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Social Media and Open Trial: An Emerging Conflict or an Opportunity?

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Declaration

I declare that this thesis has been composed solely by myself and that it has not been submitted, either in whole or in part, in any previous application for a degree. Except where otherwise acknowledged, the work presented is entirely my own.

Lamprini Georgiou

31 August 2017

Abstract

This thesis presents a comprehensive overview of the concept of open trial in different eras, before and after the birth of the Internet and social media. It describes obstacles and challenges that emerge in the digital environment such as the citizen journalism phenomenon as well as directions for evolving and rethinking the concept of open trial in this new era. It focuses on the jury trial as a means of implementing openness and it proceeds across different periods and jurisdictions with a normative analysis. It finally presents several technological solutions for resolving the conflict between open, fair trial and social media. These solutions range from a number of light weight measures to a radical reformulation of the criminal trial by jury which is based on a cryptographic e-voting protocol and blockchain technology.

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Chapter 1

Introduction

In 2012, the Judicial Office for Scotland on behalf of the Lord President,¹ initiated a review of the current policy regarding recording, broadcasting and live text based communication (LTBC) in civil and criminal trials. This consultation expressed a realisation that new forms of communication, including in particular social media, were changing radically the environment within which trials take place. The review, even though it focuses on Scottish courts, puts forth concerns related to the judicial system that are global and fundamental in nature.

In particular, the administration of justice faces two challenges:

- a) changing possibilities on how to distribute information. Gone are the days when only professional journalists had access to mass media, whose operation required considerable financial investment. Instead we have entered a world where everybody can at any time record, comment on and disseminate news potentially to a worldwide audience.
- b) because of the above, we also see a changing public expectation about what

¹See Gill (2013).

openness of public proceedings means: increasingly, we expect to get access to all information, in real time, from a mix of media including social media, and supported by text, images and clips.

The consultation identified a potential conflict between the demands for open justice, and the demands of a fair and just trial. However, apart from stating that these two are potentially in conflict, and that furthermore, open justice is the subordinate value to fairness and therefore has to yield, there was little in the consultation, or the ensuing report, that analysed the nature of these values and their alleged conflict in any detail. And despite the focus on new media, responses to the consultation came predominantly from established media organisations, or focused on use of new media by these.

Addressing this gap and “unpacking” the concept of “open justice” in an age of social media reporting, is the aim of this thesis. It will ask in particular:

- What exactly do we mean with open justice, and why we consider it of value.
- What are, exactly, the contributions to and conflicts between open justice and fair trial.
- If there are irreconcilable conflicts, if open justice is really merely a “means to an end”, or if other arguments can be made that should matter when balancing open justice against the guarantee of a fair trial.
- How the balance between open justice and fair trial was realised in the past throughout history through a mixture of legal rules (including rules of procedure), social norms on the one hand, contingent factors such as “markets” and architecture on the other, and how modern forms of communication challenge this status quo.

- How we can optimise, or even radically redesign, open justice and fair trial in an environment where every citizen is potentially a journalist, with new and instantaneous forms of multi-modal communication at their fingertips.

To address those questions, a comprehensive overview of the concept of open trial in different eras is presented, before and after the birth of the Internet and Social Media. If we understand better how “openness of the trial” and the wider media and social landscape co-evolved, we will understand better which of the concrete legal rules that we use to regulate currently trial procedures are truly essential to protect non-negotiable values of justice, and which ones are merely historically contingent expressions of the “real world” constraints under which trials had to operate. To give a first idea of the type of argument we are making, consider something like the railway during the first industrial revolution. Prima facie the introduction of railways seems to be unrelated to the legal concept of open justice and fair trial. On closer examination however, one can challenge this assumption. Affordable and fast travel for everyone potentially increased the number of spectators of a trial dramatically. Not only that, it also increased potentially the available jury pool to a significant degree. These changes then also meant that rules and procedures of the trial had to respond — for instance by reserving seats for affected parties and official journalists, or by demanding jurors without prior knowledge of the defendants — something frequently impossible in earlier centuries, where the only jurors available would have been direct neighbours.

Based on the submissions to the report and its final conclusion and recommendation, it can be argued that the contribution of open justice to fair trial in modern, stable democracies might be exaggerated, but its non-utilitarian values are underappreciated. As it is, the report had, unfortunately, not led to substantial outcomes and it fell short to give a satisfactory solution to the problems that were

raised. The concept of open trial and its conflicts with other rights, such as privacy, fairness and freedom of expression were not thoroughly analysed. Crucially, the review did not make the distinction between professional and non professional journalists — citizen journalists — who may use LTBC communication to report a trial’s proceedings. In addition to that, it focused almost exclusively on the “sender” of trial information, but only touched upon problematic “receivers” of this information, in particular the danger to jeopardise a trial if jurors use their social media accounts and post prejudicial material online or inadvertently come across content that they were instructed not to read. As it will be discussed, these are serious concerns that endanger the very notion of a fair trial.

With respect to moving forward towards a solution, it will be further argued that using formal legal rules to restrict LTBC and other live forms of court reporting are undermining the non-utilitarian aspect of fair trial, while at the same time are unlikely to be efficient in the long run due to changes in technology. Furthermore, the solution that was given by the Scottish Courts, albeit simple, it is very far from a complete solution that would also embrace the benefits that Social Media and the Internet can bring to the administration of justice. Using Lessig’s scheme of regulatory modalities, a series of measures will be suggested, in varying degrees of “radicalism” that could help promote open justice, while minimising the risks that social media poses. The main aim is to contribute to our understanding of what “open justice” could and should mean in the age of social media. A secondary aim however, is to suggest that the advent of modern communication technologies may allow us to rethink much more radically the institutional set up of the trial.

The thesis is divided in five chapters. The current chapter includes the introduction and an overview of the consultation of the Judicial office for Scotland for contemporary context. In the second chapter, fair and open justice is placed

in the context of history of ideas, tracing its evolution through centuries and jurisdictions. This will enable us to get a clearer idea what the precise normative role of “open justice” is. From this, some thesis about the value of openness in the administration of justice will be extracted that applies across time and (jurisdictional) space. Here I make a novel and important argument linking the concept of “open trial” to the democratic institution of jurors. The trial by one’s peers was realised for the first time in classical Athens and introduced in England and Scotland as a result of the Norman invasion. For this purpose, this thesis is articulating how the institution of jurors implemented the values of openness in a criminal trial. Moreover, it is explained how jurors evolved as an independent body and became responsible for the role of producing the verdict. The thesis proceeds, by analysing the modern concept of open trial as a fundamental right, which is protected in several international conventions and explain in what way it underpins the common law trial.

The third chapter is focused on the importance of media as judiciary’s watchdog. As the population had been increasing, public scrutiny of trials was increasingly achieved via reporters. I will expose the challenges that print and broadcast media have raised and whether courts have managed to mitigate them. I will argue that persistent legal debates on how to balance the ideal of open trials with other societal values, were often either mooted or at least mitigated, by external contingent aspects of “architecture” and “business model”: inevitable time delays in turning the information into print copy and distribute it, together professional ethos of trained journalists that rewarded fair, informed and unbiased reporting, have supported the fairness of the proceedings.

This normative analysis is followed by the fourth chapter that focuses on Social Media. The first major challenge I will address, relates to the citizen journalism phenomenon, where everyone with no expertise and training can be a publisher in the courtroom via platforms such as Facebook, Twitter, YouTube and web-based

blogs. The courts have to weigh rights in an environment where information is transmitted instantaneously. A second challenge that it is examined is in what way the unrestricted nature of Social Media has undermined the criminal trial, especially the jury trial. The norm with Social Media and Internet Platforms is that people engage in them everyday and even share personal details with people they have not physically met.² A third challenge is related to the transformation of the jury's role. I argue that initially, the jury was one way to implement open trials, they and (the limited available) reporting served the same ends. But different evolving constraints on jurors, observers and reporters meant that increasingly, they were perceived to be in conflict. As the role of the jurors to ensure openness diminished in the public perception and yielded to professional journalists, their role as impartial adjudicators increased, and with that the fear that media coverage could detract them from the proper execution of their job. Jurors over time have been transformed to a sentencing body that know as little as possible about the facts and the law of a case, as opposed to jurors of classical Athens and of Middle Ages in the United Kingdom that were selected precisely, because they were a knowledge resource. With the rise of LTBC communication it has been argued by a number of scholars that jurors' online research and online communication can be utilised as a means of fulfilling the ideal of a more active jury.

I note that, despite the focus on "regulation of new media", there will be only a passing discussion of media law as traditionally understood. This responds to the key problem identified by the thesis: In the past, professional media outlets created an "information bottleneck", where formal laws could get traction: media professionals understood the legal rules of reporting, wanted their names associated with their stories and relied on a continuous positive relationship with the courts. This meant that both formal punishment for contempt of court or

²See (Hoffmeister, 2015a, p.131).

even less formal sanctions, such as revocation of accreditation was a real threat. Citizen journalists by contrast, are typically not trained in media law, and also may just be one-off and frequently anonymous observers of a specific trial, making traditional legal sanctions ineffective.

The thesis proceeds by presenting new technologies that unsettle the historical balance between openness and fairness that characterise the current trial set-up, and discuss the specific challenges these pose. In the final chapter, Lessig's theory of regulatory modalities is used³ to suggest a mix of adjustments to legal regulation, "quasi-market" and code-based solutions that would see the courts much more aggressively, using these tools proactively, and technological tools that regulate the way in which spectators can report from trials.

In my first recommendation, I take Lessig's "Market" solution and apply it to the court's environment. It is explored what would happen if the court became itself a publisher and a broadcaster and could control the dissemination of information from the courtroom. My second recommendation is a "light weight" code based approach that uses a digital "commitment reminder" system embedded in a smart phone application. The reminder application will pop up each time the user opens their mobile phone. Any member of the public or jury should be obliged to download and install the application, prior to entering the courtroom. It is argued that the use of automated tools can "nudge" people into responsible reporting. The efficacy of the proposed solution is also examined by drawing on recent experimental research on behavioural economics. My third recommendation is a radical reformulation of a criminal trial. In this section, I ask the question if in an age where everyone can be given access to live courtroom information, it is still necessary to use a limited number of jurors as a random selection to represent the citizenship. Instead, the random element is transferred to a newly

³See (Lessig, 1999, pp.85-89).

designed cryptographic protocol called *random sampling voting*.⁴ I take advantage of the basic properties of this system and especially the anonymity it provides and I reconceptualise a jury trial by suitably modifying the voting protocol. I also explore the possibility to execute the protocol on a blockchain environment, using a smart contract, in order to increase its resilience to disputes. The resulting system, which I call “Random Sample Justice,” shows how it is possible to perform a trial completely online, transcending geographic constraints.

⁴See Chaum (2012).

Chapter 2

The evolution of open trial

The history of open trial is intertwined with the struggle of people to balance the power of kings and rulers in the administration of justice. Ruling elites, who were the first to be involved with the administration of justice, produced legal proceedings and sentences that — on occasion — were arbitrary, inconsistent and, in conflict with the community norms and perceptions of fairness as existed. Holding trials literally “in the open”, in public such as in market places, were the first means of scrutiny of the trial and a way to achieve transparency. Soon though, jurors as representatives of the public became the basic “vehicle” of implementing the values of an open trial in a society where media did not exist.

In this chapter I present how open trial began, as a concept, by the institution of jurors who acted as representatives of society, and how it evolved over the centuries until it became protected as a fundamental right in international conventions. This is not meant to be a comprehensive documentation of the whole history of open trial but rather a reference to important stages of its evolution in the classical, medieval and modern world. I finish the chapter by providing the

modern perspective of open trial as a basic right and explain its virtues as well as potential downsides in its implementation.

2.1 The jury trial in classical Athens

The first time the concept of open trial is encountered in the historical record is in Classical Athens, and especially through the institution of jurors. This section describes in what way trials were “open” to the public and how selected citizens who fulfilled their public role, through jury duty, served as guardians of democracy in the Athenian Polis.

The first recorded incident of a procedure where the public was to form an opinion, rather than a ruler, the king, or the elders and resembled the concept of an open trial is encountered in Homer’s *Iliad*. As described in (MacDowell, 1978, p.17), after a chariot-race, each participant used to claim his prize, in front of an audience. In a particular incident, Menelaus¹ appeared frustrated, because another soldier claimed the prize and presumably beaten him unfairly. Menelaus stood up and gave a speech in front of the public. The audience not only consisted of leaders, but of ordinary people as well. After he finished his speech he asked his opponent to give an oath before all. With this action, Menelaus was trying to put pressure on his opponent, so that he accepted his wrongdoing not only in front of the elders but to the whole population.

This incident indicates that despite the fact that verdicts were delivered by the king, with the possible advice of elders or judges, they were still influenced by public opinion. We do not really know exactly, when the transition of judging a

¹King of Mycenae and, according to the *Iliad*, leader of the Spartans of the Greek army during the Trojan War.

case by a king started to be influenced by public opinion, but we suspect that this change must have been gradual and it varied across different cities in Greece.²

In the meanwhile, the population of Athens was increasing, the practice of appeal became more prevalent and people who were very keen on participating in the public proceedings had to earn a living. In response, a new format was developed: a small number of ordinary people was chosen to represent the rest of the population and their decisions was binding for all. In this way, the right to a trial by jury, i.e., by a small number of ordinary people with no expertise, was invented in Athens as a response to preserve the newly acquired right to an open trial under changing economic and social circumstances. The requirements to take part as a juror where to be male over thirty years old and to have full citizen rights. Evidence of support for this new way to conduct a trial can be also found in the fact that in the middle of the 5th century BC, a daily pay of two or three obols³ was introduced to ensure that poorer classes could participate in the jury and to prevent bribery.

