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Criminalization Of Juror Misconduct Arising From Social Media Use

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CRIMINALIZATION OF JUROR MISCONDUCT ARISING FROM SOCIAL MEDIA USE

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TABLE OF CONTENTS

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INTRODUCTION

A criminal defendant's right to an impartial jury is a bedrock principle of our criminal justice system. Indeed, the Constitution guarantees each criminal defendant not only the right to a jury trial but also that the citizens serving on the jury be uninfluenced by external prejudices and preconceptions. As central as this right has been, and continues to be, to our criminal justice system, guaranteeing criminal defendants an impartial jury has always posed a problem. During Aaron Burr's treason trial, for example, Burr's lawyer argued that Burr could not have possibly received a fair trial since the jury's perception of Burr was prejudiced by newspaper accounts of the scandal.[1]

Despite the persistent hurdles that courts have faced in providing impartial juries to criminal defendants, modern technology and the public's increasing access to it have exacerbated the problem. As a ubiquitous force in our daily lives, social media especially has posed unique problems to the jury system. After all, a juror's impartiality may be questioned from a single "tweet" or Facebook post during the course of a trial. Scholars generally agree that social media implicates exceptional new problems to the impartial jury,[2] but they have failed to come to consensus over the proper solution. Although some scholars have argued for clearer and more concise jury instructions to combat juror misconduct, social media's pervasiveness suggests that even the clearest jury instructions may fail to deter individuals from using social media while serving as jurors.

This Essay analyzes criminalization as an alternative solution to juror misconduct arising from social media use, where jury instructions fail to prevent such misconduct. Despite the lack of scholarship on the subject, criminalization is far from a radical solution—California enacted legislation in 2011 that sought to criminalize jurors' improper use of social media.[3] By criminalizing juror misconduct, states can deter misconduct from occurring while also instilling the importance of the jury institution in the public. At the same time, it is important to be cognizant of objections that judges and jurors may raise. This Essay proceeds in three parts. Part I outlines persistent problems that arise from the use of social media as well as several deficiencies of jury instructions. Part II lays out California's legislative approach, where juror misconduct arising from social media use may be punished as a misdemeanor. Finally, Part III analyzes benefits that arise from criminalization as well as several anticipated objections to the approach.

[1] Chief Justice Marshall stated that the "great value of the trial by jury certainly consists in its fairness and impartiality." *See* United States v. Burr, 25 F. Cas. 49, 50 (C.C.D. Va. 1807).

[2] *See, e.g.*, David E. Aaronson & Sydney M. Patterson, *Modernizing Jury Instructions in the Age of Social Media*, 27 CRIM. JUST. 26 (2013); Hon. Amy J. St. Eve & Michael A. Zuckerman, *Ensuring an Impartial Jury in the Age of Social Media*, 11 DUKE L. & TECH. REV. 1 (2012); Frank J. Mastro, *Preventing the "Google Mistrial": The Challenge Posed by Jurors Who Use the Internet and Social Media*, 37 LITIGATION 23, 23–24 (2011).

[3] *See infra* Part II.A.

I. PERVASIVE JURY PROBLEMS ARISING FROM SOCIAL MEDIA USE AND THE INADEQUACY OF "PROPER" JURY INSTRUCTIONS

A. *Incidents of Jury Misconduct*

Broadly defined, juror misconduct is a "juror's violation of the court's charge or the law, committed either during trial or in deliberations after trial."[4] It may come as no surprise that as social people integrated social media into their lives, incidents of certain types of juror misconduct have occurred with more frequency. The following section explores specific ways that juror misconduct can occur, focusing specifically on three categories of misconduct which social media has had the greatest impact on.[5]

1. Juror Influence by External Contacts with Third Parties

A fundamental component of a criminal jury trial is a defendant's right to a verdict "based upon the evidence developed at the trial."[6] A juror's contact with people, save for the judge and other members of the jury, can violate this fundamental component.[7] Third-party communication raises the possibility of a juror externally developing evidence, subverting the basic protections guaranteed to defendants, including their rights to confrontation, to cross-examination, and to counsel.[8]

Of course, improper third-party communications occurred well before the rise of social media.[9] But social media has made third-party opinions more accessible than ever before. Take for instance, a jury trial in the United Kingdom where a juror was dismissed from the jury "after using Facebook to ask pals if they thought the defendants were guilty."[10] The juror not only posted details about the case to her Facebook page, but also told her friends, "'I don't know which way to go, so

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[4] BLACK'S LAW DICTIONARY 1017 (8th ed. 2004).

[5] *See* Bennett L. Gershman, *Contaminating the Verdict: The Problem of Juror Misconduct*, 50 S.D. L. REV. 322, 323 (2005). Gershman lists a number of scenarios in which defendants have claimed juror misconduct. For purposes of juror misconduct stemming from social media use, three come to the forefront: "[1] influenced by external contacts with third parties, [2] exposed to extraneous, non-evidentiary information . . . [and 3] engaged in conduct demonstrating bias and prejudgment." *Id.; see also* Ebony Nicolas, *A Practical Framework for Preventing "Mistrial by Twitter,"* 28 CARDOZO ARTS & ENT. L.J. 385, 394–95 (2010).

[6] *See* Turner v. Louisiana, 379 U.S. 466, 472 (1965) (citation omitted). Justice Holmes famously stated that the "theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print." *See* Patterson v. Colorado, 205 U.S. 454, 462 (1907).

[7] *See* Remmer v. United States, 347 U.S. 377, 379 (1954).

[8] *See Turner*, 379 U.S. at 473.

[9] *See, e.g., id.*; Parker v. Gladden, 385 U.S. 363, 364–65 (1966) (reversing conviction based on bailiff's remarks to several jurors that the defendant was guilty).

[10] Guy Patrick, *Juror Axed For Verdict Poll on Net*, SUN (Nov. 24, 2008), http://docs.newsbank.com.proxy.library.cornell.edu/openurl?ctx_ver=z39.88-2004&rft_id=info:sid/iw.newsbank.com:AWNB:LSNB&rft_val_format=info:ofi/fmt:kev:mtx:ctx&rft_dat=124AB8BC1E8E3C30&svc_dat=InfoWeb:aggregated5&req_dat=0D0CB4F0E6B93180.

I'm holding a poll.'"[11] In addition to demonstrating a blatant disregard for the jury's obligations, the juror's actions reveal the ease with which a juror could access third-party opinions via social media. Currently, anyone with a smart phone walks around with access to his or her friends, family, and extended social network.

In another case, a juror "'posted comments about the evidence as it was being presented during the trial on his 'Facebook Wall,' inviting his 'friends' who have access to his 'Facebook' page to respond.'"[12] Unlike the previous example, however, the juror's misconduct was not discovered until after the jury reached a verdict. Having participated in deliberations and the verdict, the juror's Facebook friends could have directly influenced the trial outcome.[13] This sort of misconduct may not necessarily result in a reversal on appeal, but appellate courts have ordered retrials in a growing number of cases based on a juror's social media use. Recently, the Supreme Court of Tennessee reversed a defendant's conviction based on the trial judge's failure to inquire into improper communications between a juror and a state witness.[14] According to documents submitted shortly after the jury was let out to deliberate, a juror sent a Facebook message to a state witness, commending her on "a great job today on the witness stand."[15] It was later discovered that the juror had a preexisting relationship with the state witness, a fact that would have been grounds for the juror's dismissal before trial began.

