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# THE DISCONNECTED JUROR: SMART DEVICES AND JURIES IN THE DIGITAL AGE OF LITIGATION

PATRICK C. BRAYER\*

## INTRODUCTION

[M]odern cell phones, which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy.<sup>1</sup>

The power of digital connection and disconnection is evident in our everyday lives. Members of modern society comprehend the incredible advantages that come with constant communication. The smart phone, in particular, has allowed us to marshal the technological advances of the internet, social media, and mobile devices. It has changed the way we work, interact, and organize.<sup>2</sup> Digital innovation has indeed changed the operating system of society, creating new communities and empowering people with revolutionary tools of interaction.<sup>3</sup>

Conversely, we see and sometimes feel the real life discomfort of disconnection. We watch movies and news reports poking fun at young adults experiencing the anxiety of temporarily being disconnected from texts and social media platforms.<sup>4</sup> We hear the complaints of friends and family when their devices have failed to maintain a signal or establish a connection. And for many of us, the preoccupation with checking messages and emails is not foreign. But as professionals, charged with the task of selecting juries, do we completely understand the impact when courts remove a smart phone from the hands of a sitting and/or deliberating juror?

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\* Patrick Brayer is the Deputy District Defender of the St. Louis County Trial Office. He has served as the St. Louis area regional coordinator of law students and interns for the Missouri State Public Defender System, where he is a twenty-seven year veteran of the trial division. This article represents his personal opinions and beliefs. Special thanks to Katie Ricks, Eleanor Gourley, and Sarah Rockefeller for their input, suggestions, and insights. Also, special thanks to Mari Katherine Webb for convincing me to incorporate *Riley v. California* into my analysis.

1. *Riley v. California*, 134 S. Ct. 2473, 2484 (2014). In the majority opinion, Justice Roberts speaks to the inseparable connection individuals have to their smart devices. *Id.* at 2494–95. His observation of cell phones becoming an “important feature” of the human body is a central idea of this article. *Id.* at 2484.

2. LEE RAINIE & BARRY WELLMAN, NETWORKED: THE NEW SOCIAL OPERATING SYSTEM 6–7, 34 (2012); JARON LANIER, YOU ARE NOT A GADGET: A MANIFESTO 70 (2010); BRIAN X. CHEN, ALWAYS ON: HOW THE IPHONE UNLOCKED THE ANYTHING-ANYTIME-ANYWHERE FUTURE—AND LOCKED US IN 162 (2011).

3. RAINIE & WELLMAN, *supra* note 2, at 6–7.

4. *See, e.g.*, THIS IS 40 (Universal Pictures 2012). *See also Dateline: Digital Detox* (NBC television broadcast Jan. 23, 2013).

Is the modern-day trial attorney or trial judge aware of the effects of digital isolation on the contemporary juror caused by court rules regulating the use or possession of digital devices by sitting jurors? This article will discuss how removing a juror's smart phone (or device), or forbidding its possession or excessively controlling its use at any stage of jury service can have an unintended impact on jurors, affecting their understanding of the evidence, their deliberations, and ultimately their verdict.

In the first part of this article, I will draw from the work of social scientists from a variety of disciplines, and illustrate the power of digital connection and disconnection on individuals and, specifically, sitting jurors. In the second part of this piece, I will review the existing literature on how federal and state courts, from a variety of jurisdictions, currently ban smart phone possession by jurors or greatly restrict their use. This section will also address how the Supreme Court has implicitly acknowledged that a juror's smart device contains the individual narrative of his or her private life.<sup>5</sup> In this article, I will argue how *Riley v. California*<sup>6</sup> recognized the powerful expectation individuals have in maintaining control of the information in their phones, and how separating a juror from his or her device could promote extreme anxiety. In the third part of this article, I will comment on the need for the legal community as a whole to comprehend and prepare for the evolution of the modern digital juror and embrace a new model of juror empowerment. This preparation will require courts, scholars, and litigators to develop new and innovative methods of venire selection and case presentation, accommodating a whole generation of fact finders; a generation that has never known a life without the internet, social media, or smart devices.<sup>7</sup>

Today's juror lives in a changing culture brought about by a revolution in mobile device technology.<sup>8</sup> Many have created a lifestyle of connection that includes an expectation of "continuous access" to friends, family, and information.<sup>9</sup> The phone in the hand of a potential juror is more than a device; for some individuals, it is an element of their very existence and contains all the information of their private lives.<sup>10</sup> These individuals regard their digital device as a preferred mode of interaction, and their device defines how they relate socially and professionally to their world.<sup>11</sup> Each individual juror is likely in possession of a piece of technology that links him or her with a community that brings support, comfort, acceptance, a sense of survival, and a place to store the most sensitive private and professional information.<sup>12</sup> The

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5. *Riley*, 134 S. Ct. at 2494–95.

6. *Id.*

7. See Patrick C. Brayer, *The Connected Lawyer: The Evolving "Operating System" of the Networked Professional*, 37 FORDHAM INT'L L.J. ONLINE 84, 99 (2014); see generally RAINIE & WELLMAN, *supra* note 2, at 95.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

existence of a social network that sustains an individual is no longer a new phenomenon, and an expectation of ubiquitous connection to a network of one's choosing has become a new societal norm.<sup>13</sup> As such, an expectation of ubiquitous connection and constant possession of one's private thoughts, information, and associations will accompany each juror who possesses a smart device.

## I. THE SCIENCE OF CONNECTION

### A. *Research at the Crossroads*

"iPhone Separation Anxiety Makes You Dumber, Study Finds"<sup>14</sup>

In January of 2015, researchers published a study suggesting that an individual's ability to complete cognitive tasks is impacted by the anxiety he or she feels when separated from his or her iPhone.<sup>15</sup> The researchers asked participants to complete word search puzzles, examining their level of anxiety and cognition, while removing their iPhone and causing the device to ring.<sup>16</sup> The research showed that:

iPhone separation and the inability to answer one's iPhone during cognitive tasks affects a variety of psychological outcomes. The data showed that the inability to answer one's iPhone while it was ringing activated the aversive motivational system (increases in heart rate and unpleasantness), and also led to a decline in cognitive performance.<sup>17</sup>

Significantly, the researchers determined it may not be the ringing of the phones that caused distracted thinking, but rather the separation of the user from his or her phone. "Our findings suggest that iPhone separation can severely impact attention during cognitive tasks."<sup>18</sup>

This research raises an important issue for individuals who study the impact of smart phone usage by jurors. If individuals detecting but not being able to respond to incoming calls or texts results in cognitive impairment and anxiety, the act of banning the possession of smart phones by jurors is scientifically justified. Alternatively, separation from our smart phones may impact attention to "all areas of our lives including communicating with strangers, friends and family, colleagues, and care-providers. Simply not being able to answer one's iPhone may reduce attention toward those daily interactions."<sup>19</sup> If jurors are cognitively impaired when severed from their devices of digital connection,

13. *Id.* at 6, 13, 34, 95.

14. Jack Linshi, *iPhone Separation Anxiety Makes You Dumber, Study Finds*, TIME (Jan. 11, 2015), <http://time.com/3662846/iphone-seperation-study>. This headline is one example of how media interpreted a 2015 study describing the cognitive emotional and physiological impact of iPhone separation anxiety. See also Russell B. Clayton et al., *The Extended iSelf: The Impact of iPhone Separation on Cognition, Emotion and Physiology*, 20 J. COMPUTER MEDIATED COMM. 119 (2015).

15. Clayton et al., *supra* note 14, at 133.

16. *Id.* at 123.

17. *Id.* at 132.

18. *Id.* at 133.