Further refinements of the jury concept followed. Crucially for our discussion later, the Athenians, in order to prevent jurors from being bribed, introduced a method of selection that was based on a public lottery implemented by a device called a “kleroterion.”⁴ We do not know exactly how many jurors sat in the same panel, but most likely they where two panels of 500 jurors each.⁵ The large number of people included in the jury shows that they were indeed seen as an implementation of the open trial ideal to control the authorities, and less as an “aide” to a judge.

It appears that jury trial as was held in Athens, contributed significantly in the

²See (MacDowell, 1978, pp.10-40).

³An obol was a form of ancient Greek currency.

⁴See Rhodes (2004).

⁵See (MacDowell, 1978, p.37).

society of this era. The values it carried, resemble the values of an open trial, as we currently understand them. Firstly, it held an educative role as the Athenians (males only) would learn everything about the law as bystanders before they were expected to serve as jurors, magistrates or litigants in a trial. Secondly, they also learned how to form persuasive arguments and hence, participate in councils and in public life in general. Thirdly, ancient jury trials were open to a large audience; citizens, visitors, speechwriters and students. Through publicity, jurors' decisions and litigants' arguments were open to public scrutiny. Thus, the publicity served as a means of increasing the trustworthiness of the testimony, as a mistake, a lie or an exaggeration could be easily detected. Moreover, as the laws were not in written form, someone could have been tempted to mislead the jurors. Speakers addressed the audience directly, who by the practice of "thorubus"⁶ could approve or disapprove the litigant's arguments.⁷

Jurors' decisions were final and not open to appeal,⁸ nevertheless, publicity created an informal accountability mechanism. Jurors' reputation would be affected by their decisions, as the whole city would be informed about the outcome of the trial. Moreover, due to the lack of a public mechanism of prosecution and enforcement of laws, a record of any previous reprehensible acts of the litigant, whether he was prosecuted before or not, could be revealed during the trial and thus considered.

It follows from all the above that the Athenian trial was a place of debate, a place of expression and a place where moral norms were built.⁹ Indeed, the jury duty was of a great importance, and was taken seriously in the Athenian polis, where jurors were even buried with their juror tickets.

⁶Literally, "noise" in Greek.

⁷See (Lanni, 2012, pp.127-134).

⁸ibid.

⁹ibid.

2.2 The jury trial in the English speaking world

2.2.1 Great Britain

“England owes more of her freedom, her grandeur, and her prosperity to the jury trial than to all other causes put together. Trial by jury has been seen traditionally as their citizens’ great bulwark of freedom, the lamp that shows that freedom lives.” (Jeremiah S. Black).

While earlier scholarship had often tried to trace the English jury to earlier Danish or Saxon legal customs, more recent scholarship paints a more nuanced picture that emphasises the discontinuity that the Norman invasion brought.¹⁰

In Saxon Times, persons who committed a crime were judged by the community they belonged to. The notion was that one who committed a crime against another person was considered as having done a wrong against the whole community. Each village had its own tribunal and the fact that the trials were public simply meant that the proceedings were held in the open air. The Norman invaders were able to use the existence of these methods of public decision making to legitimise their reforms, nonetheless, their jury was a very different institution. The jury,¹¹ in its beginnings was created by the Normans to help the administrative power. The first jurors were men, who were forced to give information under oath for the King’s fiscal plans, essentially informants about the wealth of community.¹² It was not until a hundred years later that Henry II, first introduced the jury into the criminal trial process. By the Assize of Clarendon in 1166, and then the Assize of Northampton, a local jury was required to present to the King those

¹⁰See Turner (1968).

¹¹This can also be seen in its name, from the Norman French *jejure*, which means literally “I swear” in French see (Birch E. Bayh *et al.*, 1960, p.6)

¹²See (Stephens, 1896, p.157).

suspected of committing crimes in their town. Nevertheless, the jury took no part in the trial itself.

Following negotiations with the Barons and King Henry II, a compromise was reached that future conflicts would be resolved taking into account advice from men of similar status.¹³ At this point we see a crucial change in the role of the juror: not any longer a tool of the state, but a counterweight and balance.¹⁴ Despite this progress, jurors were still oppressed by judges during the legal proceedings. Methods other than formal legal rules, what this thesis following Lessig calls “regulation through architecture,” also played a role in this: In the period of the Star Chamber and until the 16th century some courts did not supply food during deliberations in order to expedite the process and push jurors to comply with the judges’ point of view.

In 1670, this conduct started to change. An acquittal of two defendants by the jury against the judge’s will, was followed by a fine of forty marks by the judge to the jury that produced the decision.¹⁵ This incident led to the landmark *Bushell* case, that changed the relationship between jurors and judges in the court. In that case, the jurors were imprisoned because they did not pay the fine and one of them, named Bushell, made an appeal. In this appeal, it was the first time that a Judge made the point that “it is absurd a jury should be fined by a Judge for going against their evidence.” Indeed, as a result of the decision of the *Bushell*’s

¹³Magna Carta in its thirty-nine section declares: “No free men shall be taken or imprisoned, or diseased, or outlawed, or exiled or anyways destroyed; nor will we go upon him, nor will we send upon him, unless by the lawful judgment of his peers, or by the law of the land.” (Stephens, 1896, p.155).

¹⁴A different point has also been expressed about the origin of jurors in England. At the beginning of the 13th century, the matter of guilt or acquittal of the defendant was decided by two juries. The second jury, which was composed of twelve men and acted after a first jury, made an initial interrogation. Due to conflicts arising between the two, the two juries eventually split, with the second remaining as the sole one to judge the defendant. Its decisions were based on unanimity. It is also been argued that the number of twelve symbolises the twelve apostles. See Alexiadis (1976).

¹⁵See (Griffiths, 1987, p.7).

case, juries started to be given an increased protection in the court and public scrutiny started to play a more significant role in the process.

I will now discuss how the jury as a body, gradually changed various forms until it evolved in its current incarnation, as a body of sentencing. At first, the jury was a “self-informing” or investigating body from the local area. The defendant gave their consent¹⁶ to be tried by jurors in an oral trial. At this early stage common law trial did not distinguish between judge and witnesses, law and fact, verdicts were not being scrutinised and the juror was an “information gathering device.” In such an environment, a conflict between the ideals of open trial and jury trial was impossible.

The trial by peers in its first instances meant that jurors investigated on their own the facts of the trial, and then passed their knowledge to the court, because they were chosen from the same area, where the crime took place.¹⁷ Therefore, jurors in medieval times, not only had personal knowledge of the facts, but were also familiar with the accused and the witnesses of the trial. It first started from the beginning of the 16th century for jurors to base their assumptions only on the evidence presented in trial, and in the 18th century this rule became compulsory.

Between 1400 and 1700, prosecution of crime became more organised and a number of changes took place in the trial process.¹⁸ During this phase, the jurors were selected from a wider area, so it became less likely that they knew the accused personally. We note that this change went hand in hand with substantially improving infrastructure and a road network that began to link emerging market and early industrial centres.¹⁹ The jury held unanimous verdicts and the sentence,

¹⁶It has been argued that the act of consent was an implicit affirmation of devotion to the community. The accused was in the hands of the community and asked for their mercy. See (Duff *et al.*, 2007, p.28).

¹⁷See (Duff *et al.*, 2007, p.26).

¹⁸*ibid.* pp.29-40.

¹⁹See (Edwards and Hindle, 1991, p.218) without the discussion on the implications for the administration of justice.

without any accompanying reasoning, was delivered and executed instantly. This laid the foundation for one characteristic of the jury trial that from a very early stage pulled in the opposite direction from the demand for openness — the exception from the requirement to give reasons for their decision - which became much later enshrined by and protected through law.²⁰ The main changes in this period were that the evidence was presented in court, the distinction between law and fact was developed and the issue of credibility of witnesses made its appearance.

Between 1700 and 1900, the adversarial trial emerged via the Treason Trial Act 1696, which for the first time gave a right to full legal representation and defence during the trial. Nevertheless, those accused for felonies did not have the same privilege.²¹ An increasing professionalisation of the criminal lawyer, brought a shift of control of the trial process to them, including the extensive examination of witnesses. Due to the resulting power struggle, jurors gradually morphed into a passive body. For our purposes, it is important to highlight the contingent, external factors that were behind these developments, what in the information technology law literature is described as “regulation by architecture.” The improved infrastructure meant that jurors had not any longer necessarily personal knowledge of the accused. At the same time, a revolution in information technology, the invention of the printing press, assisted in the evolution of “text based” professions such as lawyers. Given the costs of buying books and of study, and the widespread illiteracy, this meant that lawyers now had a knowledge monopoly that the average juror could not access any longer. This turned jurors from informed decision makers to an ideal of a passive vessel, approaching the trial as a “blank slate” and basing their decision solely on what the lawyers decide for the parties they should hear. My research did not find any contemporaneous sources that gave a principled justification for this evolution in

²⁰See Schauer (1995).

²¹See (Duff *et al.*, 2007, pp.41-50).

terms of reliability, justice or fairness, rather a combination of emerging business models (in the legal profession), changes in social makeup and infrastructure and “information technology,” or the politics of information access, worked together to achieve this result, largely side-lining the legislature. Only much later do legal commentators elevate the passive jury that has no prior knowledge of the case into a necessary and indeed virtuous feature of the adversarial trial, “back-inventing” epistemological justifications that seem to have little resonance in the debates at the time.²²

Once it was accepted that the ideal juror was a juror without prior knowledge and duty bound to only consider information introduced (and possible cross examined) by the parties, did a potential conflict between the new understanding of the role of the jury and the ideal of open trial emerge. Again driven by the new technology that was the printing press, and an emergent journalistic profession, the danger arose that jurors could prejudice their status as “blank slates” and read commentaries with further information about the very trials they presided over. This then forced legal responses to regulate the way in which the press could report about trials.

Openness, as we saw in Athens and in the Anglo-Saxon jury, had been an unspoken feature of the pre-modern trial. It had remained manageable because it was restricted, again through “architecture“ and “markets”: only people living in easy travelling distance could attend, and only those who could afford it, as there was no financial incentive to observe a trial. To the extent that they commented on what they saw, they were restricted to word of mouth and hence reached very limited audiences, from which the jurors could be shielded. Improved transport, and the emergence of paid for court reporting, changed all that and required to use formal laws to re-balance open trial and jury access to information. In the

²²See (Hassett, 1980, pp.157-160).

process, it became necessary to make explicit what the benefit of the open trial were, which will be the topic of the next section.

2.3 The establishment of open trial

The mid-nineteenth and early twentieth century saw the ideal of open trial, previously taken for granted, but now suddenly contested, being enshrined in law. Although, a proper definition of an open trial as practiced today, is difficult to extract, the common prerequisite is that proceedings should be open to the public and the press and ensure all those elements that are essential for preserving a fair administration of justice.

Several International Conventions such as, the European Convention of Human Rights, (ECHR) and the International Covenant on Civil and Political Rights (ICCPR) emerged as formal recognitions of the value of openness in legal procedure. Moreover, the UN Human Rights Committee has praised the significance of public hearings with the following words: “The publicity of hearings ensures the transparency of proceedings and thus provides an important safeguard for the interest of the individual and of society at large.” Additionally, the European Court of Human Rights has also highlighted the importance of open trial as an underpinning principle of fair trial: “the public character protects litigants against the administration of justice without public scrutiny; it is also one of the means whereby people’s confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of article 6 par. 1, namely a fair trial, the guarantee of which is one of the principles of any democratic society.”²³

²³See (Doswald-Beck, 2011, p.354).

As understood today, the core of open justice is a trial which offers the possibility, in terms of space a) to the public and the press to be present during the proceedings and b) specifically to the representatives of the press, the possibility to report what is happening during the trial, so that those who could not attend it are still able to be informed. Moreover, and creating potential conflicts with both privacy laws and fair trial ideas (juror tampering), the names of the personnel of the trial, the accused, the parties, the judge, the jurors, and the witnesses should be publicly known.²⁴ Thinking of open trial as a fundamental right, it is also important to identify the subject that is entitled to that right. Legal scholars have debated whether this right belongs to the public or to the person, typically the accused.²⁵

The Human Rights documents cited above, see it primarily as a fair trial right of the accused, though other human rights, most notably free speech rights, could be a basis to establish a right for the public to open justice. However, at least traditionally, free speech rights were seen mainly as a right to disseminate information that one already has. Only much more recently a right to access information is considered as a part of this right. In the US, the SCOTUS decision of *Richmond Newspapers, Inc. v. Virginia*, 448 US 555 [1980] recognised a first Amendment (Free speech) right in access to court documents, and interestingly, also a “free association” right to enter a courtroom as a public space. The court does argue that there is an “unbroken practice” in common law countries to grant this access, but does not provide much information in terms of judicial authority. In the analysis presented here, while it is true that there was an uninterrupted practice of open trials, it became recognised as a right only when technological, social and market changes made it necessary to limit openness of the trial, and

²⁴See (Jaconelli, 2002, p.3).

²⁵A more balanced position is that it is mostly a privilege for the defendant and only he or she should be given precedence in taking advantage of it and use all the constitution safeguards that are associated with it. See (Sinars, 1967, p.505).

hence forced the legal system to think explicitly about the meaning, benefits and limits of this “right.”