2. Juror Exposure to Extraneous Non-Evidentiary Information

Extraneous non-evidentiary information is defined as any evidence that is not presented by either party during the course of a trial. This includes specific information, such as a defendant's prior misconduct or propensity towards violence, as well as more general information, such as news coverage of the trial. Similar to issues that arise where jurors are influenced by third parties, a juror's access to non-evidentiary information implicates violations of a defendant's right to an impartial jury and confrontation.[16]

The incorporation of technology into our daily lives has significantly increased jurors' exposure to non-evidentiary information. Prior to modern mobile technologies, jurors faced the difficult task of avoiding a daily newspaper's or evening television news' coverage of a trial. Today, jurors face the exponentially more difficult task of avoiding traditional news coverage, as well as modern media

[11] *Id.*

[12] *See* Juror No. One v. Superior Court, 206 Cal. App. 4th 854, 858 (2012) (quoting declaration by Juror No. 5).

[13] *See id.* ("Juror Number One was a juror in the trial of People v. Christian et al., Sacramento County Superior Court case No. 08F09791 (the criminal trial) in which the defendants, real parties in interest in this writ proceeding, were convicted of various offenses . . . .").

[14] *See* State v. Smith, 418 S.W.3d 38, 42 (Tenn. 2013).

[15] *See id.* at 42. Perhaps more striking than the juror's Facebook message was the trial and lower appellate courts' reactions when presented with the information. *See* State v. Smith, No. M2010-01384-CCA-R3CD, 2012 WL 8502564 (Tenn. Crim. App. 2012) (affirming the trial judge's denial to hold a hearing on the issue of possible juror misconduct based on the fact that the "juror's communication with Dr. Lewis appears to be a social communication rather than one in which the juror is seeking extraneous and improper information about the case), *vacated*, 418 S.W.3d 38 (Tenn. 2013).

[16] *See* Sheppard v. Maxwell, 384 U.S. 333 (1966).

and the "armchair lawyers" of social media. As difficult as this task may seem, jurors are not required to avoid internet use altogether; rather, they need only avoid information pertinent to the trial and refrain from conducting research about the trial.[17]

This requirement has proved too much for some. In one case, a juror discovered information online about a defendant's past conviction for child molestation. The juror revealed the information to the other jurors, which caused the judge to declare a mistrial.[18] To add insult to injury, instead of showing remorse for causing a mistrial, the juror stated, "that he had no regrets because he believed jurors need[ed] to know about [the defendant's] past."[19] In another recent case, a federal judge had to declare a mistrial in a drug trial because nine out of the twelve jurors admitted to doing internet research about the case.[20]

3. Juror Conduct Demonstrating Bias and Prejudgment

Juror misconduct may also occur where jurors use social media to express bias or prejudgment prior to deliberations. To succeed on a claim of juror misconduct based on juror bias or prejudgment, a defendant must demonstrate that the juror was "actual[ly] bias[ed]."[21] While actual bias must be determined on a case-by-case basis,[22] at the very least it seems clear that jurors who publicly express the way they intend to vote prior to deliberations are actually biased. After all, a juror who decides to convict prior to hearing all the evidence deprives the defendant of due process of law, as well as a jury trial decided by an impartial jury.[23]

Social media has provided a constant outlet for jurors seeking to express their opinions. In a case involving the mayor of Baltimore, the defendant-mayor moved for a new trial after learning that five of the jurors had been conversing on Facebook throughout the trial.[24] A notable exchange occurred when a non-juror named Al commented on Facebook that he believed the defendant-mayor was not guilty. His friend, who was serving as a juror in that case, responded, "NO AL

[17] *Cf.* United States v. O'Keefe, 722 F.2d 1175, 1179 (5th Cir. 1983) (noting that there is a presumption of jury impartiality that can only be overcome with evidence that "extrinsic factual matter tainted the jury's deliberations").

[18] *See* Debra Cassens Weiss, *Juror Whose Revelation Forced a Mistrial Will Pay $1,200*, ABA JOURNAL (Oct. 13, 2009; 12:02 PM), http://www.abajournal.com/news/article/juror_whose_revelation_forced_a_mistrial_will_pay_1200. As punishment, the juror agreed to pay $1,200 to the county "for expenses related to two days of jury deliberations in the case." *Id.*

[19] AnnMarie Timmins, *'Juror Behind Mistrial Pleads, Pays $1,200'*, CONCORD MONITOR (Oct. 10, 2009), http://www.concordmonitor.com/article/juror-behind-mistrial-pleads-pays-1200.

[20] John Schwartz, *As Jurors Turn to Web, Mistrials Are Popping Up*, N.Y. TIMES, March 18, 2009, at A1.

[21] *See* Smith v. Phillips, 455 U.S. 209, 215 (1982) ("This Court has long held that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias.").

[22] For an analysis of the Court's opinion in *Phillips*, as well as instances of implied bias that may constitute reversible error, see Gershman, *supra* note 5.

[23] *See Phillips*, 455 U.S. at 217 ("Due process means a jury capable and willing to decide the case solely on the evidence before it, and a trial judge ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen.").

[24] *See* Mastro, *supra* note 2.

GUILTY AS HELL . . . SORRY."[25] This was before the jury had deliberated and well before the jury reached a verdict. Upon learning of the online interaction, the trial judge ordered an evidentiary hearing. Even though the case ended in a plea bargain, it seems clear that at least one of the jurors formulated his decision before deliberations were completed, which indicates a very real possibility that the defendant's right to an impartial jury and due process of law were violated.

B. *Inadequacy of Jury Instructions*

The foregoing section was intended to demonstrate the unique ways in which social media use could result in juror misconduct. Scholars have already recognized social media's impact on juror misconduct,[26] and many of them advocate for improved jury instructions to solve the problems associated with jurors' social media use. That is, clearer and more concise jury instructions that admonish the use of social media while serving as a juror will prevent or at least limit juror misconduct.[27] But jury instructions in many jurisdictions have already incorporated wording that strictly admonishes social media use while serving on a jury.[28] According to one study, thirty-five states already use jury instructions that "mention the Internet generally, mention both the Internet and social media, or mention specific web and social media sites and services."[29] Despite these supposed modern jury instructions, juror misconduct continues to occur. In some instances, misconduct occurs despite multiple admonishments from the judge. In an Arkansas state court case, for example, a juror "continued tweeting even after the trial judge questioned and admonished him."[30] This included at least one "tweet" indicating the jury verdict before it was publicly known.[31]

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[25] *See id.* at 24.

[26] *See supra* note 2.