19. *Id.*

courts that remove phones are diminishing the traditional benefits of a trial by jury, including the synergistic power of a deliberating body that is intellectually vibrant and emotionally attentive. In short, the question at the crossroads of research is whether it is the ringing of or the separation from a smart device that causes distraction. In this article we venture down the road less traveled by advancing a theoretical foundation for allowing jurors to keep their devices at all phases of the trial process, including deliberations. As we contemplate the new norm of connection we can begin to understand the effect of disconnection on sitting jurors.<sup>20</sup>

### B. *The New Normal of Connection*

To adequately understand the new normal of constant connection, it is important to consider the reality of future generations of jurors having never known a life without smart phones, social media, or the internet.<sup>21</sup> Younger jurors have matured in an era where they and all their peers are connected to a social network at all times, even at night while sleeping.<sup>22</sup> Connection has progressed beyond how individuals interact; connection has become an essential part of how young adults define who they are.<sup>23</sup>

The existentialism of human digital connection came into being when individual relationships ceased to depend on time or place.<sup>24</sup> A person defines him or herself by the people or absence of people in his or her life.<sup>25</sup> Traditionally, when we interacted with our family, friends, work, or community, it was dependent upon face-to-face or phone contact at a definable place and time, with little expectation for uninterrupted connection.<sup>26</sup> Social media, text messaging, and the convenience of smart devices have diminished the impact of place and time on the interactions that define individual existence.<sup>27</sup> When time and place is removed from the calculus of human connection, a new paradigm of digital expectation is created. Individuals are expecting constant access to the people and information that define who they are and at times, who they want to become. Conversely, jury duty is a mandate, by its very nature defined by a place and a time.

MIT researcher Sherry Turkle describes how a new generation of individuals has become socialized to depend on new digital technology.<sup>28</sup> She illustrates how many of today's young adults had parents who were physically present but distracted by their own use of technol-

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20. SHERRY TURKLE, *ALONE TOGETHER: WHY WE EXPECT MORE FROM TECHNOLOGY AND LESS FROM EACH OTHER* 177 (2011).

21. See RAINIE & WELLMAN, *supra* note 2, at 95.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. See generally *id.* at 108.

27. *Id.*

28. TURKLE, *supra* note 20, at 178, 266.

ogy.<sup>29</sup> Her case studies and research reveal that many younger adults (and by extension jurors) will have been raised by parents who spent time talking on cell phones, or answering and reading messages or email on BlackBerries and laptops, rather than dedicating their full attention to their children.<sup>30</sup>

Over the past two decades, the association of “technology with shared attention” took root in the mind of developing adults.<sup>31</sup> Technologically distracted parents became a compromise to the alternative of absent parents and empty houses; a byproduct of work and career obligations.<sup>32</sup> Parents were no longer physically absent because of time and place requirements, but mentally absent because of technology. For the children of the distracted parent, digital connection became the new learned mode of social connection. Simultaneously, digital technology continued to improve, with devices providing a network of contacts and information, available at any time in any place.<sup>33</sup> If our network is always with us and we have been raised to associate connection with attention, then does our network become an inseparable part of who we are? Does constant access to that network becomes the new normal?

For other researchers like Lee Rainie and Berry Wellman, Directors of the Pew Research Center’s Internet & American Life Project and of NetLab at the University of Toronto, “networked individualism” is less about an individual’s need for attention and more about empowerment and how today’s user of “mobile connectivity” exercises control over support networks and information.<sup>34</sup> The “triple revolution” of internet, social media, and mobile technology has allowed the individual to step away from traditional hierarchical relationships, allowing a free expression of ideas with less dependency on the structure of a fixed group.<sup>35</sup> Today, jurors have the ability to create and efficiently manage networks of their own choosing, bringing together individuals who share interests and provide friendship and support. Information, companionship, and assistance are available at any time and in any place, expanding an individual’s ability to socialize, work, and organize.<sup>36</sup>

For Rainie and Wellman, the autonomy and control of networked individualism have resulted in a new “social operating system.”<sup>37</sup> An evolving framework has emerged, redefining how individuals interact and connect to their world.<sup>38</sup> People are no longer small, voiceless cogs in a larger organization; they have evolved into the autonomous

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29. *Id.*

30. *Id.* at 266–67.

31. *Id.* at 267.

32. *Id.*

33. *Id.* at 268.

34. See RAINIE & WELLMAN, *supra* note 2, at 107.

35. *Id.* at 11–12, 107.

36. *Id.* at 108.

37. See *id.* at 6–7, 34. See also Jacqueline Olds, *Online Optimism*, 100 AM. SCIENTIST 514 (2012), <http://www.americanscientist.org/bookshelf/pub/online-optimism> (reviewing RAINIE & WELLMAN, *supra* note 2).

38. RAINIE & WELLMAN, *supra* note 2, at 6–7, 34.

center of a network of individuals and information of their choosing.<sup>39</sup> They have a digital voice that can be heard around the world from any location, directed instantaneously to any number of people at any time of the day or night.<sup>40</sup> This new system of operation defines our identity in today's society.<sup>41</sup> Our new social operating system further frames how the modern American juror functions and experiences his or her world. This new individual functionality and experience is resulting in a new normalcy for fact finders; a new normal of jurors expecting constant digital autonomy and control.

### C. *Digital Dependency*

When trial judges and litigators come face-to-face with a panel of prospective jurors, they are connecting with an authentic group of individuals possessing real life experiences, and in some cases, addictions. If juries are selected fairly without bias or systemic prejudice, then the modern American jury will represent a true cross section of today's society.<sup>42</sup> When the public becomes part of the judicial system, they bring genuine behaviors and dependencies into the jury box and deliberation room. But do judges and trial attorneys comprehend the addictive nature of our modern devices of connection? Additionally, does the legal profession appreciate the impact of digital dependency on how it achieves its goal of empanelling diligent juries who are attentive and thoughtful?

The evolution of smart devices, social media, and the internet has resulted in a number of mental health experts and social scientist expressing concern over individuals becoming addicted to modern modes of connection.<sup>43</sup> In outlining the problem, these researchers have taken an expansive view of digital addiction, never associating the phenomenon to a limited few.<sup>44</sup> For these professionals, this type of

39. *Id.*

40. *Id.*

41. *Id.* at 95. See also Manuel Castells, *Afterword* to HANDBOOK OF MOBILE COMMUNICATIONS STUDIES 448-49 (James E. Katz ed., 2008) (“[W]e now have a wireless skin overlaid on the practices of our lives, so that we are in ourselves and in our networks at the same time.”).

42. JEFFREY ABRAMSON, *WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* xi (2000) (“Precisely because we all inevitably view the evidence at trial from perspectives shaped by the lives we live in America, diversity is important to the accuracy of jury verdicts. Representative juries are better able to ‘mix it up’ during deliberation, the preconceptions of some calling into doubt the predisposition of others. . . . On a representative jury, persuasive people are those who make arguments capable of convincing across the traditional demographic divides.”).

43. TURKLE, *supra* note 20, at 16; JACQUELINE OLDS & RICHARD S. SCHWARTZ, *THE LONELY AMERICAN: DRIFTING APART IN THE TWENTY-FIRST CENTURY* 112 (2010); LANIER, *supra* note 2, at 70; CHEN, *supra* note 2, at 159.

44. See, e.g., OLDS, *supra* note 37, at 514-15 (“That checking e-mail can be addictive has become a truism. And the danger of those gadgets seems to me to be that even when we are connecting with others face to face, a small part of our brain is preoccupied with whether a truly exciting e-mail or text is about to arrive.”).

addiction is real and pervasive, accompanied by the same anxieties and dangers as other forms of dependence.<sup>45</sup>

In times of connection, people express feelings of “enhancement” and “invincibility,” contrasted with the emotions associated with disconnection, feeling “terrified” and “adrift.”<sup>46</sup> Most alarming have been the studies comparing digital addiction with chemical dependency, describing how participants experienced traditional withdrawal symptoms when disconnected from “Twitter, Facebook, IM, web browsing and television for 24 hours.”<sup>47</sup> Participants described themselves as feeling “isolated” and “lonely” and confronted with their own rationalizations for why they needed to re-connect.<sup>48</sup> Research demonstrates that the mood of people in general, and thus, sitting jurors, could be impacted by people’s ability to connect to people, networks, and information.<sup>49</sup>

A common theme advanced by both researchers and study subjects, is how devices and the network they represent are evolving into a digital body part or “overlaid” skin that is inseparable from our being.<sup>50</sup> And “exclusion from social networks and text messaging can reduce that feeling of belonging,” setting “off pain signals in the brain.”<sup>51</sup> Regardless of whether these metaphorical research themes adequately explain how digital dependency takes hold, the legal community must be informed by established findings linking both mental and physical health to our basic ability to connect.<sup>52</sup> This idea of devices becoming a part of our person has been advanced by both researchers and a Supreme Court Chief Justice.<sup>53</sup> The sitting juror, deciding the fate of another human being, may be experiencing all the emotions, moods, and withdrawal symptoms mentioned above. Jurors view evidence and conduct deliberations through the prism of their emotional being and the filter of real life discomforts that transcend feelings of mere inconvenience.<sup>54</sup> Just like lawyers, a juror’s cognition and emotional state

45. TURKLE, *supra* note 20, at 16.

46. *Id.* at 16, 152.