In addition to this, the court in *Ganette Co v de Pasquale US [1979]* acknowledged that the Sixth Amendment right to a speedy and public trial belongs personally to the accused and does not pledge this right to the public.²⁶ This parallel justification of the public trial can create conflicts when the accused him or herself wants to waive it.²⁷

2.3.1 The virtues of open trial

In this section, we will ask more specifically what the benefits of the open trial are, regardless of whether they were historical reasons to hold trial publicly. It was Lord Shaw in *Scott v Scott AC 417 case [1913]*, who used the words of the philosopher J. Bentham in order to support one aspect of open justice to the judiciary: “Publicity is the very soul of justice, it is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself, while trying under trial.” This points to one of the strongest virtues for an open trial, which is that the community should be able to witness that the law is being properly done. This has been referred to as the disciplinary rationale of open justice.²⁸

A number of legal theorists such as Jeremy Bentham, Sir Matthew Hale and John Henry Wigmore argued that the fact that someone is testifying publicly enhances

²⁶See (Lassiter, 1996, pp.944-945). Moreover, the accused with respect to the openness of the trial, is entitled to additional rights. For instance, the accused has a right to be present in the trial, waive this right, be familiar with the identity of their accusers and have the opportunity to testify against them. See (Jaconelli, 2002, pp.3-4).

²⁷The courts have been inconsistent in deciding whether the defendants themselves or their attorneys without their consent is qualified to waive this right. See (Bernabe, 2013, p.10).

²⁸See (Jaconelli, 2002, pp.34-39).

the quality of testimony, as the exposure to the public puts pressure on the witness to tell the truth.²⁹

Chief Justice Thomas Cooley, a nineteenth century constitutional scholar, articulates the values of a public trial as such: “A public proceeding, is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.”³⁰ Along the same lines, the presence of the public usually has a benevolent effect on the judge, the jury, and officers of the court, preventing any arbitrary action on their part.³¹ In addition to the above, open trial carries two more values; on the one hand the investigatory aspect of publicity, which may lead to additional witnesses who, discovering the case, become able to testify and on the other hand, a moral aspect as a means of instruction of the moral norm in the public.

Regarding the criminal trial specifically, since the act of committing a crime is considered as a breach against the whole community, it is sensible that the accused should be publicly condemned or acquitted.³² In fact, public convictions may more effectively prevent potential future criminals suggesting that the open trial has also a deterrent effect.³³ Furthermore, in democratic societies, every citizen has a legitimate public interest in knowing who and how infringed the criminal code and is entitled to know whether a person with whom they have a social connection, has ever been convicted of a crime.³⁴

²⁹See *ibid* pp.36-37. Public contempt against perjurers can be a strong deterrent against false testimony. In the case *Sirhan v Kennedy [1968]* the defence counsel called a psychiatrist to testify. *New York Times* had published the expert’s testimony, which drew the attention of a reader who reported to the newspaper that the testimony reminded him of a book he had read about crime and psychiatry. In order to verify this allegation, the newspaper published the testimony and the extract of the book side by side. See (MacKenzie, 1969, pp.778-779).

³⁰See (Levitas, 2009, p.502).

³¹See (Shapiro, 1951, p.784).

³²See (Duff, 2009, pp.147-148).

³³See (Jaconelli, 2002, p.46).

³⁴See *ibid*.p.47.

2.3.2 The downsides of open trial

Despite the virtues of the open trial, on occasion, there can be important downsides that need to be considered. In general, the downsides that have been documented relate to biasing the proceedings because of prejudicial publicity, breach of privacy of litigants, endangerment of witnesses and children and issues related to national security.³⁵ Indeed, the conflicts between open trial and other values are numerous. It is beyond the scope of the current thesis to completely document all these exceptions. However, it will be instructive to provide some examples that illustrate the nature of some of these conflicts, so the reader can appreciate the complexity of this question. Moreover, we analyse these conflicts in more detail, before and after the birth of the Internet in the following chapters.

An important first consideration is with respect to jury deliberations. We have argued in the previous sections about the importance of juries and its relevance to the openness of the trial, especially against arbitrary practices. However, jury deliberations are one of the prominent exceptions of open trial. Juries deliberate in private, so that they can stay away from public pressure.³⁶ Furthermore, their opinions are not supposed to be given with any explanation or reasoning for their decision. However, this privilege has received several criticisms, especially after the *Van de Hurk v the Netherlands, ECHR [1994]* case, which ordered that the courts are obliged to give reasons for their decisions.³⁷ On a more practical and temporally restricted point, witnesses in a trial should be excluded from court as long as another witness is testifying, because it is likely that their testimony may be influenced by the content of what they have previously heard by other witnesses.³⁸ If open trial is perceived as a first Amendment or a free association

³⁵For instance, see article 14 par.1 of ICCPR.

³⁶The reasons behind post-verdict jury secrecy were discussed by (Markovitz, 2001, pp.1505-1508).

³⁷See (Brooks, 2004, p.205).

³⁸See (Jaconelli, 2002, p.89).

right, then the witness thus excluded would face a potential restriction of basic civil rights, at last to a degree, that then have to be balanced against the danger of tainted memory.

In the context of the criminal trial, one important downside of openness is the stigma as a result of a conviction, which may magnify the punishment unfairly during the whole life of the defendant.³⁹ For example, in a study that was conducted with people who were convicted, the fact that their criminal record appeared on their CV resulted in the decrease of job offers, as opposed to those whose record was not reported, or was confirmed that they have been acquitted.⁴⁰

Additionally, it has been suggested by various scholars that sensitive witnesses, children or adult victims who fear revenge, may not have the strength to stand in front of all the people and testify.⁴¹ Nevertheless, some alternatives exist. For example, the section 23 of the Criminal Justice Act 1988 UK can be implemented. Under this provision, a witness instead of being physically in court and give an oral statement, can give a written statement under two conditions: 1) a police officer will take the statement 2) the witness should testify that they do not give oral evidence out of fear.⁴² Moreover, under section 46 of the Youth Justice and Criminal Evidence Act 1999 UK (YJCEA), adult witnesses or victims can testify anonymously and keep their anonymity forever.⁴³ Another important exception is the case, when the openness may act as a discouragement to the reporting of a crime. In sexual crimes the court may deem that a testimony before a

³⁹It has been argued by (Duff, 2009, pp.147-148) that the stigma could be eliminated if the proceedings were held in camera and even the sentence be kept in private.

⁴⁰See (Schwartz and Skolnick, 1962, p.136).

⁴¹For example, in *R v Richards [1999]*, the main witness in a murder trial refused to testify unless the accused and his friends and family were removed from the courtroom. See (Jaconelli, 2002, p.127).

⁴²See (Jaconelli, 2002, p.125).

⁴³More details can be found in the report conducted on behalf of the Judicial Office in 2016. Unidentifiable testimonies can be ensured for minors, under section 45 of the YJCEA, even if they are defendants in court. This restriction will last until their adulthood. See Thomas (2016).

wide audience will cause embarrassment⁴⁴ thus, it might be preferable to testify behind closed doors.⁴⁵ Moreover, the victims of serious sexual crimes may be given lifetime anonymity under the Sexual Offences Act 1992 UK.⁴⁶

The need for decorum in the courtroom may lead to the exclusion of the public in case outsiders interfere with the due process of the trial. For instance, explicit demonstrations of approval, such as applause, or disapproval, such as shouts or even implicit actions of resentment against the court, could lead the judge to dismiss the rogue spectator.⁴⁷ Moreover, in some instances, the excessive publicity in media trials, may result in outcomes that are not compatible with a fair trial. For example, the large exposure of a criminal trial may create public expectations of a certain verdict, or distort the content of a testimony or the outcome of the trial, due to the public pressure on the judicial system.⁴⁸

Another point that is crucial is at which point exactly, the trial that has been in camera, should reopen its doors. The Waller test put forth in *Waller v Georgia US [1984]* may assist in some cases as it balances the open trial values and the need of decorum in the courtroom.⁴⁹ The test has been applied to complete and partial closures of the court proceedings. Its main scope is that the only cases where the trial should not be open to public scrutiny is when an overriding interest exists, which additionally, must be specific and substantiated. In addition to this, the exclusion order should be the last measure and the judges should reopen the

⁴⁴See (Sinars, 1967, p.504).

⁴⁵See *R v Malvern Justices [1988]*, where the witness testified in camera, because of severe stress. However, it has been argued that the feeling of embarrassment itself, if the witness is able to testify in public, is not a sufficient reason for the exclusion of the audience. (ibid). This argument has also been documented in the enhanced Reporting Restrictions for criminal courts, revised in 2016. See Thomas (2016).

⁴⁶See Thomas (2014).

⁴⁷See (Shapiro, 1951, p.785).

⁴⁸See (Jaconelli, 1997, p.172).

⁴⁹See (Levitas, 2009, p.518).

doors as soon as the need for secrecy passes, because otherwise the principle of open justice becomes restricted.⁵⁰

In summary, we saw how ideals of the unbiased juror and the open trial in common law countries, could be encountered in the 17th and 18th century, not so much as a result of deliberative choices by the legislator, but as a response to changes in the social, economic and most importantly “information technological” changes at that time. While initially, they served the same goal of accountable justice, the separation of roles between jurors and the wider public meant an increasingly complex relationship, and with that the need to find managerial and legal tools to control the potential conflict between them. We can see the current debate as but the next round in this conflict: once again technology allows faster and wider dissemination of information, from which the jurors then needs shielding, if we see them as nothing but passive respondents to the management of the trial by the lawyers for the adversarial parties. But as we saw, this understanding of the jury is not the only possible one, and in parts, our solutions will try to show that we are now potentially getting back to a situation similar to ancient Greece, where everybody was involved as both observer, investigator and contributor to the decision making.

⁵⁰See (Levitas, 2009, p.519). The same argument can be found in the report, which was held regarding Reporting Restrictions in Criminal Courts in 2014. See Thomas (2014).

Chapter 3

Open Trial in the Mass Media Era

In the previous chapter it was documented how the openness of the trial has helped to decrease abuses on behalf of governmental power, especially via the institution of juries. It was also showed that the principle of open justice supports the transparency of the proceedings of the judiciary. But we also saw how these two ideals can come into conflict: If a juror reads a running commentary of the trial, their judgement might get clouded. And if a witness reads about a prior witness statement, they are in danger to change their views as a result — not maliciously, but subconsciously as a result of the way our memory works.

This potential conflict was exacerbated when new technologies made reporting faster, cheaper and with wider distribution (helped by increasing literacy, itself a result of technological change.)¹ We enter now the era of mass media. As the population within travelling distance of a trial was increasing, the very idea of a

¹See Marvin (1990) (with a fascinating example how technological advances in the 16th century led to the pencil and with that a massive increase in access to the written word).

trial open to all became unmanageable. By the same token, most people had no time and resources to attend trials. In the same way in which the juror solved this problem by being a randomly chosen representative of everyone in the decision process, media were introduced to represent the public in the “court surveillance” role discussed above.

Hence, the courts started recognising this role and reserved seats from the public gallery for the accredited members of the media.² A prominent example of openness through court “architecture” comes from the UK, where in 1673, when the building of the Old Bailey was rebuilt, a large ground-floor courtroom was designed, so it could be visible from the street. In 1774, after another renovation of the building, the court’s balcony was used in order to accept press reporters.³ In the previous chapter, we discussed the advantages that ordinary citizens as court observers bring. In this chapter, it is explored how this observer role became professionalised via trained and accredited journalists. We will show that on the one hand, this brought an increase in the quality of court reporting, but also created a regulatory bottleneck that allowed the courts to efficiently constrain the quantity of reporting.

3.1 Openness and journalism

It is a widely agreed thesis that journalists are one of society’s important watchdogs, whose objective is the effective functioning of the due process of the trials. One of the most commonly quoted legal aphorisms is from the judgment of Lord Hewart in *R v Sussex Justices, ex parte McCarthy [1924]* case: “It is not merely of some importance but it is of fundamental importance, that justice

²See (Jaconelli, 2002, p.2).

³For more details see (Thompson, 2011, p.217).

should not only be done, but should manifestly and undoubtedly be seen to be done.” Moreover in *R v Felixstone ex parte Leigh [1987]*, Lord Justice Watkins argued: “The role of the journalist and his importance for the public interest in the administration of justice...is indispensable. Without him, how is the public to be informed of how justice is being administered in our courts?”

However, the introduction of traditional media in the courtroom has led to various conflicts because different rights should be balanced such as the right to an open and fair trial of the defendant, the right to freedom of speech of the media, the right to privacy of the parties and at the other end of the spectrum the administration of justice. Indeed, the proper attribution of justice is based on a balancing act between publicity and secrecy.⁴ This conflict between the judiciary and the press is mostly about the fact that publicity and reporting may jeopardise the participants of a criminal trial.

The recent past has shown that the relationship between the press and the justice system has been tested in various ways, between openness and secrecy of the proceedings. In the nineteenth century, the print media was the essential means of publicity of the trials. Journalists, in their majority, became trained, educated and obtain specialised knowledge and skills.⁵ By the end of the nineteenth and beginning of the twentieth century, journalism degrees were available at major universities. With this professionalisation came also formal and informal self-regulation, e.g. in the form of a code of ethics, which is used as a compass during the journalistic professional activity. At the same time, the inevitable time delay caused by printing, proof editing and distribution, allowed journalists’ work to be supervised and checked by editors, who should be also familiar with the legal restrictions of court reporting.⁶

⁴See (Synodinou, 2012, p.208).