[27] *See, e.g.*, Paula Hannaford-Agor et al., *Juror and Jury Use of New Media: A Baseline Exploration*, *in* PERSPECTIVES ON STATE COURT LEADERSHIP 7 (2012), *available at* http://www.ncsc-jurystudies.org/What-We-Do/~/media/Microsites/Files/CJS/New%20Media%20Study/NCSC-Harvard-005-Juror-and-Jury-Use-of-New-Media-Final.ashx (noting that judges propose improved jury instructions that specifically admonish the use of social media, as well as increase the frequency in which judges admonish the jury on social media use); Thaddeus Hoffmeister, *Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age*, 83 U. COLO. L. REV. 409, 468 (2012) ("Besides permitting questions, courts also need to improve jury instructions."); Mastro, *supra* note 2, at 25–27; St. Eve & Zuckerman, *supra* note 2, at 29 ("[W]e suggest that courts should, as a matter of course, employ specialized social media instructions at frequent intervals during trial.").

[28] *See, e.g.*, New York State Unified Ct. System, Crim. Jury Instructions 2d, Jury Admonitions in Preliminary Instructions (rev. May 5, 2009) (specifically admonishing communication by any means, including "blogs, or social websites, such as Facebook, MySpace, or Twitter"); Florida Supreme Ct., Crim. Jury Instructions, General Instructions § 1.1 (2010) (emphasizing the importance of not communicating with anyone about the case, including by way of "tweeting, texting, blogging, e-mailing, posting information on a website or chat room, or any other means at all"). For a fifty-state survey of jury instructions that specifically admonish internet and social media use, see generally Eric P. Robinson, *Jury Instructions for the Modern Age: A 50-State Survey of Jury Instructions on Internet and Social Media*, 1 REYNOLDS CT. & MEDIA L.J. 307 (2011).

[29] *See* Robinson, *supra* note 28, at 310.

[30] *See* Steve Eder, *Jurors' Tweets Upend Trial*, WALL ST. J. (Mar. 5, 2012, 8:10 PM), *available at* http://online.wsj.com/news/articles/SB10001424052970204571404577255532262181656.

[31] *See id.*

What is it about social media that makes jury instructions ineffective to combat juror misconduct? A look at the broader literature regarding the ineffectiveness of jury instructions is revealing. In the past thirty years, scholars have commented on jurors' inability to "remember, understand, or apply the judge's instructions correctly."[32] While some have attributed this to overly complicated jury instructions and the misapplication of legal standards,[33] a recent study using real juries found that the complications arise from ambiguity and gaps in the law itself.[34] Professor Kevin M. Clermont's discussion of two classic empirical studies confirms these findings, at least with respect to a jury's application of the standard of proof. Professor Clermont points out that juries have difficulty applying standards of proof, finding that jurors do not distinguish between the "beyond a reasonable doubt" standard and the "preponderance of the evidence" standard.[35] Other studies reveal the ineffectiveness of judicial admonishments. One study concluded that a judge's admonishment to ignore pretrial publicity had no effect on jurors.[36] And in another study, mock jurors were found to have considered inadmissible evidence despite a judge's admonishment.[37]

When considering these studies collectively, one can conclude that jury instructions have limitations, irrespective of social media's impact. Two characteristics unique to social media, however, can further limit the effectiveness of jury instructions. For one, social media is a pervasive force in our lives, making access relatively easy. This is especially problematic considering the way that jurors process information when making a decision. Second, social media use has a unique psychological effect on its users. More than any other medium of communication, social media has an addictive quality that may make jury instructions especially ineffective to prevent their use. Further compounding these problems is the fact that jurors may view social media use as harmless, despite a judge's instructions to the contrary.

1. Completing a Narrative

[32] *See* Phoebe C. Ellsworth et al., *Juror Comprehension and Public Policy: Perceived Problems and Proposed Solutions*, 6 PSYCHOL. PUB. POL'Y & L. 788, 788 (2000); *see also* Shari Seidman Diamond et al., *The "Kettleful of Law" in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 NW. U. L. REV. 1537, 1542 nn.19–21 (2012) (compiling sources).

[33] *See, e.g.*, AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE 12–17 (1982) (concluding in a study in which people were given actual jury instructions and then testing their understanding that jurors misunderstand critical legal issues); Mona Lynch & Craig Haney, *Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination*, 33 LAW & HUM. BEHAV. 481, 486 (2009) (noting that up to 30% of simulated jurors misapplied penalty-phase evidence).

[34] *See* Diamond et al., *supra* note 32, at 1606 ("The Arizona deliberations, although generally showing sensible decisionmaking by citizens motivated to 'get it right,' reveal tensions arising from some fundamental gaps between what we tell jurors to do and what we want them to do, coupled with limitations on what we can reasonably expect from any human decisionmaker, whether judge or jury.").

[35] *See* KEVIN M. CLERMONT, STANDARDS OF DECISION IN LAW: PSYCHOLOGICAL AND LOGICAL BASES FOR THE STANDARD OF PROOF, HERE AND ABROAD 108–11 (2013).

[36] *See* Geoffrey P. Kramer et al., *Pretrial Publicity, Judicial Remedies, and Jury Bias*, 14 LAW & HUM. BEHAV. 409, 430 (1990).

[37] *See* Valerie P. Hans & Anthony N. Doob, *Section 12 of the Canada Evidence Act and the Deliberations of Simulated Juries*, 18 CRIM. L.Q. 235, 249 (1976).

A juror may rely on social media as a way to understand ambiguities in the trial's narrative. Most scholars recognize that juror decision making is largely dependent on the ability of lawyers to tell a story.[38] The narrative theory or "story model," "presumes that jurors make sense of the evidence at trial by imposing a chronological narrative organization on it."[39] Professor Dennis Devine explains that jurors actively sift through evidence as it is presented, "focusing on some elements[] and discarding others."[40] Therefore, a trial boils down to a battle between adversarial stories, wherein each side tells "a different story, present[s] evidence to support that story, and make[s] arguments for why the jury should accept their particular story as 'truth.'"[41] Ultimately, the party who can supply the jury with the story that best explains the evidence will win.

A trial narrative, however, is never perfect. Indeed, "[t]rials are by nature filled with ambiguities."[42] To overcome these ambiguities, jurors must simplify the evidence to fill the gaps in each party's story. Gap filling is an essential part of the narrative theory, because judgment is impossible without "coherent stories."[43] And although jurors are supposed to serve as "passive recipients of information,"[44] they may impermissibly turn to social media as an external source of information to complete trial narratives. As Professor Devine explains, a "key assumption is that jurors rely heavily on their existing knowledge and beliefs in creating stories, using them to fill in gaps in the evidence, resolve contradictions, and determine plausibility."[45] Rather than relying solely on existing knowledge, though, jurors may turn to social media, since one's Facebook or Twitter page in many ways represents an extension of individual identity. So even where jury instructions explicitly admonish jurors from turning to external sources for information, jurors may feel compelled to turn to social media when neither party provides plausible, persuasive, or complete narratives.