47. CHEN, *supra* note 2, at 159 (describing a study conducted at the University of Maryland titled “Unplugged,” where 200 students voluntarily gave up all media for a twenty-four hour period. Of special consideration for this article is how media in the study was considered Twitter, Facebook, IM, and web browsing) (citing Susan D. Moeller, *A Day Without Media*, INT’L CTR. FOR MEDIA & THE PUB. AGENDA, <http://without-media.wordpress.com> (last visited Mar. 30, 2016)).

48. CHEN, *supra* note 2, at 159–60.

49. *See id.* at 159 (identifying specific participant quotes from the University of Maryland study. Many of the subjects made comments indicating their general mood was impacted shortly after disconnecting from all media.).

50. *Id.*; TURKLE, *supra* note 20, at 16; RAINIE & WELLMAN, *supra* note 2, at 95.

51. CHEN, *supra* note 2, at 161.

52. OLDS & SCHWARTZ, *supra* note 43, at 112.

53. *See Riley v. California*, 134 S. Ct. 2473, 2484 (2014).

54. *See Erin Ryan, The Discourse Beneath: Emotional Epistemology in Legal Deliberation and Negotiation*, in RELATIONSHIP-CENTERED LAWYERING: SOCIAL SCIENCE THEORY FOR TRANSFORMING LEGAL PRACTICE 307, 309, 310, 314–15 (Susan L. Brooks & Robert G. Madden eds., 2010) (discussing the importance of emotion in the deliberative process and the inability of many judges and lawyers to comprehend how emotion is linked to cognition).



are inseparably linked.<sup>55</sup> A deeper study into the visceral response caused by digital disconnection reveals changes in mood and emotion that are based on the very rational need to avoid ostracism, exclusion, and humiliation.<sup>56</sup> “These converging lines of reasoning—common sense, evolutionary psychology, neurobiology and social psychology—lead us right back to the idea that feeling left out is a major engine of human emotion and behavior, fundamental to our way of being in the world.”<sup>57</sup> Such feelings of exclusion can be equally as powerful when perceived, regardless of the fact the apparent ostracism is not based in reality.<sup>58</sup>

A byproduct of our reliance on digital technology is a greater occurrence of people exaggerating their feelings of exclusion.<sup>59</sup> This modern social phenomenon has emerged because individuals are less dependent on face-to-face interaction, decreasing their use of reassuring non-verbal (and non-digital) body language, encouraging mannerisms and comforting gestures.<sup>60</sup> To date, digital communication is dominated by the written word and unable to fully utilize the unspoken language communicated when people come together in person to share a task or a chat.<sup>61</sup> An individual’s survival has been traditionally rooted in our ability as a species to gather in small groups in the same location and maintain connection with the tools of human interaction.<sup>62</sup> Absent the reassurance of non-verbal nurturing in our digital connections, people are subject to greater feelings of exclusion, forced to constantly monitor and maintain their online survival networks.<sup>63</sup>

Taking away a juror’s ability to text and engage in social media, for any duration of time, can directly influence the fact finder’s feeling of

55. See GERALD M. EDELMAN, *BRIGHT AIR, BRILLIANT FIRE: ON THE MATTER OF THE MIND* 176 (1992) (stating that neurobiologists have advanced the idea of emotions being a cogitatively strong mix of “feelings with willing and with judgments”). See also Ryan, *supra* note 54, at 309–10 (discussing the benefits of lawyers having emotional wisdom).

56. See CHEN, *supra* note 2, at 161–62; OLDS & SCHWARTZ, *supra* note 43, at 76; LANIER, *supra* note 2, at 70. These researchers connect the emotional state associated with disconnection to the basic human need for survival. Ostracism and being “left out” of a social group become paramount to social isolation. *Id.*

57. OLDS & SCHWARTZ, *supra* note 43, at 76.

58. *Id.* at 77.

59. *Id.*

60. *Id.*

61. See Mark Bauerlein, *Why Gen-Y Johnny Can’t Read Nonverbal Cues*, WALL ST. J. (Aug. 12, 2009), <http://online.wsj.com/article/SB10001424052970203863204574348493483201758.html>. Mark Bauerlein is also the author of the book *THE DUMBEST GENERATION: HOW THE DIGITAL AGE STUPEFIES YOUNG AMERICANS AND JEOPARDIZES OUR FUTURE (OR, DON’T TRUST ANYONE UNDER 30)* (2008); Brayer, *supra* note 7 (discussing Bauerlein’s observation). See also OLDS & SCHWARTZ, *supra* note 43, at 77 (discussing how humans interact).

62. OLDS & SCHWARTZ, *supra* note 43, at 77.

63. See LANIER, *supra* note 2, at 70 (“I am always struck by the endless stress they put themselves through. They must manage their online reputations constantly, avoiding the ever-roaming evil eye of the hive mind, which can turn on an individual at any moment. A ‘Facebook generation’ young person who suddenly becomes humiliated online has no way out, for there is only one hive.”); see also CHEN, *supra* note 2, at 162.

personal belonging and survival.<sup>64</sup> This reality is best demonstrated by studying individuals who had a firm understanding of the dangers of texting while driving.<sup>65</sup> Despite their understanding of the risk, individuals in one study continued to text and drive and rationalized how their own actions would be safe.<sup>66</sup> If the power of digital connection is so compelling that people would risk their own lives and the lives of others to text, how would that same influence affect a deliberating juror who is responsible for the life of another but forced to abstain from all forms of digital connection for an undefined period of time?

As legal professionals, our common sense and real-life experience informs us that we will confront an increasing number of jurors who are unwilling to stop their use of texting, social media, and email for an undefined period of time.<sup>67</sup> We understand on a base level what researchers are explaining on a theoretical level; some of the jurors we face will be so concerned about maintaining their online existence and level of connection, they will rush verdicts, fail to engage in deliberation, and be distracted to the point of ineffectiveness.<sup>68</sup> For a majority of other jurors, a less debilitating but equally significant desire to remain connected may exist. A very practical and commonsense expectation of continuous connection has become part of our changing world, with our ability to stay digitally connected linking forever with our capability of protecting property, livelihood, and loved ones.

#### D. *The Realistic Expectations of a Digital Society*

It may be difficult to pinpoint the exact day and hour when we evolved into a digitally dependent society, but for many, that moment arrived on August 25, 2005 when Hurricane Katrina brought unimaginable death and destruction to the Gulf Coast. As the wind and water of this once Category Five hurricane assaulted the city of New Orleans, property damage in the region climbed past the seventy billion dollar mark and the loss of life commenced its deadly climb past a thousand souls.<sup>69</sup> Due to infrastructure and equipment damage, millions of cell towers and phone lines became unusable—family and friends were disconnected from all voice communication.<sup>70</sup> To the surprise of many, text messaging remained operative on many cell phones.<sup>71</sup> As survi-

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64. See CHEN, *supra* note 2, at 160–61.

65. *Id.*

66. Paul Atchley et al., *The Choice to Text and Drive in Younger Drivers: Behavior May Shape Attitude*, 43 ACCIDENT ANALYSIS & PREVENTION 134, 134–42 (2011).

67. See Douglas Keene, *Panic on Tweet Street: “Without Twitter, I Felt Jittery and Naked”*, JURY ROOM BLOG (Aug. 7, 2009), <http://keenetriai.com/blog/2009/08/07/panic-on-tweet-street-without-twitter-i-felt-jittery-and-naked/>.

68. See Susan K. McClellan, *Externships for Millennial Generation Law Students: Bridging the Generation Gap*, 15 CLINICAL L. REV. 255, 270 (2009) (observing law students who are in constant need of social connection).

69. Paul Piper & Miguel Ramos, *A Failure to Communicate Politics, Scams, and Information Flow During Hurricane Katrina*, 14 SEARCHER 40, 41 (2006).

70. *Id.*

71. *Id.* I first became aware of this phenomenon several years ago when I was asked to teach at the Defender Training Institute for Louisiana Public Defenders. Participants

vors, evacuees, and concerned family and friends desperately attempted to connect, they found that their only mode of communication was digital. They also realized that their new lifeline of safety and comfort was no longer dependent upon the traditional act of speaking and listening.