⁵See (Spencer, 2012, p.86).

⁶Unlike the legal profession, there is no specific judicable Code of Ethics for journalists under which their license might be revoked or themselves be disbarred. See (Hochberger, 2006,

It is also recognised that all aspects of journalistic work have an ethical dimension, where journalists should decide what to report, how far they should go in reporting and to whom to present the information, a self-reflective and explicit concern with ethical standards and an often made commitment to the truth, combined with four other criteria, accuracy, completeness, fairness and objectivity.⁷

It is argued in this thesis that for the reasons explained above, this (formal and informal) rule-based environment, combined with the time delay in disseminating the information from the court, reporting of trials by journalists has been challenging for the courts, but in a manageable way for the proper administration of justice. Still, a distinction is to be made between print media and broadcasting. In the former, journalists always have the time to reproduce what happened inside the trial and then put it on paper. More problems started to occur in the twentieth century, where radio and television made their appearance and news could be transmitted instantly to millions of people.

3.2 Court reporting, a balance between conflicting rights

In this section the legal environment of reporting of legal proceedings by journalists in UK and US jurisdictions is examined. Relevant case law is presented as well as the basic framework which is used as a means of dealing with reporting challenges.

p.444). However, this does not appear troublesome because, one other professional standard is the relationship with their peers. See (Spencer, 2012, p.88).

⁷Reporters can face ethical dilemmas concerning their duty to report the truth. See (Hochberger, 2006, p.445).

3.2.1 United Kingdom and its framework

In the UK, the general rule is that trials should be practiced in openness and that the media should be present to report what is happening fully and contemporaneously, as representatives of the public, under the protection of article 10 of the ECHR. For the above reason any derogation from a public trial, should be asked from the party which seeks the private hearing, at least five days before the beginning of the trial⁸ and with proper justification of the reason why any other lesser measure, for example discretionary reporting, such as postponement under section 4 of Contempt of Court Act 1981, will not be efficient. Moreover, the court should not keep the trial in secret for more than necessary and should reopen its doors as soon as possible.⁹ Court reporting when is done fairly, accurately and without malice is considered a legitimate expression of open justice.

However, reporters and journalists are still only humans, motivated by commercial profit, and this is the reason why common law countries, including the United Kingdom, developed the Contempt of Court 1981 Act doctrine, to protect the fair administration of justice by media reporting. The doctrine was long recognised in common law, and used in the early twentieth century increasingly and often aggressively to discipline court reporting through professional media.¹⁰

After the *Sunday Times v UK [1979]* case¹¹ the courts started to shift their direction more in favour of freedom of expression as it is protected in article 10 of the ECHR. After this decision “the strict liability rule” of the Contempt of Court Act of 1981 was established, which states that “a publication will be in contempt of court only if it creates a substantial risk that the course of justice in a particular

⁸Refer to “The Criminal Procedure Rules,” part 16.6, in force on 6th October 2014.

⁹All these prerequisites can be found in Thomas (2014).

¹⁰See (Goodhart, 1935, p.890).

¹¹The ECHR court delivered that the injunction was a breach of article 10 of the ECHR and that the right to freedom of expression guarantees not only the freedom of the press to inform the public, but also the right of the public to be properly informed. See Cooke (1983).

case will be seriously impeded or prejudiced, regardless the intention.” Significant aspects of the contempt of court doctrine have changed since this decision, as argued by (Synodinou, 2012, p.213) and the scope of contempt has been defined more narrowly, e.g., by requiring the proceedings to be active. Whether the requirements for contempt of court are satisfied is decided ad hoc by judges.¹² The content of the article, the amount of time between comments and the trial and the place of the trial, are elements which should be measured by them, whether they are enough or not, to create serious prejudice.

I will now proceed by giving examples of reporting that breach certain values, such as the right to privacy and fairness of the defendant and the framework that is used to mitigate these challenges, apart from contempt and defamation law. I will then present other exemptions of the principle of open justice caused by super and anonymised injunctions and some relevant case-law.

As a start, it is argued that the most common way to infringe upon one’s privacy is by the reproduction of their image.¹³ In criminal trials in order to protect the fair trial and especially the presumption of innocence for the defendant, particularly strict rules against the reproduction of images apply.

In the UK, the Criminal Justice Act 1925 which prohibits photographs, (live) sketches, portraits and cameras in court, was a first means to protect the privacy of a person and especially the right to someone’s image. The inevitable distortion that sketching brings in comparison to photography can be seen as a privacy preserving tool, privacy through obfuscation, especially given the speed with which the sketch artists had to work.¹⁴ In the UK, this is further enhanced by the prohibition of “live” sketching and remember the Scottish consultation that started this thesis is about live use of social media. This is an interesting way

¹²See (Duncan, 2008, p.775).

¹³See (Synodinou, 2012, p.210).

¹⁴For a recent example see Alexander (2017).

in which courts have aimed to strike the balance, not by an outright prohibition of a practice, but by forcing the journalists to use the least accurate and reliable means, using the structure features of our mind and memory as “enforcement tools.”

However, this approach has its own shortcomings. Typically, only a very small number of artists will attend a trial, if there is more than one at all. Male sketch artists, who are still the majority, inevitably bring their socialisation, prejudices and ideals to their subject matter, resulting e.g., in a noticeable discrepancy in the depiction of female suspects, which follow standardised cultural stereotypes (the evil stepmother, the cold mother, the temptress).¹⁵ Here we see the Janus face of media regulation and open trial: the fewer reporters can report, the easier quality control and prevention of undesirable reporting becomes. But the greater also the danger of institutional biases, and if the role of the open trial is to allow control of those in power, this is a troublesome notion. Citizen journalists by contrast are almost impossible to control via laws, but bring potentially the diversity that the objective requires.

The second concern is that reporting may prejudice the fair trial for the defendant, before it even started, and results in a “trial by media.” That often happens at a pre-trial stage, where the defendant is still a suspect.¹⁶ Nevertheless, the protection of privacy and the presumption of innocence of the accused shall not reach to a point where press information about trial proceedings becomes completely neutralised.¹⁷

Finally, super and anonymised injunctions have been usually used as a prominent means of restricting court reporting and have seriously impeded the open trial

¹⁵See Barlow (2016).

¹⁶A well documented example was a suspect, eventually proven innocent, who had been presented by the media as eccentric, sexually perverted and responsible of a murder. See Haliday (2011b).

¹⁷See (Synodinou, 2012, p.212).

principle.¹⁸ Indeed, in super injunctions judges make a balancing exercise between freedom of expression and freedom of speech. Between 2010 and 2011 the increase in super-injunctions has been highly criticised, because more and more celebrities had managed to get permission to impose super injunctions to the media, in order to cover their private life and because this practice seemed to lead to a form of secret justice away from public scrutiny.¹⁹ That led to the review of the injunctions scope in 2011. The report of the Rolls committee stated that when secrecy is needed it “should only be to the extent strictly necessary to achieve the interests of justice. Moreover, when it is ordered, the facts of the case and the reason for secrecy should be explained, as far as possible, in an openly available judgment.”²⁰

Mosley v News Group Newspapers Ltd EWHC 1777 (QB) [2008], helps to illustrate the situation described above. *News Group* published an article in print edition and online showing Mosley taking part in an “orgy” under the title “F1 Boss has sick Nazi orgy with Hookers.” He tried to get an injunction but failed and then sued the newspaper on the grounds of breach of confidence and of his right to privacy under article 8 of the ECHR. The decision of the court held that there has been a breach of the article 8 of ECHR, that it is offensive to equate everything German with Fascism and that there was no public interest in the cases of adultery. The significance of this case is found in the following three reasons : 1) It was the first time in the UK that a distinct private right was recognised and protected 2) the balancing test between articles 8 and 10 of the ECHR, which had been previously used in *Campbell* case,²¹ gave precedence over the right to privacy of article 8 ECHR and 3) the importance to make a distinction between public and private people in English privacy law has been revealed. Nevertheless, the effort that was made by Mosley towards the direction that media ought to

¹⁸For definition of the terms see (Neuberger, 2011, p.20).

¹⁹See Cammaerts (2011).

²⁰See (Hall, 2014, p.310).

²¹*Campbell v MGN Limited [2004]*.

notify the subject before the publication, was unsuccessful. Indeed, the ECHR argued that a system of prior notification was not an appropriate remedy.²²

3.2.2 US and trial publicity

Generally, compared to the UK, US courts were faster to embrace new technologies, and also faster in updating the legal environment for court reporting. Federalism did contribute to this, with state courts often being “test beds” for new methods.²³ Some significant case law from the US is presented below, which deals with the challenge of pretrial publicity in criminal trials and the danger to prejudice the impartiality of jurors and the right to fair trial of the defendant.

As noted above, in *Richmond Newspaper Incorporation v Virginia* 448 U.S. 555 [1980], the Court for the first time declared the right of the public to attend criminal trials, which is implicit in the guarantees of the First Amendment. The court also stated that the First Amendment upholds not only the right to speak, but the right to listen, receive information and ideas and the right to assembly as well.²⁴

The court echoed the values of open trial that we identified before. An open trial gives a certainty that the proceedings are fair, discourages perjury, misconduct and decisions based on bias or partiality. It was also emphasised that open trials have therapeutic value to the community, providing an emotional outlet, and discourage vigilante actions by individuals. Finally, the Court recognised the didactic value of the openness of the criminal trial, as public allow citizens to learn how the judicial system works in practice and this might be an additional

²²See (Hall, 2014, pp.317-319).

²³See (Davis, 1993, ch.3).

²⁴The proponents of televising the trials, argue that this opinion should be interpreted by increasing to the maximum the public in criminal trials by including TV broadcasting. See (Cripe, 1999, p.263).

factor in building public confidence in the justice system.²⁵ This was the first time that the court recognised that the media has the same right of access as the public in criminal trials.²⁶

In *Press-Enterprise Co. v. Superior Ct.* 478 U.S. 1 (1986), the court reasoned that the right of access to criminal proceedings extends to preliminary hearings, thus, the open justice principle was increased. The defendant, a nurse, was accused of murdering twelve patients by providing them with large quantities of the heart drug lidocaine. The public was excluded from the preliminary hearing under California Penal Code §868, which permitted closed hearings, if necessary, to protect the defendant's right to a fair and impartial trial. At the end of the trial, Press-Enterprise requested the release of the trial transcript, which was refused by the court. Moreover, the California Supreme Court also declared that there is no general First Amendment right of access to preliminary hearings and also denied to release the preliminary hearing transcript. The court's decision was based on a California statute, which dictates that if the defendant establishes a "reasonable likelihood of substantial prejudice, the burden shifts to the prosecution or the media to show that there is no such reasonable probability of prejudice."²⁷

Nevertheless, the United States Supreme Court granted certiorari. In its decision it was stated that in order for the public and media to be excluded, the judge should balance between two criteria. First, it should be examined whether there is a "substantial probability" that publicity will prejudice the defendant's right to a fair trial and second, whether there are other options than closure.

²⁵For the content of majority opinion see (Lassiter, 1996, p.962-963).

²⁶See (Ittner, 2014, p.352).

²⁷See *ibid.* pp.352-353.

3.3 Cameras in the Courtroom-UK and US approaches

In recent years an intense debate has taken place regarding whether allowing cameras in the courtroom can be a means which gives prominence to the values of open justice and at the same time respect the rights of the personnel of the trial. I present two approaches coming from the UK and US, in an effort to present the wider picture of the challenges that broadcasting has brought to the administration of justice.

It was Chief Justice Warren Burger who used to say that cameras would be allowed in the Supreme Court over his dead body. When he was asked why he was so opposed to cameras in the courtroom he said: “Television in a short snippet is simply incapable of making a proper report unless you put the whole thing on. He then added: In a newspaper the words aren’t coming out of the mouth of the judge or the attorney. On television you see the person and it’s coming out of his mouth.”²⁸

The UK has been reluctant in allowing the broadcast of court proceedings. A significant shift from this direction was the permission of live streaming via Sky News of the UK Supreme Court’s hearings and judgements in May 2011.²⁹ This initiative was praised by the representatives of the press who argued the following regarding opening up the courts to the public : “It’s about democracy and being able to report the only part of the democratic system that remains closed to television.”³⁰ Along the same lines, former minister Tom Watson said: “We seem to have missed a technology. When you can tweet from court there is no reason why you can’t have cameras. Perhaps the time has finally come for the

²⁸See Deutsch (1998).

²⁹See (Thompson, 2011, p.215).

³⁰See Robinson (2011).

courtroom sketch artists to find other work.”³¹ It is likely that the reluctance in embracing photographic and video technology originate at the time where still photographs were introduced in the courtrooms. To take a photograph meant that flash powder was used, which was considered as a major distraction to the ongoing proceedings. Photography was prohibited and the rules were not updated even when new photographic technologies and television cameras emerged.³²

Nevertheless, there is no doubt that televising the proceedings can be more intrusive and more disruptive as a means of trial reporting than print media. In the past, having broadcasting that is not direct from the courtroom, was a way of mitigating the problem. An example is an attempt made by Channel Four, to present a reconstruction of the case *R v Ponting [1985]*.³³ However, the judge under section 4(2) of the Contempt of Court Act 1981 prohibited the broadcasting of the reproduction, because the trial was still in progress and the jury could have been prejudiced by the “Court Report” as the program was called.