The realities of the deliberation process compound the problem further. Professors Neil Vidmar and Valerie Hans discuss two influential studies that looked at how the story model affects deliberation.[46] Ultimately, those studies appear to extend the story model to jury deliberations, meaning that jurors "reconcile their individual narratives and arrive at a consistent story they can all agree on."[47] This has serious implications for deliberations that include a juror who has turned to social media to complete his or her own narrative. For instead of influencing one

[38] *See* John H. Blume et al., *Every Juror Wants A Story: Narrative Relevance, Third Party Guilt and the Right to Present A Defense*, 44 AM. CRIM. L. REV. 1069, 1087 (2007); Lisa Kern Griffin, *Narrative, Truth, and Trial*, 101 GEO. L.J. 281, 286 (2013); *see also* DENNIS J. DEVINE, JURY DECISION MAKING: THE STATE OF THE SCIENCE 26–29 (2012).

[39] *See* DEVINE, *supra* note 38, at 26; *see also* Blume et al., *supra* note 38, at 1087–88 ("[J]urors organize and interpret trial evidence as they receive it by placing it into a story format . . . to enable jurors to make a decision.").

[40] *See* DEVINE, *supra* note 38, at 26–27.

[41] Blume et al., *supra* note 38, at 1089.

[42] *Id.* at 1088.

[43] *See id.* at 1088.

[44] *See* Griffin, *supra* note 38, at 305–06.

[45] DEVINE, *supra* note 38, at 27.

[46] *See* NEIL VIDMAR & VALERIE HANS, AMERICAN JURIES: THE VERDICT 135–37 (2007).

[47] *See id.* at 137.

juror's own decision-making process, the work of Professors Vidmar and Hans indicate that the juror's misconduct would influence all of the jurors' decisions when they reconcile their individual narratives during deliberations.

2. Psychology of Social Media Use

The psychological impact of social media on individuals may further limit the effectiveness of jury instructions. There is an expanding body of literature about the addictive properties of the internet and social media. In one Harvard study, researchers found that disclosing information about oneself is "intrinsically rewarding . . . in the same way as with primary rewards such as food and sex."[48] The study also confirmed that there was greater reward activity in participants' brains when they shared personal activities with their social networks, compared to when their activities were kept private.[49] This may explain why criminals share their exploits on Facebook[50] or why bullies upload videos of their violence to YouTube.[51]

This too may explain why some jurors continue to use social media while serving, despite a judge's explicit instructions to the contrary. Asking someone to refrain from, say, "tweeting" about his or her life may require more than a judicial admonishment. Social media affects individuals differently, as indicated by another recent study that shows that there is a correlation between Facebook use and activity in the part of the brain associated with gratification.[52] As the study points out, this suggests that some individuals not only get more gratification from using social media, but increased levels of gratification are correlated to increased use of Facebook.[53] So although abiding by a judge's admonishment may be easier for some, jurors that receive the most gratification from sharing on social media may be unable or unwilling to comply with a judge's order.

3. Social Media Use as a Harmless Crime

[48] Diana I. Tamir & Jason P. Mitchell, *Disclosing Information About the Self is Intrinsically Rewarding*, 109 PNAS 8038, 8041 (2012).

[49] *See id.* at 8040; *but see* Robert LaRose et al., *Social Networking: Addictive, Compulsive, Problematic, or Just Another Media Habit?*, *in* A NETWORKED SELF: IDENTITY, COMMUNITY, AND CULTURE ON SOCIAL NETWORK SITES 59, 78 (Zizi Papacharissi ed., 2011) ("[B]ased on the current results, social networking services appear to be no more problematic, addictive, or even habitual than others despite their widespread popularity and popular press accounts on 'Facebook addiction.'").

[50] *See Seven Alleged California Gang Members Indicted for Crime Spree, Bragging on Facebook*, FOXNEWS (Mar. 21, 2014), http://www.foxnews.com/us/2014/03/21/7-alleged-california-gang-members-indicted-for-crime-spree-bragging-on-facebook/.

[51] *See* Sean Alfano, *Teens Arrested After Posting YouTube Video of Beating 13-Year-Old Boy and Hanging Him from a Tree*, DAILYNEWS (Feb. 1, 2011), http://www.nydailynews.com/news/national/teens-arrested-posting-youtube-video-beating-13-year-old-boy-hanging-tree-article-1.137868.

[52] *See* Dar Meshi et al., *Nucleus Accumbens Response to Gains in Reputation for the Self Relative to Gains for Other Predicts Social Media Use*, 7 FRONTIERS IN HUM. NEUROSCI. 439 (2013), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3757324/ (discovering that "Facebook use is predicted by the left nucleus accumbens response to self-relevant gains in reputation across participants").

[53] *See id.* ("In conclusion, we found that the processing of self-relevant gains in reputation in the left nucleus accumbens predicts the intensity of Facebook use across individuals.").

Jury instructions may also be inadequate to deter social media use based on jurors' perceptions that using social media during a trial is a harmless crime. Harmless crimes are those in which "no victim is necessarily available to bring a suit for retributive damages" however, the conduct involved has been "deemed (by legislators) worthy of condemnation."[54] Examples of harmless crimes include illegal drug possession and driving under the influence of alcohol.[55]

Jurors may justify their posting about the trial on Facebook or Twitter by arguing that the defendant is unharmed by their actions. Even though this is categorically wrong, as the Constitution protects defendants from this type of juror activity,[56] jurors may very well justify their actions by arguing that the defendant is unaware of the postings, and expressing one's opinion online would not alter their own opinion. Indeed, jurors may even justify the use of social media as an external resource by conceivably arguing that seeking advice from friends and family would help them during the deliberation process.[57]

C. *Proposal*

Since jury instructions alone do not seem to deter juror misconduct effectively, a more far-reaching approach may be required. In 2011, California did just that, passing legislation which criminalizes juror misconduct arising from social media use.[58] In 2009, the California legislature amended its jury instructions; however, in light of continued juror misconduct, Assemblyman Felipe Fuentes, the eventual

[54] Dan Markel, *Retributive Damages: A Theory of Punitive Damages As Intermediate Sanction*, 94 CORNELL L. REV. 239, 279 (2009).

[55] *Id.* Just because a crime is "harmless," does not mean that it cannot be punished. Most theories of criminal law have justified the punishment of harmless crimes. *See, e.g.*, Michael T. Cahill, *Attempt by Omission*, 94 IOWA L. REV. 1207, 1214 (2009) (noting that even those theorists who oppose the harm principle "claim that criminal law can reach *beyond* harmful conduct to cover a second category: conduct that is harmless but nonetheless viewed as inherently morally wrongful or offensive"); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1220 (1985) (noting that the justification of harmless crimes is prevention).

[56] *See supra* Part I.A.

[57] Of course, this may support the argument for clearer jury instructions that specifically warn jurors of the cost of their actions. *See* Hoffmeister, *supra* note 27, at 455 ("[J]urors should be told that failure to abide by these rules may cause the court to declare a mistrial, which is costly both in financial terms and in the emotional toll it takes on those involved in the process."). First, the general limitations discussed above may still prevent this sort of jury instruction from having any significant impact. *See supra* Part I.B.