The simple reality facing the legal profession today is that people generally, and jurors specifically, rationally equate safety for their families and themselves with their uninterrupted ability to remain digitally connected.<sup>72</sup> An increasing number of natural disasters, the terrorism of 9/11, and an epidemic of school and public shootings have permanently amplified our expectation of continuous communication.<sup>73</sup> Today, parents are sent a text or email when children are facing either eminent or long-term threats at school.<sup>74</sup> College campuses facilitate lockdowns in active shooter situations by way of text.<sup>75</sup> Weather warnings pop-up on smart devices as quickly as the National Weather Service can discern a threat in a targeted area.<sup>76</sup> Digital communication is used by agencies to warn of epidemics or spreading sickness.<sup>77</sup>

Digital connection is no longer a fad and disconnection is no longer a mere inconvenience. Society has permanently changed in the past decade, and with such change, courts must accommodate jurors' need to remain connected to warnings, information, and the comforting text from a child who has arrived home safely.<sup>78</sup> A landline number that reaches a court clerk in case of an emergency is an obsolete solution to the myriad challenges facing a disconnected parent or a caregiver assisting a disabled adult or child. "People love their new technologies of connection. They have made parents and children feel

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conveyed to me how, as students at Loyola and Tulane in 2005, they attempted to communicate to family and friends that they had survived the devastation. They soon realized all attempts to call out of the stricken area or dial a cell phone originating from New Orleans was futile, but text messages worked. For these new Defenders, digital connection was the only way families knew they had successfully evacuated and/or survived Hurricane Katrina.

72. TURKLE, *supra* note 20, at 248.

73. *Id.*

74. *See, e.g.*, Letter from John Brinkley, Superintendent, E. Lynne 40 Pub. Sch. to Parents/Guardians, <http://www.eastlynn40school.org/vimages/shared/vnews/stories/5510612689fdf/Tornado%20Warning%20Letter.pdf> (informing parents that they will receive a text when students are moved into a shelter during tornado warnings).

75. *See, e.g.*, *Active Shooter Response Training*, UNIV. OF NEB. LINCOLN, <http://emergency.unl.edu/shotsfired> (last visited Mar. 30, 2016) ("During an emergency, the UNL community and general public will receive information through the web and news media as well as by email and text through UNL Alert.").

76. *See Weather Warnings on the Go!*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., <http://www.nws.noaa.gov/com/weatherreadynation/wea.html#VexY3dLBzGc> (last visited Mar. 30, 2016) ("America's wireless industry is helping to build a Weather-Ready Nation through a nationwide text emergency alert system, called Wireless Emergency Alerts (WEA), which will warn you when weather threatens.").

77. The Centers for Disease Control and Prevention allows the public to receive Health Alert Network ("HAN") updates by way of e-mail or RSS feed. *Health Alert Network (HAN)*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://emergency.cdc.gov/han/> (last visited Mar. 30, 2016).

78. TURKLE, *supra* note 20, at 248.

more secure and have revolutionized business, education, scholarship and medicine.”<sup>79</sup> Stripping away a feeling of security from a sitting juror will undoubtedly impact a process dependent on the individual focus and engaged dialogue of the participants.<sup>80</sup>

Additionally, the smart device has also permanently changed the way people conduct business or ply a profession.<sup>81</sup> Today, our ability to survive at work is predicated upon our ability to connect.<sup>82</sup> Many workers perform duties away from offices and workspaces separated from the traditional desk and phone. They practice skills and professions remotely—from locations around the globe—using computers, phones, and smart devices. People are removing themselves from established places of business and traveling into locations of “learning and economic activity.”<sup>83</sup> With a changing work environment, an expectation has also evolved that workers will remain connected, in touch, and ready for a changing professional environment.<sup>84</sup> For some, this expectation remains during off hours or when on vacation. Court rules and jury instructions may be adequate to alter the actions of a sitting juror, but they are ineffective in changing the realities and expectations of the institutions or individuals that control our economic survival; and they do little to calm our anxieties when we are forced to disconnect.

Contributing to a juror’s anxiety is the court’s general inability to guarantee the duration of disconnection. By its very nature, jury deliberations are not controlled by time limitations. Judges manage the timing of recesses, daily adjournments, and, in cases of hung juries, the length of deliberations. But generally, jurors will be confronted with a mandated experience lasting for an unknown period.<sup>85</sup> In courts that remove smart devices, jurors will commence a period of deliberation with no time limit placed upon their digital isolation and no guarantee of an exact date and time when connection will resume. Jurors instinctively know the faster they reach a verdict, the sooner they will be able to reconnect. Even when and if jurors are allowed to reconnect at the

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79. *Id.* at 152.

80. See ABRAMSON, *supra* note 42, at xi.

81. TURKLE, *supra* note 20, at 152.

82. See Naveen Gupta, *Texting, the Great Untapped Business Resource*, FAST Co. (Mar. 11, 2013, 7:02 AM), <http://www.fastcompany.com/3006745/texting-great-untapped-business-resource> (“Texting can be a powerful means of communication for businesses. It can be used effectively as a tool for internal communications among staff, between employees and business partners. And most importantly, texting is a way of getting closer to and satisfying customer needs.”).

83. TURKLE, *supra* note 20, at 152.

84. *Id.* at 166 (describing one of a number of interviews with professionals who remain connected at all times because of an expectation of continual contact by their work or clients).

85. See Monica K. Miller & Brian H. Bornstein, *Do Juror Pressures Lead to Unfair Verdicts?*, 39 *MONITOR ON PSYCHOL.* 18, 18 (2008) (“In general, there are no limits on deliberation time, but the jurors may have felt pressure to reach a quick decision because of the upcoming holiday. Juries in other cases might experience similar pressure to wrap up a long trial or finish before the weekend. Research indicates that decisions made under time pressure are not as sound as those made under less pressure due to factors such as greater reliance on heuristic reasoning.”).

end of each day, they will still experience the anxiety of being out of touch during the workday, when their work is most in need of their input and expertise, and when family and friends are on the move, away from home and exposed to the dangers of the real world. It is this factor of unknown duration that exacerbates all the pragmatic causes of disconnection anxiety.<sup>86</sup>

The world has changed and with that change has evolved a constant need to remain linked to our families, friends, and workplace. Digital connection has become the new normal way of empowering ourselves with networks, information, and organizations. And for many of our fellow citizens, a life without smart devices, apps, and social media is unknown. For some, digital dependency and addiction has become a reality, with thoughts of disconnection being unfathomable. In the first part of this article, I have explored the possible impact on people generally when their smart phones are involuntarily removed for an unspecified period of time, and I have drawn connections to the likely impact on sitting jurors who, because of court rules, are unable to access their phones for undefined periods.<sup>87</sup> In the next section I will review how courts from across the nation have implemented rules and issued orders limiting the possession or use of smart devices by sitting and deliberating jurors. I start by examining the perception, but possibly not the reality, of widespread juror electronic misconduct.

## II. POWER, POSSESSION, AND PRIVACY

### A. *Limiting Smart Devices by Court Rule or Order*

To understand why some courts are banning and confiscating juror smart phones, it is helpful to first acknowledge judges, like the general public, are impacted by media coverage of electronic based misconduct.<sup>88</sup> A review of legal scholarship by both judges and law students finds listings of instances—reported in the press—where jurors ignored instructions and used their devices as a tool for misconduct.<sup>89</sup> Two examples cited by more than one author are an Arkansas case and a case from the United Kingdom.<sup>90</sup> In Arkansas, the juror ignored the instructions of the court and “[t]weeted information, along with their own thoughts and impressions,” and in Britain, a juror was dismissed

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86. See generally *id.*

87. See Marcy Zora, Note, *The Real Social Network: How Jurors’ Use of Social Media and Smart Phones Affects a Defendant’s Sixth Amendment Rights*, 2012 U. ILL. L. REV. 577, 595–96 (2012) (discussing why phones should not be banned from the courtroom or deliberation room).

88. See, e.g., Antoinette Plogstedt, *E-Jurors: A View from the Bench*, 61 CLEV. ST. L. REV. 597, 608–12 (2013); see also Jacqueline Connor & Anne Endress Skove, *Dial “M” For Misconduct: The Effect of Mass Media and Pop Culture on Juror Expectations*, in *FUTURE TRENDS IN STATE COURTS 2004*, at 104 (Carol R. Flango et al. eds., 2004) (discussing how the media reports on issues of juror misconduct).

