Should Jurors Use the Internet?

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During trials jurors are increasingly using cell phones and other devices capable of accessing the Internet. Courts are responding by amending court rules to explicitly ban these devices. This Article points out problems with these new court rules. This Article also reviews scientific literature on the effect of pre-trial publicity on jury decision-making to conclude some concerns about outside Internet research may be unwarranted. This Article exposes weaknesses in the arguments against allowing jurors to conduct outside Internet research.

Introduction

“Jurors are rarely brilliant and rarely stupid, but they are treated as both at once.” – Judge Warren K. Urbom

“When lawyers speak about courtroom technology, they are typically debating the merits of making their presentations in Powerpoint.”

2010 is the year of mobile Internet. One quarter of all Americans get news via their cell phones. Amazon’s Kindle e-reader allows readers to carry thousands of novels and access the Internet with a single notepad-sized device. As jurors bring these devices into the courtroom, they are causing quite a commotion. Last year several courts ordered mistrials after discovering jurors had accessed Wikipedia or became Facebook friends with their fellow jurors during trial. Following a case in Florida that ended in mistrial, counsel told the New York Times that courts have been unprepared for this new technology in the courthouse: “It’s the first time modern technology struck us in that fashion, and it hit us right over the head.”

Now that 22 million U.S. cell phone users access the mobile Internet on a daily basis, courts must respond quickly and effectively.

This article will first explain why the recent response to increasing use of outside information—“just say no”—will be inadequate. Second, it will question the underlying assumption that access to outside information is always harmful. Third, it will argue that denying useful tools and information is unwise in the face of increasingly complex trials.

I. Judicial Response: “Just Say No”

Courts and commentators fear that access to the Internet could introduce bias into trial proceedings. The court rules and jury instructions are apparently designed to ensure jurors only consider evidence admitted at the appropriate time. But the underlying rationale for these rules is not made clear to jurors. Jurors are therefore likely to feel—rightly so—information is being hidden from them.

Courts have recently responded by drafting new jury instructions and admonitions. New York’s criminal jury instruction, for example, explains that basing opinions on news reports, rather than trial testimony, would be unfair to both parties:

Finally, our law requires that you not read or listen to any news accounts of the case, and that you not attempt to research any fact, issue, or law related to the case. Your decision must be based solely on the testimony and other evidence presented in this courtroom. It would not be fair to the parties for you to base your decision on some reporter’s view or opinion, or upon information you
acquire outside the courtroom.\[ix]\]

This is a slightly persuasive effort to explain the reasoning behind the court’s rule. An instruction in Oregon goes a bit further by explaining the rule in the context of everyday experience:

In our daily lives we may be used to looking for information on-line and to “Google” something as a matter of routine. Also, in a trial it can be very tempting for jurors to do their own research to make sure they are making the correct decision. You must resist that temptation for our system of justice to work as it should. I specifically instruct that you must decide the case only on the evidence received here in court.[x]

Again this instruction is better than nothing, but it still fails to explain why the “system of justice” requires restricting access to outside information. Any-thing short of transparent explanations will likely continue to feed jury—and public—mistrust for the legal system.

In February 2010, the U.S. Judicial Conference suggested jury instructions on the use of “electronic communication technologies.\[xii\] The instructions ban a laundry list of devices and resources—“blogs, websites such as Facebook, MySpace, LinkedIn, YouTube or Twitter, to communicate to anyone any information about this case or to conduct any research”—but fail to explain why jurors should not, for example, look up the definition of “lividity.”\[xii\] Again, if courts want to convince jurors not to “google” on their cell phones, they must give concrete explanations for the court rules.

Failure to explain the reason for a ban can create mistrust for the judicial system. A recent New York Times article on jurors’ use of the Internet gathered 300 comments in one hour\[xiii\] some of which expressed belief in a “systemic effort to keep jurors from learning the truth . . . [in which] jurors, therefore, needed to dig deeper to uncover the truth.”\[xiv\] What can ease this mistrust? Clear and convincing explanations of judicial policies will help. Furthermore, giving jurors the tools and information in court that they need to make informed decisions in court will make them less likely to look out of court for answers.

II. Does Outside Research Really Bias Jurors?

After commentators raise concerns about jurors turning to extrinsic information, their most common recommendation is for courts to issue stronger admonitions to juries.\[xv\] Other suggestions include more vigorous voir dire or banning cell phones in the courthouse.\[xvi\] The problem with these recommendations is that courts are already doing most of these things. Juries are already told not to conduct outside research. Voir dire is about as vigorous as it can get.\[xvii\] Cell phone bans might help for one-day trials, but they will have no effect—and maybe even adverse effects—on multiday litigation. In short, commentators have offered few new suggestions for how to respond to jurors using the Internet.