Inadequacy of Jury Instructions Second, several jurisdictions already specifically warn jurors about the cost of their improper conduct related to electronic devices. *See, e.g.*, MODEL UTAH JURY INSTRUCTIONS, CRIMINAL 109B, *available at* http://www.utcourts.gov/resources/muji/ ("Post-trial investigations are common and can disclose these improper activities. If they are discovered, they will be brought to my attention and the entire case might have to be retried, at substantial cost."); 6 WASH. PRAC., WASH. PATTERN JURY INSTR., Civ. WPI 1.01 (6th ed. 2013), *available at* http://weblinks.westlaw.com/result/default.aspx?cite=UU%28I2c7bdb71e10d11dab058a118868d70a9%29&db=130417&findtype=l&fn=_top&pbc=DA010192&rlt=CLID_FQRLT5237701422254&rp=%2FSearch%2Fdefault%2Ewl&rs=WEBL14%2E04&service=Find&spa=wcrji-1000&sr=TC&vr=2%2E0 ("If you become exposed to any information other than what you learn in the courtroom, that could be grounds for a mistrial. A mistrial would mean that all of the work that you and your fellow jurors put into this trial will be wasted. Re-trials are costly and burdensome to the parties and the public.").

[58] *See* Assemb. B. 141, 2011 Reg. Sess. (Cal. 2011).

sponsor of the 2011 legislation, introduced Assembly Bill 2217 in 2010.[59] The bill sought to amend the civil and penal codes of California specifically to prohibit electronic communication while serving as a juror.[60] Even though the legislature passed AB 2217 unanimously, Governor Schwarzenegger vetoed the bill.[61]

In 2011, Assemblyman Fuentes attached an amendment to AB 141. The amendment effectively mirrored the statutory changes initially put forth in AB 2217.[62] The Judicial Council of California, the Attorney General's office, and the Civil Justice Association of California (CJAC) supported the bill, all of whom expressed concern that jurors' use of electronic devices threatened the integrity of the justice system.[63] Indeed, CJAC stated that the bill was "a common-sense extension of the current juror admonishment to consider only the facts of the case before them."[64] The legislature also believed that charging juror misconduct arising from social media use as a misdemeanor was necessary "to enforce these admonishments and deter any willful disobedience by jurors."[65] Upon passing the legislation, Assembly Member Felipe Fuentes stated, "Although current law arguably prohibits the use of electronic/wireless communication devices to improperly communicate, disseminate information or research, the fact that this kind of communication is not expressly included in current law has resulted in increased problems in courts across the county."[66]

1. California Approach

The 2011 amendment to courtroom procedure changes California law in several ways, three of which are related to juror misconduct arising from social media use in criminal trials. First, when instructing the jury of its "basic functions, duties, and conduct,"[67] judges are required to prohibit jurors from conducting any external research about the trials, specifically noting that the prohibition "applies to all forms of electronic and wireless communication."[68] In addition, the judge must repeat similar admonishments each time the jury recesses.[69] Second, while

[59] JUDICIAL COUNCIL OF CAL., JUDICIAL COUNCIL-SPONSORED LEGISLATION: MISDEMEANOR JUROR CONTEMPT 2 n.1 (Nov. 15, 2013).

[60] *See* Assemb. B. 2217, 2010 Leg., Reg. Sess. (Ca. 2010), *available at* http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_2201-2250/ab_2217_bill_20100218_introduced.html ("This bill would require the court, when admonishing the jury against conversation pursuant to these provisions, to clearly explain, as part of the admonishment, that the prohibition on conversation applies to all forms of electronic and wireless communication.").

[61] *See* JUDICIAL COUNCIL OF CAL., *supra* note 59, at 2 n.1.

[62] *See* Assemb. B. 141, 2011 Reg. Sess. (Cal. 2011).

[63] *See* S. JUDICIARY COMM., COMM. ANALYSIS OF ASSEMB. 141, at 7 (Ca. 2011).

[64] *Id.*

[65] *Id.* at 10.

[66] Eric P. Robertson, *New California Law Prohibits Jurors' Social Media Use*, DIGITAL MEDIA L. (Sept. 1, 2011), http://www.dmlp.org/blog/2011/new-california-law-prohibits-jurors-social-media-use. In addition, the law was passed after several high profile cases were "put in jeopardy due to the failure of jurors to follow directives." Susan Martin, *Juror Communications Through Social Media Now a Misdemeanor in CA Courts*, LEGAL CURRENT (Aug. 18, 2011), http://www.legalcurrent.com/juror-communications-through-social-media-now-a-misdemeanor-in-ca-courts/.

[67] CAL. PENAL CODE § 1122(a) (2011).

[68] *Id.* § 1122(a)(1).

[69] *Id.* § 1122(b).

deliberating, the jury is placed under the supervision of a court officer, who must ensure that no outsiders speak or communicate with the jury, including by "*any form of electronic or wireless communication*."[70]

The preceding two provisions were in no way controversial. At worst, they were viewed by some as redundant, as jury instructions already prohibited external communication or research by jurors, even if there was no specific reference to electronic forms of communication. A third provision, however, sought to criminalize a new category of juror misconduct. Section 166(a)(6) of the California Penal Code provides that a juror who is willfully disobedient of a court admonishment related to prohibitions on "electronic and wireless communications or research" is in contempt of court and therefore "is guilty of a misdemeanor."[71] The California Penal Code defines "willfully" as "a purpose or willingness to commit the [proscribed] act . . . . It does not require any intent to violate law, or to injure another, or to acquire any advantage."[72] Therefore, any juror who purposefully disobeys a judge's admonishment against using wireless or electronic devices in the prohibited ways could be found to be in contempt of court and thus, guilty of a misdemeanor.

2. Note on Criminalization

Under California law, a juror who is willfully disobedient of a judicial admonishment by using social media can be charged with a misdemeanor, punishable by up to six months in jail or a maximum fine of $1,000.[73] But some may argue that sending someone to jail for this sort of misconduct would be unjust, akin to sending a litterer to jail.[74] Criminalization does not have to result in jail time; rather, criminalization is defined as "[t]he act or an instance of making a previously lawful act criminal, [usually] by passing a statute."[75] Therefore, although some may be hesitant to punish juror misconduct arising from social media use with jail time, punishment in the form of a fine may be more suitable. The rest of this Essay does not attempt to discern what punishment, if any, would be appropriate; rather, it merely analyzes the benefits and objections associated with some level of criminalization.

II. CRIMINALIZATION OF JUROR MISCONDUCT ARISING FROM SOCIAL MEDIA USE

[70] *Id.* § 1128 (emphasis added).

[71] *Id.* § 166(a)(6). The amendments create parallel provisions for civil jurors, except that contempt of court is not treated as a misdemeanor. *See* CAL. CIV. PROC. CODE §§ 611, 613, 1209(a)(6) (2011).

[72] *See* CAL. PENAL CODE § 7(1) (2013).

[73] *See id.* §§ 19, 689 (2013).

[74] As one commentator so eloquently put it, "thousands suffer when people litter, but this does not make it fair to send the individual litterers to prison." *See* Dennis J. Baker & Lucy X. Zhao, *The Normativity of Using Prison to Control Hate Speech: The Hollowness of Waldron's Harm Theory*, 16 NEW CRIM. L. REV. 621, 625 (2013).

[75] BLACK'S LAW DICTIONARY 402 (8th ed. 2004).