89. Compare Plogstedt, *supra* note 88, at 608–12, with David Goldstein, *The Appearance of Impropriety and Jurors on Social Networking Sites: Rebooting the Way Courts Deal with Juror Misconduct*, 24 GEO. J. LEGAL ETHICS 589 (2011).

90. Plogstedt, *supra* note 88, at 608–09; see also Goldstein, *supra* note 89, at 589.

from a trial after polling friends on Facebook as to the innocence or guilt of the defendant.<sup>91</sup> In one article, Judge Antoinette Plogstedt cites separate examples of jurors researching cases on Google, jurors blogging about their upcoming service, jurors “friend requesting” the defendant, jurors “friend requesting” witnesses, jurors “friend requesting” each other, and a prospective juror tweeting his or her impressions of guilt.<sup>92</sup> These documented examples of misconduct are surely not lost on a judiciary attempting to provide a fair trial to all litigants.

Apart from the headlines, the reality of electronic misconduct by jurors may be far less pervasive than the anecdotal evidence suggests.<sup>93</sup> In a 2013 survey of federal judges, 93.3% of respondents indicated they had experienced no detectable instances of social media use by jurors at trials or during deliberations.<sup>94</sup> “The use of social media by jurors during trials and deliberations is still not a common occurrence, and has not increased in frequency over the past two years.”<sup>95</sup> Of the respondents who did detect jurors using social media, the judges could only cite one or two instances with few cases occurring during deliberations.<sup>96</sup> The response rate of only forty-eight percent of active and senior federal judges may also indicate a lack of urgency in combating this rare but perceived problem.<sup>97</sup> Despite evidence to the contrary,<sup>98</sup> judges across the nation are banning phones and confiscating devices from jurors.

Indiana directly bans the possession of digital devices during jury deliberations.<sup>99</sup> By way of court rule, the Indiana Supreme Court has required all trial judges in the state (to instruct their bailiff), “to collect and store all computers, cell phones or other electronic communication devices from jurors upon commencing deliberations.”<sup>100</sup> With little discretion allowed by a judge, the rule clearly directs devices to be returned only “upon completion of deliberations or when the court permits separation during deliberations.”<sup>101</sup> Under this rule, the trial court has complete authority to enforce this ban without exception.<sup>102</sup>

91. Plogstedt, *supra* note 88, at 608–09; *see also* Goldstein, *supra* note 89, at 589. From a review of the literature, it appears the British juror example is cited in several articles as an example of misconduct.

92. Plogstedt, *supra* note 88, at 608–12.

93. *See* MEGHAN DUNN, FED. JUD. CTR., JURORS’ AND ATTORNEYS’ USE OF SOCIAL MEDIA DURING VOIR DIRE, TRIALS, AND DELIBERATIONS 4, 15 (2014), <https://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=38031&libID=38001>.

94. *Id.* at 4.

95. *Id.*

96. *Id.*

97. *Id.* at 3.

98. *Id.* at 4, 15; *see also* Connor & Skove, *supra* note 88, at 104–05. Judge Connor provides an excellent explanation of why judges may perceive a problem that may not exist: “Because juror misconduct is rare, the media report such stories at a very high rate. The public, however, may assume from reading such reports that misconduct is common.” *Id.*

99. IND. JURY R. 26(b) (2010).

100. *Id.*

101. *Id.*

102. *Id.*

The court “may” allow “appropriate communications (i.e., arranging for transportation, childcare, etc.) that are not related to the case and may require such communications to be monitored by the bailiff.”<sup>103</sup> But this exception to the ban is not mandated.<sup>104</sup> If an individual is a sitting juror in Indiana, he or she will endure an undetermined forced period of separation from the devices that connect them to their world. In some cases a judge *may* decide not to allow any communications even for *childcare* or *transportation*.<sup>105</sup> The Indiana rule also acknowledges that certain jurisdictions in the state have implemented a complete ban on digital devices in the courthouse, impacting all citizens who report for jury duty.<sup>106</sup>

In Maryland, a similar procedural rule states, “An electronic device may not be brought into a jury deliberation room.”<sup>107</sup> Jurors are “generally” allowed to possess devices like smart phones in Maryland courthouses but they are also warned that some jurisdictions will not allow them in the courtrooms.<sup>108</sup> Maryland is similar to other jurisdictions, allowing for the possession of cell phones in most courtrooms only if the devices are turned off or inoperable.<sup>109</sup> Of special note are the states of Arkansas and New York, which have adopted jury instructions for judges who want to ban devices from their courtroom,<sup>110</sup> and Missouri, which has an instruction informing jurors that judges have “considerable” discretion to dictate cell phone usage.<sup>111</sup>

The outright ban on devices by supreme court or appellate court rules is not yet common in states outside of Indiana and Maryland, but a significant number of judges and jurisdictions across the country are removing or banning instruments of digital communications.<sup>112</sup> In

103. *Id.*

104. *Id.*

105. *Id.* Indiana Jury Rule 26(b) allows for the scenario where courts could exercise discretion in a way that forces a deadlocked or hung jury to reach a verdict. By depriving jurors of their ability to communicate, a judge could intentionally or inadvertently force a verdict when a mistrial is an appropriate outcome. Unfortunately, this unintended consequence may occur any time a court is allowed to remove a digital device during deliberations.

106. *Id.* (“Courts that prohibit such devices in the courthouse are not required to provide this instruction.”).

107. MD. R. P. 16-110(b)(2)(D).

108. *At the Courthouse*, MD. COURTS, <http://www.courts.state.md.us/juryservice/atcourthouse.html> (last visited Mar. 30, 2016).

109. *Id.* See also Eric P. Robinson, *Jury Instructions for the Modern Age: A 50-State Survey of Jury Instructions on Internet and Social Media*, 1 REYNOLDS CTS. & MEDIA L.J. 307, 315, 326, 327, 330, 332, 340, 356, 367–68, 374, 391 (2011) (listing of state and federal circuit courts instructing jurors (or with sample instructions) to turn off or not use devices when in the courtroom and/or during deliberations, including the United States Court of Appeals for the Third Circuit, Arkansas, Arizona, California, Colorado, Hawaii, Michigan, Montana, New Jersey, New York, North Carolina, and Texas).

110. Robinson, *supra* note 109, at 328, 392; ARK. MODEL JURY INSTRUCTIONS—CRIM. 100-A (2016).

111. Robinson, *supra* note 109, at 361.

112. See Plogstedt, *supra* note 88, at 628; Goldstein, *supra* note 89, at 599; Zachary Mesenbourg, Note, *Voir Dire in the #LOL Society: Jury Selection Needs Drastic Updates to Remain Relevant in the Digital Age*, 47 J. MARSHALL L. REV. 459, 479 (2013). See also Tricia R.

Alaska, jurors are informed that they are allowed to bring cell phones and digital devices when they report for jury duty, but “court personnel may collect these items and hold them for you when jury deliberation begins.”<sup>113</sup> In New Jersey, a policy of the Superior Court allows judges to restrict the possession of electronic devices including the forced surrender of phones and tablets.<sup>114</sup> In Orange County, Florida, the removal of cell phones and electronic devices—when jurors commence deliberations—has become so commonplace the practice has evolved into a “local custom.”<sup>115</sup>

From Malheur County, Oregon to the Federal District Court presiding in Western Louisiana, jurors are banned from possessing cell phones from the moment they arrive for jury duty.<sup>116</sup> In the Malheur County example, potential jurors are informed by the circuit court website that all cell phones should be left at home or in their car.<sup>117</sup> In some jurisdictions, a complete ban on all devices in the courthouse complex results in jurors being unable to utilize cell or smart phone communications at all.<sup>118</sup>

The above examples of jurors being denied access to their personal devices of connection may indicate a growing trend by states, courts, and judges to utilize bans and device confiscation as a way to prevent jurors from engaging in digital misconduct. The same report to the Federal Judicial Center that declares social media use by jurors is “not common” indicates that a number of federal judges are confiscating

DeLeon & Janelle S. Forteza, *Is Your Jury Panel Googling During the Trial?*, 52 ADVOC. 36, 38 (2010) (listing states that have counties banning cell phones in the courtroom).

