructing you on this is to preserve the guarantee that a defendant has the right to confront any and all witnesses that testify against him or her. It would be fundamentally unfair if this guarantee were eroded by your considering information or views about the case that developed outside the courtroom and were not subject to cross-examination.

As you probably already know, information on the Internet may or may not be true and accurate. People express opinions there that cannot be governed by the rules of evidence and that may not be true.

Information that may be generally true, such as medical information that applies to large groups of people, may not be true for particular individuals. Just as your doctor's advice to you, based on examining you, must be given more credence than Internet-based medical advice, so you must give more credence to what happens here in the courtroom than to anything else.

What you learn here in the courtroom about the specific circumstances of this case therefore must control. No outside news source, no website will have the direct access to testimony and other evidence that you will have here in the courtroom. If you choose to seek general information that may have some tangential bearing about an issue in this case outside the courtroom, please bear this in mind.

Also, the law imposes certain guidelines for the information that you may consider when it comes time to reach your verdict. You must follow the law as I give it to you, and give lesser weight to any information that comes to you from outside the courtroom. Sometimes outside information may be inconsistent with what you learn here. What you learn here will always deserve greater weight in your thinking.

During the trial, some of you may think that you can find answers online to questions that you feel have not been adequately addressed during the trial. As matters of law, some questions are not to be answered in the courtroom. You are not to give more weight to information that comes from the Internet than you give to the testimony and other evidence presented to you here in the courtroom. You are not to allow Internet-based answers to questions that have gone unanswered in the courtroom to affect your deliberations. The limits of courtroom evidence must set limits on what you consider as you deliberate.

The courts have made the decision to permit jurors to access outside information because the court acknowledges that it is hard to do otherwise and because the courts have taken the position that as responsible citizens, as people doing your highest civic duty as jurors, you will give the events of the courtroom the weight they deserve. While you may seek information beyond these four walls, you must always and without hesitation give greater weight to the information you acquire here in this room – testimony from the witness stand and any other evidence that the attorneys in this matter put before you.

A Final Note:

Distinguishing Between Taking Information In and Putting Information Out

While this paper has focused primarily on issues related to jurors as information-seekers, we must also consider the complications and challenges that arise from jurors as information-sharers. In the past several years, a few cases have ended in mistrials not because jurors were searching for

information but because sitting jurors were posting or blogging about the case. The most egregious example of this was the British juror who posted about her case on Facebook and asked her friends to cast verdict votes, promising she would follow the majority in rendering her own vote.^{xxvii} “I don’t know which way to go, so I’m holding a poll,” she wrote. In this case, this juror was dismissed and the trial continued on with 11 jurors.

It is unlikely that other cases will rise to this level of interactivity, but even less extreme modes of communicating about a case can be problematic. Traditional admonitions to jurors not to discuss a case until after a verdict is rendered are designed to ensure that jurors do not engage in discussions that might then cause them to reach an early verdict, or ultimately influence their verdict during deliberations. Thus, jurors are not even supposed to discuss the case with each other prior to deliberations, much less with friends, acquaintances, or random strangers unassociated with the case at all.

It is likely that a Task Force examining the question of juror Internet use and whether the rules should be loosened will see a distinction between the implications of loosening rules regarding what information jurors can acquire from the Internet and what information they can disseminate. One could argue that the cost-benefit analysis of allowing jurors to satisfy their “itch to know” carries more potential benefits than allowing them to satisfy their “itch to tell.” We think this is a topic worth examining, along with the question of whether the courts could lift the Internet ban on “knowing” and still reasonably expect jurors not to “tell.”

Conclusion

We hope that with this paper, we will begin a line of discourse that will enable those concerned with courtroom justice to ask whether the current paradigm is working, and if it is not, to discuss how to fix it. We think that the de facto, unregulated intrusion of the Internet into courtroom practice and jurors’ thinking is a problem serious enough to require a major paradigmatic shift in American jurisprudence. We think it is time to reckon with the reality that some jurors will seek information outside the courtroom. It is time to think about new instructions designed to help jurors handle this extra-courtroom information in order to give the trial its fair due. In the brave new world of the courtroom set atop the Internet superhighway, justice may be best served by letting reality in. At least, we should talk about it. Perhaps, the American Society of Trial Consultants could spearhead this effort.

So, we end this paper where we began, with the recognition that “*Yesterday is hist’ry, and it’s never coming back.*” The days of the pre-Internet juror are gone, and our courtrooms will never return to a time when information is not easily accessible at the touch of a button, and jurors are not accustomed to having their need to know satisfied instantaneously. In his recent reviews of two books in the New York Times, William Saletan wrote:

Humanity is migrating to cyberspace. In the past five years, Americans have doubled the hours they spend online, exceeding their television time and more than tripling the time they spend reading newspapers or magazines. . . .^{xxviii}

Jurors are, literally and virtually, in a different place these days. There has been a sea change in the way that Americans think and learn, and it is as evident in the courtroom as anyplace else. Just as classrooms and boardrooms have adapted to this change, so too must the courtroom. We do not know yet what form that adaptation will take, but we believe it is time to pursue the conversation in earnest.

^{xxvii} Urmee Khan, *Juror Dismissed From A Trial After Using Facebook To Help Make A Decision*, The Telegraph, Nov 24, 2008.

^{xxviii} William Saletan, *The Computer Made Me Do It*, New York Times, Sunday Book Review, 2/13/2011. (The two books were Virtually You: The Dangerous Powers of the E-Personality by Elias Aboujaoude, and Reality Is Broken: Why Games Make Us Better and How They Can Change the World by Jane McGonigal).