The reason these suggestions have been minimal is because they contain an underlying assumption that external information biases jurors. This assumption therefore restricts the judiciary’s options; if external information is always harmful, cell phone and Internet policies should not be liberalized. One California legislator who adopts this view introduced a bill imposing criminal penalties on jurors who access the Internet.\[xxviii\] This assumption behind the restrictive policies—that external information is always harmful—should be questioned.

Courts and commentators have generally not given balanced appraisals of the scientific research on the effect of outside information on jury decision-making.\[xxix\] For example, a recent article on jury Internet usage states confidently: “[[j]urors may feel their searching is harmless and will not bias them, something that research has demonstrated is untrue.”\[xx\] But has scientific research really demonstrated outside research is always harmful? Indeed some research suggests jurors are influenced by pretrial publicity or negative information.\[xxi\] But the majority of these studies were laboratory simulations, not field studies of actual jury behavior.\[xxiii\] Moreover, a close examination of the scientific evidence reveals more nuanced data than most courts and commentators have acknowledged.\[xxiii\]

Researchers have found, for example, that in federal criminal cases “it does not appear that highly publicized defendants are treated much differently in terms of ultimate conviction rates than defendants who receive no publicity at all.”\[xxiv\] Moreover, it was low levels of publicity that resulted in greater probability of conviction.\[xxv\] Other research found evidence that pretrial publicity did not influence trials outcomes.\[xxvi\] These results suggest that courts ought to focus on the content and quantity of the information jurors receive, rather than on outright bans.

Researchers have also found that when juries learn substantial and contrary information from evidence and judicial instructions during trial, they are capable of displacing information received before trial.\[xxvii\] In other words, prior beliefs are diluted by new, relevant information.\[xxviii\] When trial evidence is strong, this can reduce the effect of bias and external information: “the effect of irrelevant, inadmissible, or biasing information is
reduced in its effect to the degree that relevant, probative evidence is available for the jurors’ consider-

Again, this suggests that courts should manage the flow of information rather than make unrealistic
efforts to weed out juror exposure to the Internet.

III. Giving The Internet A Second Chance

“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
the judicial records . . . can viably be maintained in the face of the informational tsunami pressing
against it.”

For decades, various groups of judges and scholars have called for better tools in the courtroom.
They have argued for engaging jurors in the legal process by providing trial notebooks summarizing
key information, allowing jurors to take notes, granting access to dictionaries, and allowing jurors to
ask questions. These calls for juror engagement have met with vocal approval but have led to
few concrete changes.

Jurors are not going to stop looking at outside information. The best way to keep jurors away from Wikipedia
would be to sequester them. But sequestration is rarely practical on a large scale because it is prohibitively
expensive and tends to promote mistrust for the jury system. A more realistic response would be for
attorneys and courts to conduct advance Internet research to identify what information about their case is
available online, analyze that information, and then deal with it during trial. Another realistic response would be to
give jurors the tools they need to make informed decisions in court so they do not need to conduct outside
research.

Jurors want to know everything they can about a case so they can make informed decisions. But rather than
promote the jury’s interest in Truth and Justice, courts tend to discourage curiosity and obscure information. For
example, some courts still debate the “fairly recent innovation” of “allowing jurors to take notes during
trials.” Note-taking! And while some evidence shows judicial resistance to note-taking may be waning,
individual judges still have the final say.

Juries were not always this sheltered. For four-hundred years after William the Conqueror’s reign, jurors were
expected to investigate facts and “declare the truth” on the basis of personal knowledge. Even after sworn
testimony became common in the sixteenth century, jurors were still permitted to ask questions. It was only when
lawyers began to assert the function of law-making and law-finding that “[t]he struggle for control over the jury
came to a head.” Rules of evidence then emerged to limit the information available to juries and to control
how the information was received. Jury power was ultimately curbed by strong demands from bankers,
merchants, and industrialists for a more predictable—and sympathetic—legal system. As for the
prohibition against note-taking? That arose at a time when most jurors were illiterate.