US policy has been also very controversial regarding the televising of proceedings. State courts have experimented with their rules between 1970-1990, which now are more permanent. The vast majority of courts permit in their legislation some coverage of their proceedings both at first instance and at appellate level. Only a small minority of districts maintain a total ban.³⁴ Additionally, Federal Courts due to federal rule 53 of criminal proceedings, which prohibits photographs and broadcasting, have been even more resistant; only the Second and Ninth Circuits allow electronic coverage. However, restrictions are to the judge’s discretion, a balance between the right to a fair trial, privacy and safety concerns.³⁵ The case law below illustrates the situation more clearly.

³¹ibid.

³²See Atkinson (2011).

³³See (Jaconelli, 2002, pp.307-308).

³⁴See (Ittner, 2014, p.356) and (Lassiter, 1996, p.930).

³⁵See (Ittner, 2014, pp.357-359).

Estes v Texas, 381 U.S. 532 [1965] was a case in which the Supreme Court banned cameras in the courtroom. In more detail, the US Supreme Court overturned the fraud conviction of petitioner Billy Sol Estes. The Court reasoned that his Fourteenth Amendment due process rights had been violated by the publicity associated with the pretrial hearing, which had been transmitted live by both television and radio. Indeed, photographs were allowed during the trial and some parts of it were broadcasted. As a large coverage of the pretrial hearing was permitted, the courtroom was filled with newspaper reporters, cameramen and ordinary people. Even the jurors were televised live and their faces appeared on the news.³⁶ In the main trial some restrictions were imposed on the media, but still the presence of cameras was disruptive.³⁷

The court illustrated some concerns that are used even today in the debate regarding cameras in court. First, the judges believed that cameras could induce psychological bias to witnesses, because they may be distracted and preoccupied with the telecasting rather than testifying objectively. Second, it was argued that jurors may make up their minds according to the publicity which surrounded the trial and not upon the evidence presented in court. Third, it was also said that the judges borne the large burden of ensuring the fairness of the process and the court decorum with the presence of cameras and reporters. Finally, the court stated that the impact of televising the defendant should be taken into account.³⁸

The trial judge, Judge Warren, responded to the arguments, claiming that no specific prejudice by television has been found, as follows: “I cannot agree with those who say that televised trial deprives a defendant of a fair trial only if actual prejudice can be shown. The prejudice of television may be so subtle that it escapes the ordinary methods of proof but it would gradually erode our

³⁶See (Lassiter, 1996, p.939).

³⁷See I.Belmas *et al.* (2016).

³⁸See (Ittner, 2014, pp.353-355).

fundamental conception of trial.” He added about televised trials: “the public might equate the trial process with the form of entertainment regularly seen on television.”³⁹

Nevertheless, in *Chandler v Florida* 449 U.S. 560 [1981] the Supreme Court shifted its opinion arguing that allowing cameras in the courtroom was not automatically violation of the defendants right to a fair trial. It was argued that there were more to be gained than to be lost and permitted the televising of the trial, despite the fact that the trial had attracted publicity.⁴⁰ The Court, which had included a new provision that permitted television and still photograph in the courtroom, concluded that the Constitution does not prohibit a state from experimenting under the Canon 3A (7) of the Florida program and rejected the appeal.

Following the *Chandler* case many state courts have found that televising the proceedings in criminal trials is not a violation of the defendant’s Sixth Amendment right per se.⁴¹ Even though the court did not recognise a specific right to the media to enter the courtroom, it nevertheless, recognised that every court is free to decide whether or not to accept cameras in its proceedings. Following this case, by 2000, all states in the US, permit still photograph or television coverage of some of their proceedings.⁴²

Importantly, these state level experiments have now generated empirical data about the effects of live reporting from trials. Moreover, some surveys that were conducted in the US, showed that cameras had beneficial effects on both the participants in the trial and the general public.⁴³ If these findings stabilise, then

³⁹See (Friedman, 2015, p.143).

⁴⁰See (Ittner, 2014, p.355).

⁴¹See (Lassiter, 1996, p.945).

⁴²See (I.Belmas *et al.*, 2016, p.359).

⁴³For example in a 1997 New York Report, 35% of judges agreed that lawyers were more prepared in televised proceedings. Moreover, in a 1984 Kansas Report, the majority of jurors

it will also be more difficult in Europe to favour fair trial over openness, under a proportionality and efficiency test that balances these rights.

Nevertheless, allowing cameras in the courtroom did not remain unchallenged. In the case *US v Massaoui* 205 F.R.D. 183, 184 [2002] the judge had also to deal with cameras, but now in a case of terrorism, hence, issues of national security were raised. Massaoui was a member of Al-Qaeda and was accused of participating in the attacks of 9/11. The judge refused to allow cameras in the courtroom because it was supported they would interfere with the security of all persons involved. The judge had to be confronted with representatives of Court TV, who challenged that it was a case of high public interest and thus should be broadcasted. Moreover, the judge rejected the journalists' proposal of masking the faces of witnesses and jurors.⁴⁴ This is relevant for one of the solutions presented below, and shows one way in which courts are reluctant to accept "mitigating technologies" in the balancing process.

stated that cameras did not affect their ability to concentrate. Also they believed that the fairness of the trial would not be jeopardised, when asked whether themselves or a family member were the defendants. See Thompson (2011).

⁴⁴See (Ittner, 2014, p.361).

Chapter 4

Open Trial in the Social Media Era

The rise of the Internet, mobile technology and the use of social media has posed serious challenges in the context of the openness of a trial, especially in the case of criminal trials. In the last part of the twentieth century, there has been an enormous increase of information dissemination via the Internet, which became increasingly accessible using a variety of devices including mobile phones, laptops and tablets. The use of social networking websites, such as Facebook, Snapchat, Twitter, YouTube and others, has been a part of almost everyone's daily life in many parts of the world. The power of social networking is such that it is expected that the number of users worldwide will reach some 2.95 billion by 2020, around a third of Earth's entire population.¹

In the previous chapter, we saw how long and torturous the way of “new” technologies in the courtroom was, with the US leading the way and the UK

¹See <https://www.statista.com/topics/1164/social-networks>, Last visited July 26th, 2017.

only slowly catching up with photography and TV. Only very recently did the US experience allow to test and substantiate empirically many of the concerns and hopes that were linked with the use of new media during trials. This was despite the fact that photography, TV and radio are “stable” technologies that did not change much over the last decades, which in turn allowed us to increase our understanding of their limitations, impact and dangers. By contrast, recent years have seen a proliferation of (sometimes short lived) technological formats, tweets, vines, gifs, chats etc., that could all impact in very different ways on the audience. Little is known about the way in which they impact on the viewers and the cognitive constraints they have. To give an example, in the previous chapter, we cited judge Warren Burger’s dictum that “Television in a short snippet is simply incapable of making a proper report unless you put the whole thing on.” But how would he react to vines, the short lived service that allowed users to upload 6 second video snippets? They could be filmed surreptitiously, not just from phones but smart watches, glasses or other wearables. We will never find out, as vines withdrew their offerings after a short period.² For the legal regulation of new media in trial settings this is a considerable problem. As we saw, it requires a balancing between different rights, which in the context of European human rights requires in particular an assessment of the proportionality, necessity and efficacy of any restriction of rights. In the absence of reliable information about the risks and benefits, such an assessment is difficult to make.

The rise of the Web 2.0 technology³ in social media platforms has transformed the digital environment completely. Before the emergence of cyberspace and social media, the participation in the “public sphere” was only for a small part of the population. Usually, the more educated or politically active members of society could invest the time and had more direct access to traditional media in order to

²See Browne (2017).

³“The Web will be understood not as screenfuls of text and graphics but as a transport mechanism, the ether through which interactivity happens,” as stated by Dinucci (1999), who coined the term.

express their opinions. With LTBC the landscape changes, as less literate, less confident or affluent people can openly express their views in online platforms.⁴ Furthermore, Web 2.0 applications have changed the way people interact with each other online. That has happened because, Web 2.0 has a different “ideology”, which transformed people from consumers to producers. Hence, everyone can create content, publish it and share it with other people. For example, you can create a Facebook or Twitter account by providing some of your personal data, i.e., name, email address and a photo. Then you create a list of “friends” or “followers” respectively, with whom you can share your ideas and thoughts by posting material of your taste. Your friends have the opportunity to approve your content by using the “like” button, or even comment on it, or tag it.⁵

In this chapter it is explored what changes the Web 2.0 technology and LTBC have brought to the administration of justice. I will especially deal with the rise of citizen journalism in the courtroom and then move on to the jury trial. I will investigate the risks that LTBC has posed to the values of the open trial, especially via jurors’ misconduct. At the end of the chapter I analyse the reasons behind jurors’ inappropriate behaviour, as a means to perceive the issues at stake rigorously.

4.1 The rise of citizen Journalism — new challenges for the court

Citizen journalism refers to “non professionals taking an increasingly central role in news reporting, writing, editing, publication and distribution.”⁶ The Web

⁴See (Schulz and Cannon, 2013, p.2).

⁵See Obar and Wildman (2015).

⁶See (Hamilton, 2015, p.612).

2.0 infrastructure as described above, has increased the phenomenon of citizen-journalism as in the web era, ordinary people can engage in news reporting and dissemination of every kind of information. Citizen journalism includes actions like blogging, photo and video uploading, sharing and instantaneous commenting on current events. Moreover, its definition can also include reposting, providing a link, tagging or commenting on posts that others or professional sites have uploaded, as a means of participating in the discussion, without producing original content.⁷ In this section it is explored how citizen journalism was born and what new challenges has brought to traditional media and hence, to court reporting and broadcasting.

The rise of the phenomenon of citizen journalism started in the late 1980's with the civic and public journalism reform movement. Dzur (2002) argues that public journalism was an attempt to adopt ideals of deliberative democracy to the journalistic profession by embracing the technique of public deliberations.⁸ Under this new concept, news were supposed to be reported out of norms and constraints. The main scope of this practice is to focus on topics out of the mainstream domain and to encourage a public debate, where no one of the participants is privileged. This kind of journalism in general, does not focus on the facts as seen by the lobby of journalists and editors, but instead promotes the public engagement in the news.⁹ Moreover, it has also been argued that civic journalism can be used as a means of reconceptualising the autonomy, which characterises the journalistic profession in a democratic environment.¹⁰ Hence, the advent of the Internet and

⁷See (Goode, 2009, p.1288).

⁸In this context (Dzur, 2002, pp.315-316), explains the reasons which led to the rise of “public journalism” in the 1990's. People in the US were feeling that politics were isolated from their public affairs.

⁹See (Boler, 2008, p.40). See also McDevitt *et al.* (2002), who have conducted an empirical research in order to see how much support the values of civic journalism can gain by students and professionals of journalism. Indeed, the more supportive in civic journalism were college students, as opposed to professional journalists.

¹⁰For instance, (Bowman and Willis, 2003, p.9) have introduced the term *participatory journalism*. “Participatory journalism is the act of a citizen or group of citizens playing an active role in the process of collecting, reporting, analysing and disseminating news and information.

especially the increase in systems like social media applications and web-blogs, gave incentive to more and more people to engage in topics of public interest.

The citizen journalism phenomenon has, nevertheless, brought on serious challenges to traditional journalism, its role and boundaries and has aroused a debate among traditional and non traditional journalists. Indeed, traditional journalism is associated with people, who have received training, work with established news or media organisations under editorial supervision, therefore they usually report the news with accuracy and objectivity. However, citizen journalists do not get paid, they lack training and their method of collecting and disseminating information is unfiltered and unsystematic.¹¹

Indiscriminate use of current information technology may cause a serious damage on the administration of justice. Indeed, the time delay in transmitting news before the age of social media was important, because it allowed the more deliberate and filtered dissemination of information. Now, the instantaneous and uncontrolled dissemination of information via the Internet and LTBC, may cause even more problems than the mass media on the due process. Moreover, traditional journalists had legal training and editorial control, as opposed to citizen journalists who are ordinary people. Thus, due to their lack of training of legal rules of reporting, they may jeopardise the trial at any instance.

Despite these dangers, judicial opposition to these new reporting methods was surprisingly mute in the UK, where tweeting, emailing and texting of messages from portable, unobtrusive devices can now be permitted from courts under the direction of the judge. This shows a much quicker acceptance than the more visible cameras of professional journalists. This practice is also encountered in

The intent of this participation is to provide independent, reliable, accurate, wide ranging and relevant information that a democracy requires.”

¹¹See (Kim and Lowrey, 2015, p.300). Moreover it has been argued that videos by citizen journalists “are recorded by observers... increasingly used by news outlets to illustrate events that ... may precipitate heated public debate.” See (Mallen, 2016, p.5).

the US.¹² Nevertheless, courts have not yet managed to define clearly what is the meaning of broadcasting and whether Tweeting is a form of broadcasting.¹³

Citizen journalism is increasing dramatically. A survey by the Edelman Trust Barometer, found that the majority of Americans believe that peer-to peer opinions are more trustworthy and have more serious impact on people, than information coming from professionals.¹⁴ Someone could argue that mainstream media are organisations that focus on profit and advertising, as opposed to peer to peer digital networks, which promote dialogue and interaction. Moreover, citizen journalism has proven to be beneficial in a number of cases.¹⁵

In contrast to the above trends, use of social media for court reporting has been problematic. This was reflected also in the result of a consultation carried out by the Lord Chief Justice for England and Wales in 2011,¹⁶ which resulted in a revised practice note.¹⁷ Less ambitious in scope and less theoretically informed than its Scottish counterpart that we described in the introduction, its main rationale was one of “quiet resignation”: since enforcement of prohibitions seems impossible, and no strong case against social media had been made, permitting the practice seemed both prudent and a proper balancing of open justice and fair trial rationales. However, as we noted above, this took place largely in the absence of empirical studies, and also even less than its Scottish counterpart discussed explicitly the conflicting values that need to be balanced. Instead, it opted for a “certification based approach”, where accredited journalists are given the benefit of the doubt (due to their training and knowledge of the contempt of court act) when using new media, but without giving them much in terms of guidance of

¹²See (Schulz and Cannon, 2013, pp.5-6).