113. ALASKA CT. SYS., ALASKA TRIAL JURY HANDBOOK 9 (2016), <http://www.courtcords.alaska.gov/webdocs/forms/j-180.pdf>.

114. N.J. SUPER. CT., POLICY REGULATING JURORS' USE OF ELECTRONIC DEVICES DURING JUROR SERVICE (2010), [https://www.judiciary.state.nj.us/jury/juror\\_wireless\\_use.pdf](https://www.judiciary.state.nj.us/jury/juror_wireless_use.pdf).

115. Plogstedt, *supra* note 88, at 628.

116. Sharon Nelson et al., *The Legal Implications of Social Networking*, 22 REGENT U. L. REV. 1, 1–2 (2009). See also *Possession and Use of Electronic Devices in the Courthouse*, U.S. DIST. COURT, W. DIST. OF LA., <http://www.lawd.uscourts.gov/possession-and-use-electronic-devices-courthouse> (last visited Mar. 30, 2016) (providing for no juror exception to the following rule: “No electronic device, including but not limited to cellular phones, pagers, laptop computers and personal digital assistants (PDAs) may be brought into or used in any Courthouse in the Western District of Louisiana by visitors to the Courthouse without the prior approval of a judge of this court, except as set forth in the following paragraphs.”).

117. *Jury Service*, MALHEUR CTY. CIRCUIT COURT, OR. JUDICIAL DEP'T, <http://courts.oregon.gov/Malheur/Pages/JuryService.aspx> (last visited Mar. 30, 2016) (“Leave the following items at home or locked in your car. All cell phones, Ipods, cameras, no recording devices of any type; any type of weapons, pocket knives, scissors and chemical sprays. You will be instructed to not discuss the trial with anyone. Also, no emailing, text messaging, tweeting, blogging or any other form of communication. We do not allow jurors to maintain possession of their cell phones during trial.”).

118. See, e.g., Plogstedt, *supra* note 88, at 629 (“In the US District Court for the Middle District of Florida, all courthouse visitors are precluded from bringing cell phones, laptops, and cameras into the courthouse, without the express order of judge. This practice promotes security and also limits juror misconduct while inside the courthouse building.”) (internal citation omitted). See also U.S. DIST. COURT, SAM M. GIBBONS U.S. COURTHOUSE, TAMPA JURY BROCHURE (2015), <https://www.flmd.uscourts.gov/Jury/TampaJuryBrochure.pdf>.



phones in order to prevent jurors from utilizing social media inappropriately.<sup>119</sup> In the survey of federal judges, 30.1% of respondents in 2013 indicated they had confiscated jurors' phones and other devices as a way to prevent juror misconduct during deliberations.<sup>120</sup> In 2011, the percentage of responding federal judges using confiscation as a tool was 28.9%.<sup>121</sup> A smaller but significant number indicated they had confiscated devices prior to trial each day.<sup>122</sup> Additionally, 17 judges out of the 494 responding to the survey indicated, "their courthouse does not permit electronic devices or cell phones in the court house."<sup>123</sup>

Jurists, practitioners, students, and academics have all advocated for judicial device confiscation in articles and blogs.<sup>124</sup> As recently as 2013, scholarship in this area proposes, "Courts must ban juror cell phone use during the trial proceedings and must confiscate juror cell phones, laptop computers, iPads, tablets, e-readers and other electronic devices during juror deliberations."<sup>125</sup> The same proponents of confiscation justify this extreme remedy by indicating, "These minimum protections are necessary to ensure the integrity of the trial."<sup>126</sup> Experts in the field of technology and cyber law champion this growing trend toward asking jurors to relinquish their cell phones.<sup>127</sup> Practicing attorneys advocate that courts ignore the "separation anxiety" of jurors and "collect" the devices before deliberation, and in Florida this same message is reinforced to judges in seminars.<sup>128</sup> Some of our best legal minds have succumbed to the lure of the seemingly easy solution of device confiscation while our nation's highest court is implicitly conveying a very different message.

119. See DUNN, *supra* note 93, at 9–10.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 10.

124. See Anita Ramasastry, *Why Courts Need to Ban Jurors' Electronic Communications Devices*, FINDLAW (Aug. 11, 2009), <http://writ.news.findlaw.com/ramasastry/20090811.html> ("And while jurors are in the courthouse, the best solution will likely be to ask them to check their own electronic devices, yet also make telephones available for their use. After all, justice requires us to pay attention in court and not to be thinking about our next text, Tweet or Web search."). See also Plogstedt, *supra* note 88, at 630 ("Courts must ban juror cell phone use during the trial proceedings and must confiscate juror cell phones, laptop computers, iPads, tablets, e-readers and other electronic devices during juror deliberations. These minimum protections are necessary to ensure the integrity of the trial."); Mesenbourg, *supra* note 112, at 481 (acting as an example of a law student calling for a ban).

125. Plogstedt, *supra* note 88, at 630.

126. *Id.*

127. See Ramasastry, *supra* note 124 ("Anita Ramasastry, a FindLaw columnist, is the D. Wayne and Anne Gittinger Professor of Law at the University of Washington School of Law in Seattle and a Director of the Shidler Center for Law, Commerce & Technology. She has previously written on business law, cyberlaw, computer data security issues, and other legal issues for this site, which contains an archive of her columns.")

128. Patrick M. Delaney, *Sorry Linus, I Need Your Security Blanket: How the Smartphone, Constant Connectivity with the Internet, and Social Networks Act as Catalysts for Juror Misconduct*, 24 ST. THOMAS L. REV. 473, 497 (2011).

## B. *Riley v. California* and a Jurors' Expectation of Privacy

As judges across the nation continued to seize the phones of jurors, the Supreme Court spoke to the powerful bond between individual and device.<sup>129</sup> In *Riley v. California*, Chief Justice Roberts recognized the “pervasive and insistent” nature of our devices.<sup>130</sup> He also commented on how our phones have become an inseparable part of our person.<sup>131</sup> To make this point, the Court emphasized that nearly seventy-five percent of Americans are within five feet of their cell phones “most of the time, with 12% admitting that they even use their phones in the shower.”<sup>132</sup>

Not only did *Riley* recognize the existence of a new normal of individual human connection, but the opinion also advanced the idea of how major portions of our private modern lives are contained in smart devices, and citizens maintain a high expectation of protecting their digital information.<sup>133</sup> This expectation of privacy along with our anticipation of constant use understandably provokes anxiety over phone separation and device confiscation.

Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans the privacies of life. The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought.<sup>134</sup>

Arguably, the Founders also fought for Americans to be free from the anxiety of government-mandated separation from our most private connections, information, and possessions. *Riley* begs a question for all judges that ban phones today: Why not also remove a juror’s purse or wallet before he or she enters the deliberation room? A (small but impactful) dictionary may lurk inside these items.

In addition to following the legal holding of *Riley*, judges from around the nation should embrace the *Riley* opinion’s overarching message: smart devices have become an indivisible part of our person.<sup>135</sup> It makes little sense for a judge in Indiana (who follows *Riley*) to suppress a warrantless search of a cell phone but, in a trial on the same litigation, remove from each juror his or her smart device. It also is counterintuitive for federal courts to spend time carefully reviewing warrant applica-

129. *Riley v. California*, 134 S. Ct. 2473, 2490 (2014).

130. *Id.* at 2484.

131. *Id.*

132. *Id.* at 2490 (citing HARRIS INTERACTIVE, 2013 MOBILE CONSUMER HABITS STUDY (2013)).

133. *Id.* (“Today, by contrast, it is no exaggeration to say that many of the more than 90% of American adults who own a cell phone keep on their person a digital record of nearly every aspect of their lives—from the mundane to the intimate.”) (citation omitted).

134. *Id.* at 2494–95 (internal quotation and citation omitted).