A. *Benefits of Criminalization*

1. Deterrence

As an additional burden on jurors, criminalization may be a greater deterrent of undesirable behavior than jury instructions. Deterrence is one of the primary goals of the criminal law,[76] and although scholars debate its efficacy, there is no doubt that legislatures and courts ground many laws in the assumption that punishment will deter future crimes.[77] While there is a near-endless supply of literature debating the effectiveness of life-sentences and the death penalty as deterrents of serious crimes,[78] there is a dearth of scholarship regarding the use of minor punishments as a means to deter less serious crimes. Nevertheless, there are two strands of literature from which we may draw guidance.

James Q. Wilson and George Kelling proposed what they labeled the "broken windows" theory as justification for punishing certain petty crimes in urban areas.[79] The broken windows theory suggests that if small problems, such as broken windows, go unaddressed, they will result in a loss of public confidence and lead to more serious crimes in the area.[80] Although scholars debate the wisdom and legality of punishing petty crimes as a means to prevent serious crimes,[81] many mayors, including then-Mayor Giuliani of New York City, relied on the broken windows theory as justification for cracking down on petty crimes.[82]

Is juror misconduct arising from social media use like a broken window in the jury system? It is difficult to say for sure; but the broken window theory provides justification and support for criminalizing petty crimes as a means of deterring unwanted behavior. At the very least, it seems evident that the current paradigm

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[76] *See* Matthew Aglialoro, Note, *A Case for Actual Innocence*, 23 CORNELL J.L. & PUB. POL'Y 635 (2014). Deterrence is based on the "premise that individuals are willing to commit crimes if the expected benefits of the crime exceed the expected benefits of engaging in lawful activity." Michael A. Perino, *Enron's Legislative Aftermath: Some Reflections on the Deterrence Aspects of the Sarbanes-Oxley Act of 2002*, 76 ST. JOHN'S L. REV. 671, 675 (2002).

[77] *See* Posner, *supra* note 55, at 1193; *but see* Neal Kumar Katyal, *Deterrence's Difficulty*, 95 MICH. L. REV. 2385, 2391–2403 (1997) (arguing that measuring deterrent impact of increased punishment poses a more difficult problem than previously supposed, because some criminals will simply substitute one bad act with another).

[78] *Compare* H. Naci Mocan & R. Kaj Gittings, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J.L. & ECON. 453, 474 (2003) (concluding that capital punishment has a deterrent effect), *with* Peter Passell, *The Deterrent Effect of the Death Penalty: A Statistical Test*, 28 STAN. L. REV. 61, 79 (1975) (concluding that there is no evidence that capital punishment has a deterrent effect).

[79] *See* George L. Kelling & James Q. Wilson, *Broken Windows: The Police and Neighborhood Safety*, ATLANTIC MONTHLY, Mar. 1982.

[80] *Id.* Empirical research at the time appeared to support the premise of the broken windows theory. *See* Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 369 (1997) (discussing research study by Wesley Skogan); *but see* Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291, 308–29 (1998) (questioning the accuracy of Skogan's study).

[81] *See* Maria Foscarinis et. al., *Out of Sight—Out of Mind?: The Continuing Trend Toward the Criminalization of Homelessness*, 6 GEO. J. ON POVERTY L. & POL'Y 145, 163 (1999) (arguing for a more humane approach to homelessness than criminalization); Peter A. Barta, Note, *Giuliani, Broken Windows, and the Right to Beg*, 6 GEO. J. ON POVERTY L. & POL'Y 165, 185–93 (1999) (arguing that the criminalization of panhandling in New York City violates the First Amendment).

[82] *See* Barta, *supra* note 81, at 167.

fails to deter those jurors who feel compelled or urged to use social media while serving.[83] Criminalization, therefore, may not only serve as a way to prevent jurors from using social media, but also to prevent jurors from committing more serious infringements.

In a similar vein, scholars have discussed the deterrent impact of punishment with respect to certain de minimis crimes that have a profound cumulative impact. Take littering, for example. Even though the effect of one person throwing a small piece of trash on the ground is minimal, catastrophe would ensue if every person were to throw trash on the ground.[84] Therefore, while many would agree that jailing someone for littering is unjust, a small punishment in the form of a fine may be appropriate to deter a negative, cumulative outcome.

The parallels between a juror's use of social media and an individual's littering provide support for minor punishment of juror misconduct arising from social media use. After all, if one juror were to use social media during a trial, an argument can be made that the violation did not prejudice the juror.[85] However, the argument becomes attenuated where eleven jurors on the same jury use social media. The collective harm caused by this sort of juror misconduct would more likely than not result in a violation of a defendant's constitutional rights. Because the resulting harm is so great, the initial juror misconduct should be punished, even if just with a minimal fine.

2. Recognizing the Importance of the Jury's Role

The jury system is sacrosanct in the United States criminal justice system. The Sixth and Seventh Amendments specifically refer to the jury right, and the Supreme Court has consistently recognized it as a fundamental part of our democracy.[86] In commenting on the importance of the jury system, Alexis de Tocqueville said the jury "always preserves its republican character, inasmuch as it places the real direction of society in the hands of the governed . . . instead of leaving it under the authority of the Government."[87]

Despite the views of the Supreme Court, scholars, and philosophers, the importance of jury duty may go unappreciated by individuals.[88] Since the founding

[83] A judge does have the power to hold non-compliant jurors in contempt of court, but this appears to be rarely relied upon.

[84] *See* Baker & Zhao, *supra* note 74, at 653.

[85] Most juror misconduct must be shown to have actually prejudiced the defendant. *See, e.g.*, Rushen v. Spain, 464 U.S. 114, 118 n.2 (1983) (ex parte contact between juror and trial court is reviewed for actual prejudice); Smith v. Phillips, 455 U.S. 209, 215 (1982).

[86] *See, e.g.*, Balzac v. Porto Rico, 258 U.S. 298, 310 (1922) ("One of its [the jury system's] greatest benefits is in the security it gives the people that they, as jurors actual or possible, being part of the judicial system of the country can prevent its arbitrary use or abuse."); Powers v. Ohio, 499 U.S. 400, 407 (1991) ("[W]ith the exception of voting, for most citizens the honor and privilege of jury duty is their most significant opportunity to participate in the democratic process.").

[87] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 281 (Henry Reeve trans., 3d ed. 1838).

