

The Right to a Fair Trial

in the Age of Facebook

»»» by Lori Andrews

When Utah police tried to serve a warrant on Jason Valdez, a member of the Norteños gang, he barricaded himself in a motel room, taking Veronica Jensen as a hostage. With SWAT officers outside his motel and in the adjoining rooms, Jason used his Android phone to post six status updates to Facebook, add 15 friends, respond to numerous comments on his wall posted by friends and family, and post a picture of himself and his hostage with the caption, “Got a cute ‘HOS-TAGE’, huh?” A Facebook friend posted on Jason’s page that a SWAT officer was hiding in the bushes: “gunner in the bushes stay low.” “Thank you homie,” Jason replied. “Good looking out.”

The standoff ended when SWAT officers used explosives to blast through the front door and through the

wall from an adjoining room. The hostage was fine, Jason ended up in intensive care, and police are considering whether to charge Jason’s friend with obstruction of justice for warning him about the SWAT officer.

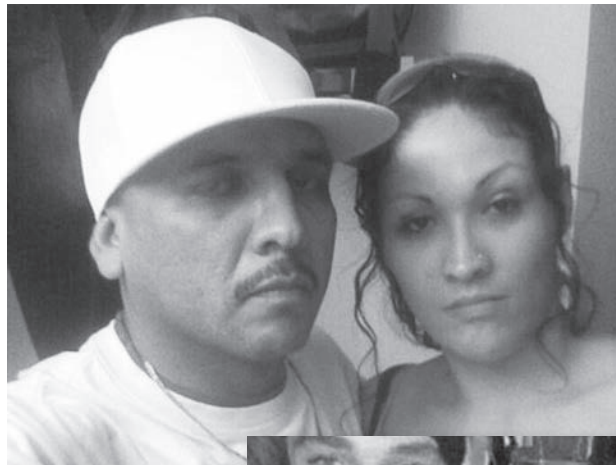
Social Networks and Criminal Investigations

Social networks have become a police officer’s BFF. A 2014 survey by the International Association of Chiefs of Police of 728 law enforcement agencies from 48 states and the District of Columbia found that 82.3 percent of the agencies used social networks in criminal investigations. Nearly half of the law enforcement agencies said that social media had helped them solve crimes. Search requests, too, have helped to identify offenders. Robert Petrick’s conviction for murdering his

wife, for example, was secured through evidence from his Google searches, including “neck,” “snap,” “break,” and a search for the topography and depth of the lake where his wife’s body was found.

Social media posts and photos have been used to show a crime was committed, to show that the defendant was prone to violence or lies, to impeach a witness, to show that the defendant or someone close to the defendant intimidated a witness, and to justify a longer sentence. But the use of social media can conflict with a right to a fair trial.

A constellation of rights in the U.S. Constitution work together to protect people’s right to a fair trial. These include the Fourth Amendment, which puts constraints on how evidence is collected; the Fifth Amendment’s protection against self-incrimination; and the



Left: Screen shot from Facebook posts by Jason Valdez during hostage standoff.
 Top Right: Facebook photo posted by Jason Valdez during hostage standoff.
 Bottom Right: Facebook photo of Joshua Lipton in "Jail Bird" costume.

Sixth Amendment's right to an impartial jury. But our digital world has created new challenges for the implementation of each of those rights.

The Fourth Amendment

The Fourth Amendment, which prohibits unreasonable searches of persons and property, was adopted to protect us from police officers coming into our homes and searching for evidence of a crime by reading our private papers and going through our belongings. If law enforcement officials want to obtain evidence, they need probable cause—some reasonable, individualized suspicion—that the particular person has committed a crime or is about to commit a crime. Generally they also need a warrant, which they can obtain if they persuade the judge that their suspicions about the person are reasonable.

With the Fourth Amendment, the Framers privileged privacy over crime prevention. Sure, the cops might miss out on finding an embezzler or black-mailer or wife beater by not being able to march into everybody's house just in case criminal activity was going on. But they'd probably have to unnecessarily invade the privacy of many upright citizens to find the people whose homes concealed evidence of a crime. And the Framers didn't want that to happen.

Even though offline searches can't be conducted without probable cause, cops routinely search social networks. A deputy sheriff in the Chicago suburbs searched the Facebook pages of high school athletes. When the deputy found party photos indicating underage drinking, four boys were suspended from their team and criminally prosecuted. A girl who had shoplifted was caught

when she posted a photo of herself in the stolen dress. A sixteen-year-old boy posted a Myspace photo of himself with his father's guns. Even though it is legal to have a gun at home and his father had permitted him access to the guns, a jury convicted the boy of possession of a gun by a juvenile.