Today the legal profession may be justified in exercising caution in some circumstances, but it is absurd to
continue many of these traditional practices. Trials can involve hundreds of witnesses and thousands of exhibits.
No juror can store all that information in his or her head. Even in shorter trials, jurors would be well-served by
note-taking. Psychologists (and law students) have known for some time that the dual process of hearing and
writing enhances retention. And lest there be any concern about the law: Trial judges are well within their
authority to allow note-taking during trials.

In the early 1990s, one-hundred law professors, attorneys, judges, researchers, and representatives of business,
insurance, and various interest groups met in North Carolina to consider the workings of the jury system and to
recommend improvements. The participants did not agree about everything, but the overwhelming proportion
strongly supported making jurors more active during trials:

Jurors need not and should not be merely passive listeners in trials, but instead should be given the
tools to become more active participants in the search for just results. To that end, trial procedures
and evidentiary rules should take greater advantage of modern methods of communication and
recognize modern understanding of how people learn and make decisions.

Jurors want answers to their questions. Some judges have begun to allow jurors to submit questions to the court
and to allow attorneys to provide answers. This is a good start. But courts are competing with pocket-sized
encyclopedias inside every cell phone, so they will need to explain to jurors exactly why the court rules exist. And
of course lawyers must be permitted to deliver useful information to reduce the desire to turn to outside sources.

Conclusion
“Once a new technology rolls over you, if you’re not a part of the steamroller, you’re part of the road.” – Stewart Brand

It is still quite fashionable to attack the jury system as moribund. Indeed jury participation is at an all-time low. Jurors report feeling unengaged. But it is not correct to blame the jury for the judicial system’s failures. Alexis de Tocqueville found a key purpose of the American jury was to be a “gratuitous public school” that empowers citizens with information about how to take charge of social affairs. It is simply time to add some technology to this civics classroom. It is time to give jurors the tools they need to do their job.

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[v] Id.


[xii] A Maryland appeals court threw out a first degree murder conviction after a juror, confused by the word “lividity” during a murder trial, looked up the term on Wikipedia. Del Quentin Wilber, Social networking among jurors is trying judges’ patience, Wash. Post, Jan. 9, 2010 at C01.


[xvii] Ironically some commentators have recommended doing background checks on jurors by using the very
resources, for example Facebook, they seek to ban.


[xx] Id. (emphasis added).

[xxi] See Brickman, et al., supra, note 19, at 290 nn. 2-8 (citing Amy L. Otto et al., The Biasing Impact of Pretrial Publicity on Juror Judgments, 18 Law & Hum. Behav. 453 (1994)); Christina A. Studebaker & Steven D. Penrod, Pretrial Publicity: The Media, the Law, and Common Sense, 3 Pscyhol. Pub. Pol’y & L. 428 (1997); Studebaker, et al., Assessing pretrial publicity effects: Integrating content analytic results, 24 Law & Hum. Behav. 317 (2000); Neil Vidmar, Case Studies of Pre- and Midtrial Prejudice in Criminal and Civil Litigation, 26 Law & Hum. Behav. 73 (2002). None of these studies offer full support for Brickman et al.’s assertion that research on pretrial publicity is definitive. Otto et al., supra, at 453. Studebaker and Penrod assessed pretrial publicity effects reported in previous studies, but did not offer new evidence; they merely “propose[] a multimethod research approach by which meditational mechanisms can be assessed.” Studebaker & Penrod, supra, at 428. Studebaker et al., did not study juries per se, but instead conducted a content analysis of media coverage of the Oklahoma City bombing. Studebaker et al., supra, at 317. Vidmar points out deficiencies in research on prejudicial publicity and explains how courts have rejected research based on laboratory simulations rather than actual case studies. Vidmar, supra, at 73.


[xxv] d. at 114.


[xxvii] Rita J. Simon, Does the Court’s decision in Nebraska Press Association fit the research evidence on the impact on jurors of news coverage?, 29 Stan. L. Rev. 515 (1977); accord Martin F. Kaplan, Cognitive Processes in the Individual Juror, in The Psychology of the Courtroom 197 (1982); but see Geoffrey P. Kramer et al., Pretrial Publicity, Judicial Remedies, and Jury Bias, 14 Law & Hum. Behav. 409 (1990) (finding judicial admonition had no effect and deliberations exacerbated negative effects of factual or emotional information).


[xxxix] Nancy S. Marder, Juries and Technology: Equipping Jurors for the Twenty-First Century, 66 Brook. L. Rev. 1257, 1276. (2001). Believe it or not, the merits of note-taking is still subject to some scholarly debate. See e.g.,


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