135. See DeLeon, *supra* note 111, at 38–39 (providing an interview with state judges who believe banning devices in the courtroom is “extreme” and causes juror aggravation and anger).

tions for digital media but to unconditionally allow for the seizure of phones.<sup>136</sup> In *Riley*, Chief Justice Roberts condenses in a few phrases what social scientists and researchers have been reporting for years. What would be obvious to any alien visitor should also be obvious to our courts and trial judges: the forced separation of a cell phone from a juror would have the same impact as separating from that juror “an important feature of”<sup>137</sup> his or her person and who they are.<sup>138</sup>

### III. A NEW RELATIONSHIP WITH THE MODERN CONNECTED JUROR

One of the many advantages of authoring an article as a practitioner are those moments of deep dialogue, when a fellow litigator spontaneously and succinctly articulates an idea or analogy, capturing the essence of advanced trial work. For me, that moment came when a colleague (both litigator and accomplished musician) spoke of her connection with audiences, performing violin pieces as part of a symphony orchestra.<sup>139</sup> She described her concert audiences as being part of the performance, providing an energy and rhythm to the work of the artisans. The existence of the listener was synergistically bound to the presentation of the musician and the very nature of the concert being dependent upon an unspoken interaction between orchestra and concertgoers. But can jurors and juries listening to a trial be compared to concert attendees? Similarly, one of my law student interns and a former graduate student with teaching experience recently spoke of her connection with students, teaching college level courses as part of her graduate level duties.<sup>140</sup> She described her students as being connected to her presentation, providing a deep influence on how she presented the material. The nonverbal actions of the students were tied to the presentation of the material and the very nature of the class became dependent upon an unspoken interaction between lecturer and listener.

It is acknowledged by this author that not all litigators are teachers or musicians, and not all jurors bring the same joy and cooperation to the presentation of evidence as do the audiences of a musical performance. But the concept of empowering, educating, and synergistically interacting with jurors should not be a lost analogy on a profession preparing for a post-digital age of individuals becoming one with technology.

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136. See DUNN, *supra* note 93, at 9. See also Lulu Chang, *Facebook Tastes Its Own Medicine, Forced to Hand over User Information*, DIGITAL TRENDS (Jul. 21, 2015), <http://www.digitaltrends.com/social-media/sorry-facebook-not-even-social-media-is-more-powerful-than-a-search-warrant/> (providing an example of a federal court enforcing a warrant on Facebook).

137. *Riley*, 134 S. Ct. at 2484.

138. *Id.* at 2494–95.

139. These observations were based on conversations with St. Louis area litigator and professional musician Stephanie To.

140. This observation was based on conversations with Mari Katherine Webb, a member of the St. Louis University School of Law Class of 2016 and a former graduate student at Memphis State University.

The phenomenon of musical connection and educational interaction informed me in understanding how juries could better connect with lawyers, litigants, and cases. It also reminded me that many of the books and articles I had reviewed in preparation for writing this piece had painted jurors in a very different light than how my colleague had described her positive experiences with audiences.<sup>141</sup> The existing literature on juries and the removal of smart devices is grounded in a profession-wide fear of juror misconduct.<sup>142</sup> There is no shortage of anecdotal yet documented evidence of jurors using instruments of connection to improperly obtain information about case facts or litigants, communicate to others about the proceedings in violation of court instructions, and use their phones instead of engaging in deliberations.<sup>143</sup> What is also evident from the existing literature is that courts and lawyers that are proponents of removing a juror's smart phone base their concerns on a distrust of a juror's ability to follow instructions and keep promises made in *voir dire*.<sup>144</sup> But does a paternalistic and fearful approach to juries, by judges and lawyers, empower jurors to return inconvenient and unpopular verdicts? And does the true misconduct exist in the undetectable rushed and convenient verdicts of a disconnected juror?

Renowned jury scholar Jeffrey Abramson observes how juries over time have risked imprisonment to render a verdict they believed just, resisted the witch hunts for perceived communists in this country, "sheltered fugitive slaves and the abolitionists who helped them escape," found art in the photographs of Robert Mapplethorpe, and overcame the established power to find for dissenters like John Hancock, Angela Davis, and Father Phillip Berrigan.<sup>145</sup> He also notes how juries throughout history have acquiesced to the conventional wisdom of the day, returning verdicts saturated in popular bias and convenience.<sup>146</sup>

The premise of this article, of trusting jurors to keep and appropriately use their smart devices, is based on the belief that the modern juror will resist returning verdicts that are personally expedient if judges and lawyers promote an atmosphere of trust and empowerment. One way to communicate distrust and promote disempowerment is to

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141. See, e.g., BRANDON L. GARRETT, *CONVICING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG* 173 (2011); MARK GERAGOS & PAT HARRIS, *MISTRIAL: AN INSIDE LOOK AT HOW THE CRIMINAL JUSTICE SYSTEM WORKS AND SOMETIMES DOESN'T* 206 (2013) ("The founding fathers intended that the leading citizens of the community would serve as the jury pool for trials. Today most of the leading citizens are going to get out of jury service.").

142. Plogstedt, *supra* note 88, at 598.

143. SUNWOLF, *PRACTICAL JURY DYNAMICS2: FROM ONE JUROR'S TRIAL PERCEPTIONS TO THE GROUP'S DECISION-MAKING PROCESS* 606-07 (2007).

144. Plogstedt, *supra* note 88, at 629.

145. JEFFREY ABRAMSON, *WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY* 1 (1994).

146. *Id.* ("The names of the Sottsboro Boys and of Emmett Till, Viola Liuzzo, Lemuell Penn, and Medgar Evers mark the miscarriages of justice perpetrated by an all-white jury system that was democratic in name only.").

mandate the removal of an individual smart device based on the assumption that jurors are likely to engage in misconduct.

The state of art practiced by many innovative modern litigators is less about “demand” from and “fear” of jurors, and more centered on showing respect, providing leadership, and cultivating juror empowerment.<sup>147</sup> Recognized trial attorneys have accepted the fact that the modern juror has precious little time (because of personal and professional demands) to sit through “lengthy and tedious presentations.”<sup>148</sup> As a result of this observation, innovative trainers from across the country are teaching less experienced trial attorneys to put aside their fear of jury selection and embrace the beliefs, priorities, concerns, and rights of individual jurors.<sup>149</sup> Demonstrating to each individual on the jury that they are respected members of the process and judicial system is empowering (and trusting) them to bring forward their own personal beliefs of justice, fairness, and equality.<sup>150</sup>

Conversely, if courts and lawyers demonstrate to jurors that they are not respected or trusted and their individual concerns and beliefs are not valued, an environment of disempowerment is fostered. If we, as a society, celebrate the past “courage of jurors willing to protect dissenters from the orthodoxies of the day,”<sup>151</sup> then how can the legal system, in good conscience, send messages of disrespect and distrust to each juror by removing his or her smart device?

The digital age has shifted how we as a profession must look at juror misconduct. Today, legal scholarship is saturated with examples of jurors consulting smart devices in the jury room, and with jurors searching for information not addressed by the evidence at trial or the official jury instructions.<sup>152</sup> But the same juror will likely retire from a trial or deliberation at the end of the day and conduct the same search

147. See TREY COX, WINNING THE JURY’S ATTENTION: PRESENTING EVIDENCE FROM VOIR DIRE TO CLOSING 3–4 (2011). See also Mary Moriarty, *infra* note 149 (providing an example of training materials on jury selection).

148. COX, *supra* note 147, at 4.

149. See Beverly Beimdiek, Powerpoint Presentation: Getting Jurors to Talk (Jan. 2014) (on file with author); Mary F. Moriarty, Powerpoint Presentation: Theory-Based Voir Dire (Nov. 15, 2013), <http://www.nysacdl.org/wp/wp-content/noindex/Bufalo2013/MoriartyCombined.pdf>.

150. See Goldstein, *supra* note 89, at 602 (discussing how taking a juror’s property will result in feelings of oppression and lost control).