In many instances, citizens send social network information to the police to be vindictive or to gain something



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themselves. About half of teenagers post photos of themselves engaging in illegal behavior, mainly underage drinking. Yet not all those teens are prosecuted. Who passes on those incriminating photos to the police? Sometimes it is the parent of a rival to the teen in the photo. If the photographed teen is suspended from school or knocked off the team, the rival will gain a spot.

At sentencing, social network information again comes into play. In a Rhode Island case, a twenty-year-old's sentence was harsher because of pictures posted to Facebook. Joshua Lipton drove under the influence of alcohol and caused a car accident that seriously injured a woman. Two weeks later he posted photos of himself wearing a Halloween costume that consisted of a bright orange jumpsuit with the phrase "jail bird" written in black. One of the victims of the accident saw the photos and gave them to the prosecutor. At the sentencing hearing, the prosecutor argued that the pictures demonstrated that Lipton was not remorseful and thus deserved incarceration, as opposed to probation, and the judge agreed.

The Fifth Amendment

The Fifth Amendment provides that no person shall be "compelled in any

criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." Those constitutional rights help govern what information is admitted in criminal cases. We all have a Fifth Amendment right not to incriminate ourselves. We can "plead the Fifth" and not testify. But can our Facebook and Myspace postings be used against us? And are courts savvy enough to know when someone else has posted something just to incriminate an innocent suspect—or to create a false alibi? How well does the justice system distinguish between the digital self that we create on the Web due to wishful thinking (or the desire to appear tough or rich or young) and our real offline identities?

Judges are supposed to make sure that the evidence is authentic, relevant, and more probative than prejudicial. Yet judges tend to admit the entire contents of a Facebook page or Twitter account, including photos a person has been tagged in by others. Many high school and college students have been prosecuted for underage drinking because they are holding a red cup in a photo. Yet this seems unfair. What if a student had a soft drink, not beer, in the cup?

Prosecutors have used Instagram and Facebook photos of people wear-

ing gang colors or making gang signals to prove that they were involved in gang activity. But should the justice system really make that leap? A junior high student who was being bullied might post those kinds of photos to trick others into thinking he was tough. Under the Los Angeles Police Department's guidelines on gang colors, virtually all of us would fall into one gang or another. "Plaid shirts in either blue, brown, black or red" are indicative of gangs in LAPD-land. "Excessive amounts of dark clothing or a predominance of one-color outfits are also indicators of possible gang involvement."

The Sixth Amendment

The right to a fair trial is also protected by the Sixth Amendment right to an impartial jury. Jurors have to wrap their heads around the idea that the legal process is not about truth per se, but a judgment based on admissible evidence. If evidence was obtained impermissibly (for example, through a search without a warrant), it cannot be considered. Evidence that is unrelated to the case and may be prejudicial to the defendant is not allowed to come before the jury. Before deliberation, the judge instructs jurors on how they are supposed to interpret the terms of a statute or the legal responsibilities



Technology and the Sixth Amendment

In this activity students analyze a political cartoon and discuss the impact that digital technology has on one's Sixth Amendment right to an impartial jury.

Distribute copies of, or project, the cartoon to students. *Note: Handout and presentation-ready copies of the cartoon are available for free download at www.insightsmagazine.org.*

Ask students to discuss what they see in the cartoon. Students might observe the age of a majority of the jurors. Students might note that all the jurors are using the same type of technology in the courtroom. In depicting so many older jurors, students might infer that the cartoonist emphasizes the potential challenges that the legal system faces as the accessibility and familiarity with technology continues to grow and bridges generations.

Discussion Questions:

1. What do you notice about the jurors in the cartoon? Why do you think the cartoonist chose to include so many jurors who are clearly older in age?
2. What else do you notice? Is this a U.S. courtroom? (Teacher might have to explain to the students that this is a Canadian cartoon and in Canada attorneys wear traditional gowns while in court).
3. In what ways can access to digital technology, and particularly social media, influence a jury?
4. The lawyer in the cartoon assumes that the jurors are googling “the accused.” What reasons might the cartoonist have for showing that a juror is investigating the lawyer?
5. What else might the jurors be doing on their phones? Do they look attentive to the case? What impact might this have on their deliberation?



Pascal Elie, *Law Times*, June 20, 2015

6. What do you think the cartoonist is saying about the courts' ability to protect Sixth Amendment rights in a digital era?
7. Do you agree or disagree with the point that the cartoonist is making?
8. What title would you give this cartoon?