¹³See (Ittner, 2014, pp.362-363).

¹⁴See (Anthony and Martin, 2009, p.3).

¹⁵See (Bock and Schneider, 2017, pp.346-347).

¹⁶In 2011, Lord Chief Justice led a consultation process regarding how to regulate best the use of LTBC by reporters in the courtroom.

¹⁷See Judge (2011).

how the old law applies to the new media. Citizen journalists can apply for the right to use live social media, but need to convince the court that they can do so responsibly. This happens because their report may be considered unbalanced, inaccurate and unfair. This opportunistic side of information disseminated online by citizen journalists has been recorded in the literature.¹⁸

The procedural approach described above, suffers from two shortcomings. It reinforces a possibly obsolete distinction between professional and citizen journalists, which also sits against both the open trial and free speech rationale of permitting court reporting. If, as we argued above, the role of the open trial is both a human right based on free speech and free association rationales and secondly also, a way to control and restraint government and judiciary, any state-run accreditation system is bound to clash with either rationale. More importantly though, it relies almost exclusively on post-fact punishment and enforcement. However, the reliance on punishment and deterrence is generally a problem for Internet-distributed content and it gets even worse when it comes to trial reporting, where the damage will often be instantaneous and irreversible. Consider the following scenario: despite instructions to the contrary, a member of the public tweets that a key witness “positively identified” the suspect. This is picked up and retweeted by a follower of the juror, who lives in Australia. She in turn is followed by the next witness, who waits in the witness room. On reading the tweet, his previously shaky and uncertain identification now becomes much more confident and assured, as to be predicted by the psychology of eye witness testimony. At this point, punishing the juror, let alone the retweeter who lives outside the jurisdiction of the court, is pointless, the harm is done, the trial compromised.

However, the rise of citizen journalism may not be seen only as a threat to the

¹⁸For example, in a well-known clip on Youtube uploaded by a taxi-driver who participated in it, was according to the police, a distorted side of the story, but nobody challenged its credibility. Mallen (2016) provides some reasons why the taxi driver chose to upload this video and why the public took this version for granted.

administration of justice; it may also be used constructively by the courts. The decline of traditional means of media and the gaps on court reporting due to this decrease, can be substituted by lay reporters. Therefore, citizen journalists may be used in order to report the content of the proceedings. Strengthening this point, the approach that is proposed by the King's Student Law review gives a firm support to this practice. It is explained that UK courts should embrace the current policy of Federal appellate courts in the US, which puts emphasis on the "act of journalism."¹⁹ In other words, court's activities should focus on the dissemination of information by the court, including LTBC, instead of focusing on the individual who engages in the act of reporting. That solution will cover citizen journalists and bloggers who act independently and will discharge them of the burden of seeking the court's permission.

Moreover, if control of the judiciary is a function of open justice, ideally all cases should have reporters. However, in reality resource limitations mean that reporting is typically restricted to the most high-profile cases, with the selection again often amplifying existing social biases and prejudices.²⁰ If we compare Wikipedia with a traditional encyclopaedia, we can see how this type of constraint-related selection bias is mitigated in social media platforms: even niche interests are served by enthusiasts, or people with a personal stake. Applied to trial reporting, it is much more likely that crowdsourced trial reporting will lead to a complete, or at least less selective, reporting practice.

¹⁹See (Robbins, 2016, p.11).

²⁰Documented in particular in Barak (1994) that showed the strong selection biases when cases "worth reporting" are selected.

4.2 The jury trial in the digital era

In this section I will illustrate the challenges that the Internet has brought to the administration of justice in a jury trial and evaluate the impact of those challenges on the values of an open trial. I also explain in what way citizen journalists can endanger the jury trial and its values and furthermore, what are the perils of a trial, when jurors misconduct and become citizen journalists themselves.

4.2.1 Fairness

In the previous section, I contrasted, professional journalists with “citizen journalists.” However, as the discussion of the jury trial shows, the problem is not just the sender, but also the recipient. In particular, the danger is that live tweets and other commentary from the observers of the trial are in turn picked up and read by the jurors, who might adjust their behaviour in response to the way they see themselves (or the accused etc.) depicted. Part of the solution therefore might not just be “supply side management”, that is regulation of restriction of live court reporting, but also “demand side” measures that make it more difficult for jurors (or, where applicable, witnesses) to access the information. Jurors can of course be both, source and consumer of social media commentary on the trial.

In order for the reader to better appreciate the problematic situation some examples are provided. For instance, jurors may use the Internet to search for information online, about the defendant, the witnesses, the lawyers, as well as legal terms they may not understand. They do not need anymore to go on a library or open a dictionary. They can find any information from their smart phone using a search engine such as Google or a site like Wikipedia. They may even use a street view feature such as the one provided by the Google Maps application, to investigate the crime scene and draw their own conclusions about

the ongoing trial. And even if they do not do so intentionally, the mere use of social media might give them this information automatically in their timelines or twitter feeds.

In more detail, even if the research jurors do is in good faith, the information they read may bias their point of view. For instance, they may form an opinion about a case in advance, before seeing all the evidence presented in court. In principle, jurors are not informed by the court about a defendant's previous sentences, because it is considered as prejudicial information. Thus, this knowledge is deliberately suppressed by the court, because it may affect the presumption of innocence of the defendant. One other reason for this kind of "no disclosure" may be that there is a tendency to believe that if someone has already committed a crime it is very likely that they will commit another in the future.²¹

Another issue worth mentioning, is that jurors may be exposed to online information through social media and the Internet unwittingly. Additionally, if the source they use is not reliable and accurate, this may lead to wrong and unfair conclusions. For example, imagine that a juror opens their mobile phone for a minute waiting for the bus and reads something about the case they serve as juror on their Facebook news feed. It is very likely that the image that they will have in their mind about the case, can be completely distorted.

The following empirical research epitomises the situation described above and the difficulty of dealing with prejudicial material. A survey conducted in the UK by Thomas in 2010, revealed some interesting results.²² The survey included 688 jurors who served in 62 different cases including high profile cases with extended publicity, which lasted more than two weeks, as well as standard cases with little media coverage which lasted less than two weeks. The recall of media coverage in

²¹See (R.Marder, 2014, p.627).

²²See (Thomas, 2010, pp.40-44).

high profile cases was 70%, as opposed to standard cases which was 11%. In high profile cases with media coverage, the majority of the jurors, 89%, remembered the defendant as guilty and 20% admitted that it was difficult for them to put these reports out of their mind, while serving as jurors. Moreover, in high profile cases 26% of the jurors admitted that they saw information on the Internet about the trial and 12% admitted looking for information online. In standard cases the proportion was 12% and 5% respectively. What is unexpected is that the jurors who admitted looking for information on the Internet were over 30 years old (81% in high profile cases and in general cases, 68%).

The improper conduct of jurors illustrated in the previous examples, violates two basic principles of the jury trial: (a) Jurors should not discuss the case with third parties, but only with their peers and only in the jury box during deliberations. (b) Jurors should not make their own research on the case. They must reach a verdict based only on the evidence presented in the court and must not be influenced by external sources.²³ That particularly was stressed by the Court of Appeals in the *Karakaya [2005] case*.²⁴

It is now explained how these principles strengthen the fairness of the trial. Firstly, the evidence presented in court is reliable as it had passed through scrutiny by lawyers and judges. Even if the evidence comes from a testimony, it is a result of someone's appearance in court under oath. In principle, a witness is someone who was present in the incident, which is the subject of a trial, or is an expert sharing their knowledge in court. Secondly, documents and witnesses, have passed the test of cross-examination and therefore have been vetted for their suitability. Thirdly, as all jurors will have seen the same evidence, heard the same witness's

²³See (Haralambous, 2010, p.257).

²⁴In that case a rape conviction was retried, after the jury bailiff found documents downloaded from the Internet in the jury room. The judge of the case particularly stated: "The downloading of this material and its use by not less than one member of the jury after the jury had retired contravened very well established principles." See Martin (2005).

testimony and lawyer's arguments, they will all have the same basis on which they can add and explain their thoughts about what the evidence means, during deliberations in the jury box.²⁵

Clearly, the problem is not new, because jurors were not supposed to look for information outside the court before the Internet, especially via the press or television. However, the availability of Internet and social media platforms has increased the difficulty for judges to detect improper behaviours and punish them. One reason for this is due to the fact that social media effects are subtle, therefore it is difficult for the defendant to prove juror misconduct and bring it to the judge's attention.²⁶ Moreover, it is impossible for the court to effectively deal with all possible cases of misconduct. For example, jurors may not share with their colleagues the fact that they have done private research, or even if fellow jurors are informed about it, they may not proceed to report it to the court out of fear of extending their jury duty. Another reason is that even in case a juror does not use their mobile phone and laptop during the trial they may do it while they are in the privacy of their home or at the office.²⁷ Another aspect of the problem that was highlighted by (Thomas, 2013, p.493) is that there is a grey area of jurors' misconduct, which although the court does not encourage, may not always result in contempt. For example, posts on Facebook about the experience as a juror, or tweets and blogs about jury service are less likely to constitute contempt of court, as opposed to looking for a legal term on Google, or looking up the crime scene on Google Street View, or Google Maps.

The courts have tried to deal with these technological challenges in various ways, which will be discussed later on this thesis. One of these, is by declaring mistrials or retrials, which cost both the court and the parties money and time and for the

²⁵See (R.Marder, 2014, pp.623-624).

²⁶See (Ittner, 2014, p.360).

²⁷See (Morrison, 2011, p.1590).

latter also more anxiety, let alone the danger that by declaring mistrials, society may lose its faith whether the judiciary can still implement laws fairly.²⁸ Other methods of dealing with the problem is by punishment; the judges can dismiss the juror who engaged in improper behaviour, impose a fine, or even imprisonment.

It is worthwhile to review next some case law related to jurors' misconduct. Perhaps expectedly, there have been many inconsistencies in how misconduct was dealt with. In some cases the court decided that certain actions prejudiced the fairness of the trial and in others decided that it did not.²⁹ One reason for the inconsistencies might be that the contempt of court framework, which is mostly used by judges in cases of improper behaviour, is incompatible with misconduct as it is manifested via the use of digital communications.

In the case, *United States v Fumo*, 655 F.3d 288 [2011] the defendant, made a motion for retrial, when it was discovered that a juror had posted details about the trial on Facebook and Twitter. Specifically, a juror uploaded comments about the trial on his accounts that were used by the local media. The appellate court held a hearing, questioning the juror about his Internet and social networking activity. The court agreed with the first instance court's explanation of the posts as "nothing more than harmless ramblings having no prejudicial effect that were so vague as to be virtually meaningless." The court concluded that although the juror had violated the court's instructions, nevertheless, there was no sufficient evidence that his improper use had a prejudicial effect on the defendant.³⁰

In another case concerning an illegal Internet pharmacy a mistrial was declared. At first, one juror had admitted conducting research in the Internet concerning the case. The judge after this incident made an investigation and found that

²⁸See Haehlen (2011).

²⁹See (Hoffmeister, 2012, p.438) for a thorough account of the factors that are evaluated by the court before imposing the framework of contempt of court to "rogue" jurors.

³⁰See (Ittner, 2014, p.360).

eight other jurors out of twelve have done the same. The jurors had used Google search to find information about the defendant and lawyers of the trial and had also used Wikipedia to conduct an online research in order to find medical terms that were not presented to them by the court. It is worth mentioning that the mistrial was declared after eight weeks of trial proceedings.³¹

In another instance, a juror used his phone to send eight tweets, while the civil trial was in progress. He tweeted the following: “Oh and nobody buy Stoam. It’s bad mojo and they will probably cease to exist, now that their wallet is 12M lighter.”³² The defendant tried to overturn the verdict after he discovered these tweets. In another civil trial a juror looked for the defendant on Facebook and attempted to “friend” her. After the judge dismissed her of jury duty, she posted on her Facebook account how glad she was to be off jury duty. In 2008, a juror was dismissed from a trial at Crown Court in Lancashire UK, after she posted details of the case on Facebook. The juror, had used her Facebook account to collect different opinions from her Facebook friends and was asking them to assist her in deciding whether the defendant was guilty or not, because she said that she could not decide and hold a poll.³³

Along the same lines, jurors’ posts may give the impression that they have already reached a verdict despite the fact that the trial is in process. For example, in *Commonwealth v Timothy D. Guisti [2001]* a juror sent an email to 900 persons she had on her list stating: “stuck in a 7 long jury duty rape, missing important time in the gym, working more hours and getting less pay because of it! Just say he’s guilty and lets get on with our lives!” The juror even though she did not explicitly said that the defendant was guilty, she surely implied it and documented

³¹See (Haehlen, 2011, p.48).