151. ABRAMSON, *supra* note 145, at 1. In the introduction to his book, Abramson notes that juries over time have become known for their heroic courage, as compared to juries throughout history whose infamous verdicts are now regarded in a critical light. *Id.*

152. See, e.g., Robbie Manhas, Note, *Responding to Independent Juror Research in the Internet Age: Positive Rules, Negative Rules, and Outside Mechanisms*, 809 MICH. L. REV. 812, 815–16 (2014). This student note provides an excellent example of how the newest members of the legal profession are seeking innovative solutions (other than the removal of devices) to the problem of digital based juror misconduct. Manhas also discusses how forbidding the use of phones during trial or deliberations “is a sensible rule.” *Id.* at 815. I agree partially with Manhas in that instructing and educating a jury not to use devices during trial and deliberations (but allowed at breaks) is sensible, but I take issue when forbidding device usage evolves into removal and over restriction.

in the privacy of his or her home.<sup>153</sup> We fear jurors who are distracted by the continuous usage of smart devices, who do not participate in the rigors of deliberation, or who communicate the details of trial and deliberation by way of social media.<sup>154</sup> Yet we are blind to the juror who is acquiescing to a convenient verdict, consumed by the thought of unread and unacknowledged text, emails, and alerts, all locked away in a bailiff's office. Litigators (especially lawyers who are presenting a nonconformist message) are worried about juries obtaining secret information about them, their case, and their client, but the same litigators are indifferent to the disempowering act of removing a smart device, encouraging jurors to conform to the demands of authority.<sup>155</sup>

In short, the legal profession must be on guard against creating a problem out of a perceived solution. The unintended consequences resulting from removing or banning the reasonable use of a smart device by a citizen juror are real. These consequences are also understandable when lawyers and judges fully accept the extent of our evolution into a digital society. To fully understand the consequence of seizing a device from a juror, an analogy is helpful. In formal opinions relating to other ethical issues about jurors and social media, the ABA has made use of analogies to conceptualize the relationship between modern technologies and traditional professional standards.<sup>156</sup> The taking of a digital device today is less analogous to removing magazines and newspapers from the jury room and more akin to confiscating “[t]he sum of an individual’s private life.”<sup>157</sup> Specifically, it is similar to asking jurors to surrender wallets, purses, private diaries, pictures of children, credit cards, bank statements, and private phone books, all before they enter the deliberation room. All these very private items are placed in the hands of a stranger for an undetermined period of time in a location of questionable security. If this practice was occurring in the more objectionable traditional form, citizens, attorneys, and judges would be greatly alarmed. That same level of concern is warranted today.

Fortunately, the solutions to the new problems that attend digital jurors are not new or necessarily creative; they are the traditional meth-

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153. See *id.* at 816. See, e.g., NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT 115 (2007). Vidmar and Hans describe how in the O.J. Simpson jury trial extensive efforts to sequester the jury “may not have worked” in preventing outside information from reaching the individual jurors. This observation begs the question: if a juror wants to search for information outside of the trial, can the simple taking away of a smart device prevent the juror from conducting the same search on the same phone the minute the juror exits the courthouse? *Id.* For two additional pieces of scholarship, see also Mesenbourg, *supra* note 112, at 480; Laura W. Lee, *Silencing the “Twittering Juror”: The Need to Modernize Pattern Cautionary Jury Instructions to Reflect the Realities of the Electronic Age*, 60 DEPAUL L. REV. 181, 205–06 (2010).

154. See Manhas, *supra* note 152, at 815.

155. See SUNWOLF, *supra* note 143, at 606–07.

156. See ABA COMM. ON ETHICS & PROF. RESP., Formal Op. 466 (2014), [http://www.almd.uscourts.gov/docs/aba\\_formal\\_opinion\\_466.pdf](http://www.almd.uscourts.gov/docs/aba_formal_opinion_466.pdf).

157. Compare Ralph Artigliere et al., *Reining in Juror Misconduct: Practical Suggestions for Judges and Lawyers*, 84 FLA. B.J. 8 (2010) (noting the analogy of removing items from the jury room), with *Riley v. California*, 134 S. Ct. 2473, 2489 (2014).

ods of juror education and instruction that we as a profession have utilized throughout our history.<sup>158</sup> Well-reasoned instructions from the court explaining smart device policy accompanied by an interactive and educational voir dire by attorney and/or judge will promote a model of trust, dialogue, and empowerment.<sup>159</sup>

These four simple ideas will safeguard both the individual's interest in connectedness and the court's interest in justice: (1) courts should never remove or forbid the possession of a smart device by a juror at any stage of the proceeding or at any location in the courthouse; (2) courts should continue to create and utilize reasoned instructions on the appropriate use of smart devices by jurors, especially when it comes to when and how the device is utilized; (3) litigators and/or courts should engage in an educational dialogue with jurors as part of their existing voir dire process, discussing why certain well-reasoned restrictions on smart device usage are imposed and inquire if jurors can follow the limitations set out by the court; and (4) if courts instruct jurors to disable (turn off) or not use a smart device during trial or deliberations, predictable and adequate breaks should be scheduled, allowing jurors time to utilize phones and devices.

In the digital age, it is a reasonable request to ask jurors not to use their device of connection when hearing evidence in court. But it is not practical to forbid a deliberating juror from returning a text from his or her child when they use the restroom or eat lunch. It is reasonable to instruct jurors not to engage in independent research on their smart devices or tweet the progress of deliberations. But do courts inadvertently rush verdicts when they seize the phones of thousands of deliberating jurors (every year) in a failed attempt to eliminate a relatively small number of juror misconduct cases?<sup>160</sup> It is important for the legal profession to be concerned about incidents of jurors engaging in digital misconduct, but it is disingenuous to speak of its evils without first promoting a profession-wide practice of education and instruction as part of an effective voir dire.<sup>161</sup>

## CONCLUSION

The banning, seizing, or confiscating of a smart phone belonging to a juror, in addition to over-restricting the juror's use of a device, is a practice that should be discontinued by all judges and courts. When a

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158. See Artigliere et al., *supra* note 157, at 8.

159. *Id.* at 12–13.

160. See DUNN, *supra* note 93, at 9–10, 15.

161. See Robert J. Truhlar, *Can We Talk? Getting to a Policy of Cell Phones in the Courtroom*, 33 COLO. LAW. 29 (2004) (discussing a (possibly satirical) proposal on developing a policy for juror cell phone usage in the court room). One suggestion for consideration is allowing jurors to use cell phones at times of sidebars. *Id.* This suggestion may have been made in jest but the idea is more practical today than it was in 2004. Today, smart devices would allow for a quick and non-disruptive way for jurors to stay in touch with their network of family and friends. I use this source even with Truhlar's tagline: "If any federal judges read this column: I'm only kidding!" *Id.* at 30. I have found over my years of practice and writing, inspiration for change can come in many forms, including humor.

juror is disallowed the use or possession of a mechanism of modern connection and storage, he or she will experience authentic feelings of anxiety, inattention, lack of control, ostracism, and fear for the wellbeing of others. Social scientists, our highest court, and our experiences and common sense inform us that jurors, and arguably their verdicts, will be impacted by a forced separation from phone possession and thoughtless restriction of device usage.

Jurors today live in a world where digital connection has become a normal part of their existence. For many of these participants, their lives have always been dominated by their ability to connect. Research in the field of smart device usage establishes that individuals can be impacted cognitively when separated from their phone, and for some jurors the real phenomenon of digital addiction and obsession will be overwhelming. For a majority of jurors, the peace of mind that comes with being in constant contact with loved ones, close friends, and businesses is a realistic expectation that should follow them into the deliberation room. For many deliberators, the idea of being dependent on a stranger to deliver a written message from their child, delivered on a court's voicemail after an emergency arises, will be too overpowering to fathom.

As society evolves into a digitally-dependent world, courts are responding to the highly publicized, yet uncommon problem of juror electronic misconduct, forcing jurors to abandon their smart phone by way of ban or confiscation. Fearing jurors will do independent research or communicate impressions of proceedings, states, counties, and federal courts are banning cell and smart phones from courthouses, courtrooms, and deliberation rooms. Supporting the conclusion that phone bans are becoming an increasing trend is the mounting existence of legal scholarship by students, practitioners, judges, and academics advocating for courts to take the devices from jurors. Ironically, these calls for device bans take place at a time when our highest court is speaking to the expectation we all have in being able to securely store and continually possess the components of our private and professional lives. The Supreme Court implicitly guides us in understanding how taking a modern phone for any reason, by any authority, is equivalent to the taking of an individual's most private thoughts, associations, possessions, financial instruments, and professional information. In the case of jurors, all are seized by a stranger and sequestered in an unknown place.

The most effective and least intrusive method to combat juror misconduct in the digital age remains well-written jury instructions and a quality voir dire by a judge or litigator. A new age of post-digital litigation is approaching, when all fact finders will be inseparable from their constant connection to networks and information. This age will present a need for litigators to be empowering and trusting of jurors. The disempowering and anxiety-provoking act of taking an individual's phone is draconian and archaic. The time has come for all judges to allow jurors to possess their devices at all times and allow for their frequent use at appropriate times in the proceedings. If we expect jurors



to return reasoned and thoughtful verdicts, we should stop treating them like misbehaving children and allow them to debate, deliberate, and decide free from the confines of anxiety and disconnection.