Extended Activity

Students might research what courts around the country are doing to deal with the challenges they face in maintaining the integrity of the legal system in a world of rapidly changing technology. What is the prevalence of social media use by jurors during a trial or deliberation proceedings? Is the reality of the situation as extreme as the image presented in the cartoon? Students might also look at this issue from another perspective. In what ways is technology being used by lawyers to inform voir dire (jury selection process)?

of the parties. Yet some people are so dependent on social networks that they can't make a decision about anything—whether to buy a certain car or break up with a boyfriend—without doing Internet searches or running a

poll of their friends. When faced with the evidence in a sexual assault and abduction case, a juror posted the facts on her Facebook page and said, “I don't know which way to go, so I'm holding a poll.”

Jurors aren't supposed to be swayed by emotions unrelated to the case (such as their own past dealings with the defendant) or by anything they've read in the news media or any other source. They are not allowed to

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Discussion Questions

1. Do you think police should use social media to conduct investigations or identify individuals? Why?
2. Why would social media posts be used in court?
3. What effect(s) do you think social media has on a defendant's right to an impartial jury?
4. Is there a fair and constructive role for social media in the criminal justice system? What do you think it should be?



Suggested Resources

- Lori Andrews, *I Know Who You Are and I Saw What You Did: Social Networks and the Death of Privacy*, Free Press, 2012.
- “As Jurors Go Online, U.S. Trials Go Off Track,” Reuters, December 8, 2010. <http://www.reuters.com/article/2010/12/08/us-internet-jurors-idUSTRE6B74Z820101208>
- Frank LoMonte, “When it comes to social media, some old-school legal rules may not apply,” Student Press Law Center, August 2014. <http://www.splc.org/article/2014/08/when-it-comes-to-social-media-some-old-school-legal-rules-may-not-apply>

talk about the case with others, so that they don't base their decision on the influence of a friend or relative, rather than their own judgment. They can't visit the scene of the crime on their own or conduct their own investigations.

Before Facebook, Twitter, Google, YouTube, and Instagram, it was easier to keep jurors in line. If a case garnered attention in the local press, a judge could order a change of venue so that the case was heard in another town. If the court was worried about outside influences, the jurors could be sequestered. But now with a quick search on a smartphone—or a peek at a defendant's Facebook page—jurors are routinely breaching the right to a fair trial, and courts, lawyers, and legislatures are trying to figure out what to do about it.

With a simple search, jurors can find out the skinny on the lawyers, seek out past misdeeds of the defendant, make assessments of the credibility of witnesses, and even use Google Earth to revisit the crime scene. But all of these actions violate a defendant's right to a fair trial. Web searches uncover information from outside of the courtroom, where there is no chance for the defendant's lawyer to correct inaccuracies or cross-examine the individual who provided the information.

In 2010, Reuters monitored tweets over a three-week period for the term “jury duty.” The study found that tweets from jurors or prospective jurors pop up at the rate of one every three minutes.

Ignoring their legal duty, some jurors make up their mind before all the evidence is presented. “Looking forward to a not guilty verdict regardless of evidence,” one person tweeted. Another said, “I've already made up my mind. He's guilty. LOL.” Yet another man, in a jury pool, hadn't even been selected for the trial. Yet he boldly tweeted, “Guilty! He's guilty! I can tell!”

Jurors' misuse of social media to find evidence outside of the courtroom and to spill trial secrets to the world has led to dozens of mistrials and overturned verdicts, costing the government millions of dollars to retry the same defendants. The legal system is struggling with how to deal with such jurors. In some states, the punishments have been minor. When a Georgia juror Googled information in a rape case, the judge fined her \$500. When a Michigan juror posted on Facebook, “Gonna be fun to tell the defendant they're GUILTY,” the judge replaced her with an alternate and made her pay \$250 and write a five-page essay about the constitutional right to a fair trial. California, though, has gotten tougher. A new state law provides for a penalty of up to six months in jail for a juror who disobeys a judge's ban on the use of social networks, tweets, or Web searches to find out about—or discuss—a case.

When Social Media Enters the Courtroom

Social networks increasingly create a challenge for criminal law. When social media enters the courtroom, judges should consider how the information was obtained, whether it was falsified or authentic, and how closely related it is to the issues in the case. Unless the social network posting provides reliable evidence of some element of the crime (not just some prejudicial information about other aspects of a defendant's or a victim's life), that posting should not be admitted. The constitutional right to a fair trial has an important place even in the era of Facebook. **IN**