³²See (Krawitz, 2012, p.42).

³³For more detail see Khan (2008), who describes the incident in the *Telegraph*.

her violation of the instruction to only form an opinion when all the evidence had been heard.

Jurors always have been under an instruction not to discuss the case, not even with family. But it seems safe to assume that this rule was honoured more in the breach than in the observance, at least when it comes to close family members. This was not normally a problem in the past, when the social circle of most people was limited, an information leakage therefore normally contained. This is rather different, when information is communicated to all one's Facebook friends or Twitter followers. While this case is sometimes seen as an example of the danger of social media use by jurors, it would be possible to draw the opposite conclusion. Only because the juror shared their mental state with the world, was the inappropriate reasoning process discovered and it became possible to challenge the decision. We noted above that the exemption of jurors to give reasons is one of the most astonishing exceptions from the open trial principle. Oversharing on social media might be a remedy.

Finally, another point that may help, is to understand how jurors are subconsciously affected by online publicity of trials even though they believe that they make their best to stay impartial.³⁴ The field of cognitive psychology gives its own explanation by the term "Groupthink" as a social conformity, where individuals prefer to keep for themselves their opinion instead of sharing it with others. Psychologists divide the social conformity in two categories: a) the normative social influence, where individuals prefer to go with the opinion of majority, because they believe this is how they will feel accepted by people, and b) the informational social influence, where the individual goes with the crowd, because they believe that people know better than them. Professor Goldstein, has expressed his concerns that this type of mindset has already affected jurors, who prefer to

³⁴See (Simpler, 2012, pp.283-285).

adopt people's opinion as expressed in social media, because they are afraid that someone may discover what they really believe.³⁵ Goldstein also adds that the secrecy in deliberations can be ineffective, as jurors are accountable as individuals to social pressure during and after a trial. Since we can't keep any longer information like this hidden from our extended social circles — the Facebook friends mentioned above who saw the status change to “off jury duty,” for example — anonymity of jurors becomes difficult to maintain. We might add that once mobile phones and courtroom photography is allowed, facial recognition software will quickly ensure that jurors become identifiable.³⁶ One of the solutions proposed in this thesis takes this problem as its starting point: could we have a system where the pool is so large that nobody would know any longer if they are a juror?

4.2.2 Security of participants

Another problem that the use of social media puts forth is that of security of the parties, witnesses, victims and jurors. This problem is not new as even before social media time, witnesses in most of the cases, but jurors as well, have experienced threats face to face, anonymous calls, or letters. The rise of social media has substituted this traditional means of intimidation, by posts on Facebook or Twitter, texting from the courtroom, pictures or videos from cell-phones. The anonymity that Internet platforms can offer, the fact that the owners of these accounts can not be easily identified, as they may use pseudonyms for their accounts, combined with the enormous dissemination of information, makes the problem even more complex. In this section, I will give examples and also expose the challenges that electronic devices present, regarding the security of parties involved.

³⁵See (Goldstein, 1993, pp.296-297).

³⁶See Milligan (1999).

The existence until 2013, of an account on Instagram called *Rats215*, which was full of witnesses' photos, statements and testimonies from trials, is exemplary for the problem. This account had reached the number of 7.900 followers, before it was shut down by the police. The followers seemed very keen on participating and were asking for more information and encouraged for "likes", "hits" and comments.³⁷

Another point is that witness' intimidation can apply to expert witnesses, who can be victims of intimidation as regular witnesses are. A prominent example is the following: A psychotherapist testified as an expert in a murder trial. The defendant had admitted to killing her partner, but she claimed that she was in self defence after years of sexual and emotional abuse by him. The therapist, an expert in her field, confirmed the defendant's claim. After that incident, tweets and social media posts emerged from angry people who revealed the professional website and telephone of the psychotherapist, urging people to show their disgust on her. Moreover, malicious comments appeared on Amazon about her book, calling her "fraud and disgrace" and personal photos of her appeared on Facebook. All these actions intended to harm her professionally and personally.³⁸

Expectedly, jurors can be intimidated as well. For instance, a jury was attending a testimony in a murder trial, when some of them noticed that two people were video recording them. The jurors told the judge immediately and a mistrial was declared. The judge conducted an investigation and found that one of them was a friend and the other a relative of the defendant. The court charged them with contempt of court because they intimidated the jury.³⁹

³⁷See (Browning, 2014, pp.195-196), see Davis (2013) and (Browning, 2014, p.200).

³⁸See (Browning, 2014, pp.206-207).

³⁹See Davis (2013).

4.2.3 Other privacy risks

Use of social media and LTBC have additionally increased privacy concerns regarding jurors and other participants. I will begin by expressing some issues that have arisen while the trial is ongoing and I will conclude with issues that have emerged after the trial has been completed.

It is arguable that every time a juror posts comments on social media about the case he/she is serving as a juror, although forbidden by the jury instructions that are given to jurors before the jury duty, these posts or comments are their personal data. Therefore, if the court asks for the content of communication on social media, to investigate a case, there might be an issue of violating their rights of privacy and freedom of speech.⁴⁰ An example may help to illustrate the problem. A juror in California posted the following while he was on jury duty: “I am still on jury duty and bored during the case.” He also made some further comments about the case. The court learned about the post, asked him to remove his privacy settings and give his consent to release the content of his comments. The juror in response, first issued a complaint in California Federal Court, which was rejected and then appealed to the Supreme Court. His appeal was based on the fact that if he gave his consent to release the posts by his Facebook account this would violate his right to privacy.⁴¹

The privacy challenges in our setting are numerous. Not only the court might search online potential or actual jurors, in order to monitor their online behaviour, but attorneys can do it as well. Investigating jurors is not a new practice, as it was taking place before the age of the Internet as well. Attorneys frequently used private detectives and trial consultants to help them find personal information

⁴⁰See (Haehlen, 2011, pp.50-51).

⁴¹ibid.

about jurors.⁴² The information that they were interested in was mostly regarding jurors' political and religious preferences, marital status, employment, reputation and criminal record. Undoubtedly, with the Internet the landscape has changed, as attorneys may search on blogs, social media networks or even search jurors' names on Internet search engines to find the information they need. This tactic in principle, may raise serious concerns about privacy and thus, may discourage people from participating on jury duty. Moreover, it has been also claimed that if the court obliges active jurors to give their consent for revealing their online communications on their social media profiles, that might increase the possibility, on behalf of the defendant's side, to use that practice excessively, in order to pursue new trials and acquittals.⁴³

Despite the privacy implications of this approach, this tactic has been also praised by some scholars. For example, Hoffmeister (2011) argues that online investigation by attorneys has a lot of advantages. Firstly, it is not very intrusive as was in the past, where investigation involved surveillance by a private detective, who tried to gather information by neighbours and friends. Internet investigation by counsellors is more discrete, as nobody would learn that they have been searched online. Secondly, jurors may be given prior notice that they will be investigated online by the court or the attorneys. Thus, they might want to restore their privacy settings, or even choose to refrain from social media and blogs for a while. In this way jurors can have the choice to take the responsibility of their actions, contrary to old fashioned investigations by surveillance.⁴⁴

Unfortunately, the norm is that whenever a counsellor discovers an improper comment or post originating from a juror, they may prefer not to disclose it to the court, especially in case it is not an illegal action on behalf of the juror or

⁴²See (Hoffmeister, 2011, pp.615-625).

⁴³See (Haehlen, 2011, p.53).

⁴⁴See (Hoffmeister, 2011, pp.630-636).

in case the content is defamatory for their client. These actions might be in contempt of court, but no mandate exists to oblige the counsellor to inform the court. It has been argued that if the disclosure of the prejudicial information on the court was compulsory that would help the most in the administration of justice in various ways as articulated below.⁴⁵ Firstly, the fairness of the trial would be protected, as biased jurors would be dismissed from the jury panel. Secondly, the inequalities between parties would be reduced, as not only the affluent defendants, who can afford lawyers with means and personnel to conduct research will be benefited. Thirdly, the discrepancy between prosecution and defence may be mitigated, because not only the prosecution will have the privilege of information any more. Hence, the public's confidence in the legal system could increase; people will observe that online investigation and disclosure of information is not done due to the manipulation of solicitors, but for reasons of seeking the truth in a criminal trial.

Having considered the privacy of content on social media, let us now move on to a more specific issue, that of someone's image. To begin, it is argued that an image has the power to disseminate messages in a more direct way in lieu of text, therefore, it empowers the validity of information.⁴⁶ The Internet has posed a lot of challenges in the framework of contempt of court especially also in the context of images, because it is likely that in an online environment the information is not completely removed, as in a press edition and it might be still available. Here is an example: In 2011, the High Court of England and Wales had to deal with whether the photo of an accused that appeared on the websites of the *Sun* and *Daily Mail* during the trial, was contempt of court, under the strict liability rule. The defendant, who was accused of murder, appeared on a photo reproduced by the two websites, holding a gun in his hand and his finger on the trigger. The image remained online for a couple of hours, before it was taken down, after a

⁴⁵ibid. pp.643-635.

⁴⁶See (Synodinou, 2012, p.210).

notice by the police. Regarding this case, the Scottish High Court of Judiciary had declared that online material is considered as published when and as long as it is available.⁴⁷

The judge, when he was informed about the incident, asked the jurors whether they have seen the photos. As they responded they had not, the case continued and the defendant was convicted of murder. However, the Attorney General brought allegations for contempt, because the photographs could have caused substantial prejudice to the trial, if someone of the jurors had seen them online. The Court found the allegations to be proved and each newspaper was fined.

The question that arises is whether the strict liability rule can apply as effectively to Internet publications as in print publications. I argue that the strict liability rule is unlikely to be effective in a digital environment. This is because in social media, information might be shared and thus copied multiple times between different accounts and platforms and thus, it can be hard to eradicate it completely. More generally, it is difficult to erase information stored in computer systems because it is typically replicated in various forms.⁴⁸ Therefore, it seems hard to preclude the event that someone can still have access to information, which at some point may prejudice a presumably impartial juror.

Another important aspect of privacy is that the media should not be authorised to an indefinite right to retain the personal data of an accused after the trial, including their sentence or even their name. This is something courts should take into account. The Data Protection Working Group of Article 29 in Opinion 3/1999 expressed its concern about electronic databases: “If special precautions are not taken, case-law databases, which are legal documentation instruments, can become information files on individuals if these databases are consulted to obtain

⁴⁷See Haliday (2011a).

⁴⁸Removing data from online services can be extremely challenging, as is exemplified in the literature related to the right to be forgotten. See Bernal (2011).

a list of the court judgments on a specific individual rather than to find out about case law.”⁴⁹ The right to be forgotten, or the right to erasure, as it is declared by article 17 of the General Data Protection Regulation, (GDPR), which will protect the individual’s (data subject) right, against inadequate, irrelevant and excessive retention on behalf of the data controller, should protect the defendants after the trial. The *C-131/12 CJEU* or *Google Spain v AEPD* case, helps towards this direction. This decision confirms the right to be forgotten based on the articles 8 (protection of personal data) and 7 (protection of private life) of the Charter of the Fundamental Rights in the European Union. Moreover, the Data Protection Act (DPA) 1998, principle 5, states that personal data processed for any purpose or purposes shall not be kept for “longer than is necessary for that purpose or those purposes.” The right to be forgotten can be used as a means of giving the defendants a second chance to make a new start. In other words: “digital memories will only remind us of the failures of our past, so that we have no ability to forget or reconstruct our past. Knowledge is based on forgetting. If we want to abstract things we need to forget the details to be able to see the forest and not the trees. If you have digital memories, you can only see the trees.”⁵⁰

The issue of “digital memory” regarding the retention of past convictions, was also raised in the *Pachingham v North Carolina 582 US [2017]* case, where the Supreme Court ordered, that you can not ban anyone, even a convicted sex offender to use social media from communicating with the external world.⁵¹ Indeed, the court declared that it is a legitimate expression of the First Amendment to engage in social media websites and it should be protected by the court.⁵²

⁴⁹See (Synodinou, 2012, p.218).

⁵⁰See Connolly (2013).

⁵¹See Masnick (2017).

⁵²ibid.

4.3 The reasons behind LTBC use

In this section the reasons behind jurors' improper use of LTBC and the Internet in general are exposed. I reflect on different motivations behind jurors' use of social media, despite the fact that the court explicitly instructs against their use.

To begin with, one reason might be that jurors use social media simply because they are accustomed to use them every day. Therefore, they continue to act as they used to do, before jury duty. For example, they visit Google or Wikipedia as they did daily in their personal and professional life.⁵³ Moreover, they may feel that their online profile is a private platform and as such, there is no harm in communicating their daily activities. They may even do not realise that their actions may have a serious impact on the trial, as they may believe that updating their social media account with their jury experience is not "discussing" the case. In addition to the above, it is possible that people, including jurors, prefer to communicate online, because it gives them the chance to actively engage in discussion, rather than passively collect information.⁵⁴ Indeed, the Internet has made communication even more accessible and effortless for everyone.

Another reason might be that due to the fact that the courts do not give jurors enough information during the trial proceedings, they may feel curious or confused by this lack of information. Thus, they may believe that they help the due process by making an online research and this online research will help them reach to the right conclusion. It is also likely that the instructions given by courts are outdated, thus jurors may inadvertently conduct Internet research, because it is not clear to them that it is forbidden.⁵⁵ Indeed, the lack of a straightforward distinction

⁵³See (Krawitz, 2012, p.11) and (Hoffmeister, 2012, p.434).