[88] *See* V. HALE STARR & MARK MCCORMICK, JURY SELECTION § 19.06[A] (4th ed. 2012) (recounting several negative reactions to jury duty). Despite anecdotal evidence of juror dissatisfaction, the majority of studies show that people have a positive light. *See* NAT'L CTR. FOR ST. CTS., THROUGH THE EYES OF THE JUROR: A MANUAL FOR ADDRESSING JUROR STRESS 2 n.3 (1998) ("In a study of individuals reporting for jury

of the republic, people have attempted to avoid jury duty.[89] In the early nineteenth century, however, people avoided jury duty for many reasons "made obsolete by the evolution of social and economic conditions and by specific improvements in the conditions of jury service."[90] Potential jurors had to find places to stay close to the courthouse or face a long journey by foot each day they served. Nevertheless, many of the reasons people avoided jury duty remain the same. Both in historic and modern times, scholars have attributed the lackluster views of the jury system to the obligation to serve on the jury, which many consider inconvenient and financially punitive.[91]

Criminalization of juror misconduct may help instill the importance of the jury system in our democracy to the public. Courts have found that the criminalization of conduct can indicate the importance that a legislature places on prohibiting that conduct.[92] In this case, criminalization of juror misconduct arising from social media would emphasize the importance of the fair and impartial jury. Indeed, most jurisdictions already criminalize other types of juror misconduct. California, for example, charges any "breach of the peace, noise, or other disturbance directly tending to interrupt the proceedings of any [c]ourt" as a misdemeanor.[93] And in New York, the legislature has criminalized juror misconduct where a juror, "in relation to an action or proceeding pending or about to be brought before him, . . . agrees to give a vote, opinion, judgment, decision, or report for or against any party to such action or proceeding."[94] Criminalization for certain types of juror misconduct, therefore, is not unheard of in California, New York, or any other state. Concededly, criminalization of juror misconduct arising from social media use would be an extension of states' current penal schemes regulating juror misconduct.

duty, 52 percent said they would look back on their jury duty with fondness, and 56 percent indicated they would volunteer again."); Brian H. Bornstein et al., *Juror Reactions to Jury Duty: Perceptions of the System and Potential Stressors*, 23 BEHAV. SCI. & L. 321, 339 (2005) (concluding that although jurors feel some stress about serving, their overall view of jury duty is positive). John Gastil et al. even conclude that by participating in the deliberation process, an infrequently voting juror will become more likely to vote in future elections. *See* JOHN GASTIL ET AL., THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION 9–10 (2011). This suggests that jurors not only have a positive view of jury service once they have participated in the process, but also that there is a benefit to the civic process generally.

[89] *See* Nancy J. King, *Juror Delinquency in Criminal Trials in America, 1796–1996*, 94 MICH. L. REV. 2673, 2678 (1996) ("Early in the nineteenth century, jury avoidance was a continual nuisance for courts."); *see also* Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53, 61–62 (2001) (noting that the incentives for avoiding jury duty have increased in recent years).

[90] *See* King, *supra* note 89, at 2678.

[91] *See id*. at 2706 ("[S]ome citizens may feel that they cannot spare a day or two for jury service, even on dates convenient to them and with full pay."); *see also* Paul W. Rebein et al., *Jury (Dis)service: Why People Avoid Jury Duty and What Florida Can Do About It*, 28 NOVA L. REV. 143, 156 (2003).

[92] *See, e.g.*, United States v. Merkt, 794 F.2d 950, 955 (5th Cir. 1986) ("The importance of the prohibition is reflected in the criminalization of conduct, as opposed to milder enforcement sanctions."); Pappas v. Frank Azar & Associates, P.C., No. 06-CV-01024-MSK-BNB, 2007 WL 2683549 (D. Colo. Sept. 7, 2007) ("[T]he criminalization of perjury attests to the importance that truthfulness plays in the judicial process."); City of New Bern v. New Bern-Craven Cnty. Bd. of Educ., S.E.2d 735, 741 (N.C. 1994) ("The importance the legislature places on adherence to and enforcement of the Code is reflected by its criminalization of violations of the Code.").

[93] CAL. PENAL CODE § 166(a)(3) (2013).

[94] N.Y. PENAL LAW § 215.28 (McKinney 2013); N.Y. PENAL LAW § 215.30 (McKinney 2013). Many states also punish jurors who willfully misrepresent themselves in the course of filling out a jury questionnaire. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 234A, § 32 (West 2013).

However, if "[t]he institution of the jury consequently invests the people . . . with the direction of society,"[95] legislatures should not hesitate to hold those people to a higher standard.

B. *Objections to Criminalization*

The foregoing section recounts the benefits of criminalizing juror misconduct arising from social media use. Clearly this is only one side of the story, and objections to California's approach must be considered. While few scholars have commented on the criminalization of juror misconduct arising out of social media use, a number of possible objections can be gleaned from the literature.

1. Criminalization Impedes Judicial Inquiry into Misconduct

One objection to criminalizing juror misconduct arising from social media use comes directly from the California Judicial Council (the "Council"). The Council is the "policymaking body of the California courts," and is comprised of lawyers and judges throughout the state.[96] Despite initially supporting criminalization,[97] the Council has recently condemned the law and is seeking its repeal due to the law's potential to impede judicial inquiry of juror misconduct.[98]

The Council's argument against criminalization is based primarily on the law's effect in light of the state and federal right against self-incrimination. Under the California Penal Code section 166, juror misconduct arising from social media use may be charged as a misdemeanor.[99] Because misdemeanors are punishable by up to six months in jail or a fine up to $500,[100] the alleged law-breaking juror has "a state constitutional and statutory right to a jury trial."[101] In addition, any questions posed by the court in an attempt to discover misconduct "may implicate the juror's constitutional rights against compelled testimony and self-incrimination."[102] As a result, a juror could refuse to answer a judge's questions regarding wrongdoing based on the juror's right against self-incrimination. If this were to happen, the judge would have to choose between declaring a mistrial, which would cost significant time and taxpayer resources, and allowing the trial to continue. The latter option, however, could ultimately lead to reversal on appeal, where the defense discovered evidence of the juror's misconduct after the trial. Therefore, the

[95] DE TOCQUEVILLE, *supra* note 87, at 282.

[96] Judicial Branch of Cal., *Judicial Council*, http://www.courts.ca.gov/policyadmin-jc.htm (last visited Mar. 24, 2014).

[97] *See supra* text accompanying note 63.

[98] *See* Eric P. Robertson, *California Judicial Council Recommends Repeal of Law Criminalizing Juror Internet Use*, DIGITAL MEDIA L. (Jan. 7, 2014), http://www.dmlp.org/blog/2014/california-judicial-council-recommends-repeal-law-criminalizing-juror-internet-use.

[99] *See supra* notes 71–72.

[100] *See* CAL. PENAL CODE § 19 (2013).

[101] Mitchell v. Superior Ct., 783 P.2d 731, 737 (Cal. 1989) (citing cases); *see also* CAL. PENAL CODE § 689 (2013).

[102] JUDICIAL COUNCIL OF CAL., *supra* note 59, at 2.

judge's decision not to declare a mistrial could lead to more reversals and additional time and taxpayer resources.[103]

2. Judicial Resistance

Judges may also resist criminalization of juror misconduct because it represents an intrusion by the legislature into an area traditionally left to the judiciary. Judges exercise broad discretion in their own court,[104] and many adopt rules of practice that are specific to their own courtroom.[105] State courts have not hesitated to protect their "essential functions" from intrusions by the legislature. In *People v. Jackson*,[106] for example, the Illinois Supreme Court held that a state statute expanding the defendant's right to appeal voir dire decisions was unconstitutional as it encroached on judicial power.[107] There, the court specifically found that the right to examine prospective jurors was "a matter of trial detail which courts can regulate in the exercise of judicial discretion."[108] Other cases have recognized that courts have exclusive power to regulate their own employees,[109] to appoint guardians ad litem and special prosecutors,[110] and to regulate the conduct of judges.[111] Even though the legislature has the sole power to define what is and is not a crime,[112] legislative action controlling criminalization of juror misconduct may not be advisable. Legislative action so close to what many courts deem to be within their essential functions can create unnecessary tension between the two branches of government.

The encroachment is made worse by the fact that judges already have discretionary power to punish this sort of juror misconduct by way of contempt. Contempt power is inherent in the courts and exists independent of statute.[113] Although the legislature can regulate how the courts punish those in contempt, it

[103] *See id.*

[104] *See* James R. Wolf, *Inherent Rulemaking Authority of an Independent Judiciary*, 56 U. MIAMI L. REV. 507, 507 (2002) (discussing the inherent power of courts to make rules affecting their "essential functions").

[105] *See, e.g.*, *Individual Practices of Chief Judge Loretta A. Preska*, S. DIST. OF N.Y. (Sept. 11, 2013), *available at* http://www.nysd.uscourts.gov/cases/show.php?db=judge_info&id=860.

[106] 371 N.E.2d 602 (Ill. 1977).

[107] *See id.* at 606.

[108] *See id.*

[109] *See In re* Mone, 719 A.2d 626, 633 (N.H. 1998).

[110] *See* State *ex rel.* Friedrich v. Circuit Court for Dane Cnty., 531 N.W.2d 32, 37 (Wis. 1995).

[111] *See* Weinstock v. Holden, 995 S.W.2d 408, 411 (Mo. 1999).

[112] *See, e.g.*, United States v. Evans, 333 U.S. 483, 486 (1948) ("[S]o far at least as concerns the federal powers, defining crimes and fixing penalties are legislative, not judicial, functions." (footnote omitted)); United States v. Wiltberger, 18 U.S. 76, 95 (1820) ("It is the legislature, not the Court, which is to define a crime, and ordain its punishment.").

[113] *See, e.g.*, Arnold v. Commonwealth, 80 Ky. 300, 302 (1882) ("It is conceded that the court has the inherent power to punish by fine and imprisonment for such a contempt, and it might be added the legislature has no power to take from a court the power to protect itself against such flagrant contempts as was offered the court in this particular case . . . ."); Bloomberg v. Roach, 182 N.E. 891, 893 (Oh. 1930) ("It is well settled that the power to punish for contempt is inherent in all courts, for such power is necessarily incident to the exercise of all judicial functions; without that inherent power, courts would be mere puppets and their orders farcical.").

may not destroy the fundamental power.[114] Indeed, one of the Judicial Council's primary arguments for repealing California's law is that the courts would still have the power to punish juror misconduct arising from social media use with its contempt power.[115] So why would the legislature seek to punish what the court could, in its own discretion, punish? At best, some may view legislative punishment of juror misconduct arising from social media use as duplicative; at worst, others can interpret it as an expression of legislative discontent with judicial inaction.

3. Juror Response

Criminalization of juror misconduct arising from social media use may also result in lower juror turnout. Many jurisdictions already face a problem with low juror response rates.[116] Although there is no data regarding the impact that criminalization of juror misconduct arising from social media use will have on juror turnout, the existing rationale for low juror turnout suggests that criminalization will further deter participation in the jury process. Today, most scholars believe that low juror response rates are caused by an apprehension "about lost income, the inconvenience of being absent from work and family, unpleasant working conditions, and long waits." [117] Criminalization of juror misconduct arising from social media only increases the inconvenience associated with jury service.

Social media use accounts for more than 20% of the time that Americans spend online.[118] And while 80% of 18–29 year-olds currently use social networking sites, more than 50% of "Baby Boomers" (50–64 year-olds) and 30% of the "Silent generation" (65+ year olds) are also using social networking sites.[119] Because of social media's pervasiveness, many potential jurors may view a temporary ban on social media use as inconvenient. Of course, prohibiting social media use will inconvenience potential jurors, regardless of criminalization. However, the fear of criminalization may sway jurors from reporting for jury duty rather than risk punishment. A decision not to report for jury duty, though, would be rational only if jurors could avoid punishment for not reporting for jury duty.

As it turns out, existing data would support a juror's decision not to report for jury duty. For although scholars recommend penalizing jurors who fail to report for jury duty,[120] most judges are unwilling to punish non-responsive jurors.[121] Further,

[114] *See* State v. Buddress, 114 P. 879, 881 (Wash. 1911) ("[W]hile the Legislature may not lawfully take away the power to punish for contempt committed in the presence of the court, it can reasonably limit the exercise of that power . . . .").

[115] *See* Robertson, *supra* note 98 ("If Cal. Penal Code section 166(a)(6) is repealed, California judges—like their brethren elsewhere—would still be able to seek criminal and civil contempt against jurors who violate instructions not to use the Internet during trials.").

[116] *See* King, *supra* note 89, at 2697; Rebein et al., *supra* note 91, at 144 n.3.

[117] King, *supra* note 89, at 2697; *see also* Lilly, *supra* note 89, at 61–62.

[118] *See* DOUGLAS SKOKE, TRENDS, STATS, AND BEST PRACTICES FOR ADAPTING TO YOUR AUDIENCE 1 (2012) (report for Trial Graphix).

[119] *See id.*

[120] *See, e.g.*, Rebein et al., *supra* note 91, at 155.

[121] King, *supra* note 89, at 2700–01.

non-responsive jurors already believe that there is little punishment for their unresponsiveness. According to one study, more than 50% of non-responding jurors believed that failing to appear for jury service would only result in a very light penalty, and nearly 30% believe such a penalty would not be strictly enforced.[122] Therefore, if potential jurors believe that they can avoid punishment for failing to report for jury duty, criminalization of juror misconduct arising from social media use may influence additional juror delinquency.

CONCLUSION

This Essay set out to consider criminalization as an alternative solution to juror misconduct arising from social media use. Jury instructions alone have been far from effective, as is evident from the various ways in which social media has led to misconduct. The unique nature of social media indicates that jury instructions are ill-suited to prevent jurors from using websites such as Facebook or Twitter throughout trial. California's approach may serve as one example of how legislatures can go about instituting change. By criminalizing jury misconduct, legislatures can provide the deterrence necessary to stop jurors from impermissibly using social media. In addition, criminalizing juror misconduct can emphasize the importance of the jury institution in our democratic system. However, the cost of such changes may not be worth the added benefits. Any legislative changes may come under the scrutiny of both judges and juries alike. While judges may resist based on legislative encroachment, jurors may react negatively to potential punishment for everyday activities they deem harmless. If one thing is clear, it is that more research needs to be done to determine the consequences of such a change. California currently provides fertile grounds for empirical research to determine whether there are benefits to criminalization, or whether the negative consequences of criminalization add additional stress to an already troubled system.

[122] *See* ROBERT G. BOATRIGHT, IMPROVING CITIZEN RESPONSE TO JURY SUMMONSES: A REPORT WITH RECOMMENDATIONS vii (Am. Judicature Soc'y 1998).