⁵⁴Indeed, (Bahk, 2008, pp.61-64) in a study that was conducted among college students, showed that the daily usage of the Internet reaches an average of 85.2 minutes per person. Factors like race, gender, marital status and ownership of computer played no statistical significance.

⁵⁵See (Hoffmeister, 2012, p.424).

between what kind of Internet use is forbidden or permissible, makes the legality of its use unclear and confusing.⁵⁶ Another explanation might be that because the courts have instructed them what they should do, there is a human tendency, which can be dominant in some, to do the opposite of what they have been told.⁵⁷

Jurors may also engage in social media out of frustration, because they feel underestimated by lawyers and judges. These negative feelings are created, due to the fact that the judiciary and the attorneys involved have, contrary to the jurors, the whole picture of the facts, thus, jurors may feel excluded. The Internet gives them the opportunity to ameliorate this issue, as they can learn more information about the trial if they desire so.⁵⁸

Along the same lines, the court is responsible of instructing jurors what the law states and they should not challenge the court's directions even if these are counterintuitive to them. The fact that they are treated as "annoying children that someone brought uninvited to the adult party," may cause them feelings of dissatisfaction and experience this restriction as a humiliation.⁵⁹ For example, most courts do not give jurors information about the sentencing because they are considered as irrelevant to the jury's fact finding.⁶⁰ Nevertheless, searching the Internet can provide sentencing ranges for the case they participate and thus rectify their ignorance.

⁵⁶Although the results showed that the majority of them could understand the contempt doctrine on Internet use, however, 16% believed that serving as jurors meant complete abstention from the Internet, even from checking their emails. See (Thomas, 2013, pp.488-489).

⁵⁷See White (2010).

⁵⁸See (Morrison, 2011, pp.1594-1599).

⁵⁹ibid p.1595.

⁶⁰See, e.g., the reasoning of *Shannon v United States* 512 U.S. 573 [1994].

Chapter 5

Proposed Solutions

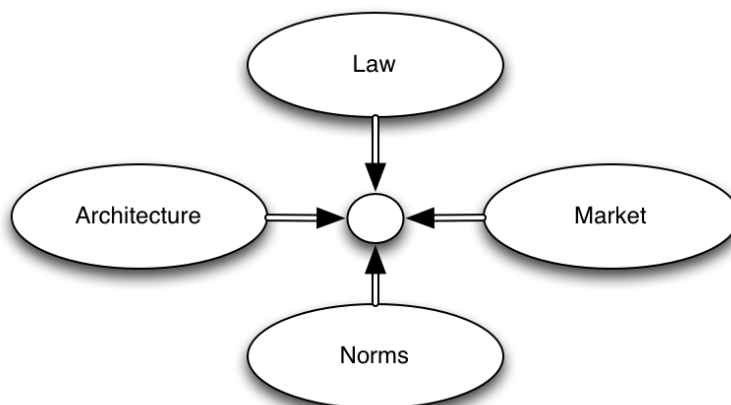
In this section, I will put forth solutions for resolving the apparent conflict between openness and fairness in the jury trial. I first organise the recommendations that have been already proposed and found in the literature that aim to effectively maintain the impartiality and integrity of the jury trial and I remark on their effectiveness. One common feature of these solutions is that they are either neutral or try to suppress the use of technology. By contrast, the solutions suggested in this thesis will try to utilise the inherent malleability of the digital realm, and with that its ability to build in legal compliance “by design.”

Three proposals are presented that differ in the level of their technological sophistication and in parallel to that, the degree of reconceptualisation of the very concept of the criminal trial. These three solutions are based on information technology tools and techniques and attempt to use technology and LTBC in a constructive way, not as a problem that needs regulation, but as a tool that can aid justice.

The theoretical underpinnings for all these solutions are drawn from Lessig’s theory of regulation (“pathetic dot theory”). Lessig (1999) popularised the idea

that in all societies pre and post Internet, there are essentially four different types of constraints that regulate people's behaviour: law, norms, market and architecture; see Figure 5.1. In the Internet era, the first three elements remain unaltered (though in a different context). The most significant, and indeed paradigm-changing difference is in the field of regulation through architecture. While playing at best a marginal role in pre-Internet societies, in the digital world it can become the main form of regulation, and indeed replace legal codes as the main method of regulation.¹ As we saw above, both the Scottish and English approaches in their respective consultation processes emphasise heavily (punitive) regulation, combined with an element of social norms (the professionalism of journalism, code of ethics and possibly, in England, education of the citizen journalists through the courts). By contrast this thesis will look at a market solution and two architecture based solutions, all enabled by technology.

Figure 5.1: Lessig's four constraints of regulation.



¹See Yeung (2007). For a critical assessment see also Yeung (2011), Koops and Leenes (2014) and Ugo (2012).

5.1 Courts' proposed solutions: Are they effective?

A number of solutions have been proposed and implemented by courts that invariably exhibit a number of drawbacks. These solutions and their effectiveness are reviewed below.

Social Media instructions to jurors

Providing comprehensive jury instructions has been frequently proposed as a solution by legal scholars. To a large degree there is consensus that instructions given to the jurors should satisfy the following properties: The instructions should be in written form, in plain language, and reminded frequently throughout the trial. They should include an explanation why jurors should abstain from Internet research and LTBC communication and in what way the improper use of Internet and social media can jeopardise the fairness of the trial.²

Empirical research has demonstrated that jury instructions can be an effective tool for preventing jurors' impropriety.³ For example, an informal survey took place in 2012, which included 140 jurors who have already participated in jury duty in 16 criminal and civil trials in the US District Court of Illinois.⁴ Jurors had to answer the question whether they were tempted to communicate about the case through social networks. If they answered negatively to the latter question, they had to answer what prevented them from doing so. The results showed that only 6 out of 140 admitted that they had the temptation to communicate. Of those saying that they were not tempted to communicate via social media,

²See (Hoffmeister, 2012, p.454).

³See Rose and Ogloff (2001).

⁴See Eve and Zuckerman (2012) who conducted the informal survey with jurors, who were summoned either under Judge Amy J. St. Eve or Judge Matthew F. Kennelly.

the majority answered that the judge's instructions prevented them from doing so and the same answer was given for those who had admitted to be tempted. Additional experiments were conducted with similar results.⁵

Most of the scholars argue that depending on the style of language the instructions are given, the impact on jurors' behaviour can vary. For example some argue that jury instructions is preferable to be written in prohibitory form, e.g., start with "do not,"⁶ while others suggest that technical terms should be avoided and examples should be given frequently.⁷ Some go as far to suggest that the specific instructions should be combined with an educational video.⁸ A useful systematisation of jury instructions criteria is provided by Aaronson and Patterson (2013). It has also been recommended that drafting instructions should be given to all participants in the trial.⁹

Some scholars highlight the reason why it is important to give specific instructions to jurors as soon as possible: it is likely that without them, jurors will not realise the importance of their role. Only after they receive jury instructions, they may think that communicating via social media can affect the trial.¹⁰

To summarise, there is agreement that social media instructions are a familiar and traditional measure, consistent, non intrusive and effective enough to mitigate the risks of jurors improper use of social media. Moreover, the majority of authors agree that because the digital landscape is changing all the time, the social media instructions should be updated and include current technological terms. This can

⁵See Hon. Amy J. St. Eve and Zuckerman. (2014).

⁶See Haehlen (2011). See also (Lieberman and Sales, 2000, p.589).

⁷See (Hoffmeister, 2012, p.462).

⁸See (Zora, 2012, p.593).

⁹See (Krawitz, 2012, p.21).

¹⁰For example, a famous TV presenter, while waiting for jury selection was tweeting and uploading photos of potential jurors, who were waiting with him to be summoned. When the clerk asked him to stop he responded that he did not do anything illegal. See (Shilo, 2014, p.254) and (Krawitz, 2012, p.36).

then be a “supply side” answer to the problem of social media use by observers of the trial, that prevents the conflict between open and fair trial with minimal restriction to openness, and also free speech.

Nevertheless, it has been pointed out that even if specific and repeated jury instructions are given to jurors, it is very likely that some at least, will continue to misuse social media. This happens because social media have become undoubtedly, a part of everyone’s daily life and jury instructions will not permanently prevent jurors from using them during jury duty, as habits replace explicit instructions.¹¹

As it has been discussed in chapter 4, instructing jurors not to use the Internet for facts or legal terms may even increase their curiosity to look for the truth and find the “right decision.”¹² Jurors tend to believe that they can reach the right decision by looking for information which was not presented in court. Moreover, while the above cited studies show that juries generally comply with instructions, other empirical studies have shown that most of the times they will misunderstand specific details of the instructions given to them i.e., they do not understand that instructions do apply to their specific Internet use.¹³ Finally, psychological factors such as reverse psychology, may provoke jurors to react adversely. This reaction, which is called “psychological reactance” and its combination with the “authority problem” against lawyers, may lead jurors to disregard instructions and make their own research.¹⁴

Ban or confiscation of electronic devices

¹¹See (Zora, 2012, p.586). Moreover, in a study that was conducted in the US, it was found that already 35 states have updated the wording of jury instructions by specifically incorporating the word Internet and Social Media. However, juror misconduct did not stop, possibly due to the reasons mentioned. See (Aglialoro, 2015, p.106).

¹²See (Zora, 2012, p.585) and (Morrison, 2011, p.1610).

¹³See (Morrison, 2011, p.1609).

¹⁴ibid. p.1610.

Some courts have taken more strict measures in their effort of restricting jurors' use of electronic devices while they are in court. In the United States some judges ban jurors from using mobile phones, while others ban the use of any electronic devices while on jury duty.¹⁵

The emerging consensus seems to be that banning electronic devices may cause frustration to jurors, because it is too extreme as a measure.¹⁶ Therefore, it is suggested that the court provides them with a court telephone number so that they can communicate with relatives and friends. Nevertheless, this solution seems very restrictive too, therefore it is proposed that jurors at least, should have access to their mobile phones during breaks and during the evening. However, other researchers argue that banning mobile phones from jurors can be a really effective measure, as they will have to wait until they go home until to post something online and that will give them some time to think about their role as jurors and not reacting impulsively as many jurors do.¹⁷

The Report of the Law Commission for England and Wales¹⁸ recommended that should a new and highly punitive approach apply to jurors caught carrying out illicit research of their own, it would nonetheless allow them to keep access to Internet enabled devices. Specifically, 1) there should not be an automatic prohibition on jurors having or using internet-enabled devices in the court building; 2) judges should be provided with a statutory power to remove Internet enabled devices from jurors; 3) the power should be automatically applied every time a jury is deliberating in the jury room;¹⁹ 4) judges should also have discretion to remove internet enabled devices from jurors at other times, where necessary

¹⁵See (Krawitz, 2012, pp.12-13).

¹⁶ibid.

¹⁷ibid.

¹⁸The Law Commission, Law Com No. 340, Contempt of Court (1): Juror Misconduct and Internet Publications. Available from <https://www.lawcom.gov.uk>. Last Accessed: August 30th, 2017.

¹⁹Why deliberation time is crucial was explained. See (Hoffmeister, 2012, p.426).

and proportionate in the interests of justice. The new sanction for this type of violation of the jurors duty was implemented through section 71 of the Criminal Justice and Courts Act 2015.

Sequestration

This solution which means “isolating jurors from the public” is out of use nowadays. Although it is considered as the most effective solution to force jurors decide a verdict only on the evidence presented to them in court, it has been however, the subject of a lot of criticism. It is considered as a highly intrusive solution in jurors’ lives that may cause them frustration, even denial in taking part in jury.²⁰ In the past, it was used mostly for cases that gained large publicity. It is also impractical and expensive, for example the sequestration of the jury in the O.J Simpson trial costed over 1 million dollars.²¹ Also, another type of sequestration, a virtual sequestration has been also proposed by researchers.²² Its meaning is that jurors can stay at home, but they will give their consent to have their electronic devices monitored. Although this solution is much more affordable than literal sequestration, it raises privacy concerns. Moreover, this remedy is considered very intrusive and costly to courts, which should hire information technology personnel of special qualifications that are able to install monitoring software on jurors’ computers and other devices. It is a consequence that these people will have access to sensitive private data of the jurors which normally, should be protected. Moreover, internet savvy jurors can always create alternative accounts under different names, which the court will not be aware of, or somehow circumvent monitoring.²³ For example, encryption can be used for email communication or

²⁰See (Morrison, 2011, p.1611).

²¹See Johnson (2004).

²²See (Hoffmeister, 2012, p.442) and (Krawitz, 2012, p.16).

²³See (Krawitz, 2012, p.16).

virtual private networking (VPN) can be used to connect to web-sites without disclosing the content exchanged or even the communication end-point.²⁴

Anonymous reporting with the aid of email address or hotline

One problem that both supply and demand side regulation of improper social media use during trial faces, is the issue of enforcement. On the supply side, we saw this when discussing the difficulties for a timely intervention when an observer tweets inappropriate information. On the demand side, courts now encourage jurors to report their fellow jurors any time they detect an improper behaviour. This kind of remedy may raise ethical issues and is likely that this is the main reason why jurors hesitate to report a colleague during the trial and usually do it after its completion.²⁵

Thus, it is suggested that the court may provide jurors with a hotline to report anonymously if they have seen anything suspicious. Moreover, the courts can provide jurors with a specific email address that it should be used for this purpose. Both remedies should be provided under confidentiality and anonymity, therefore the court should not disclose anyone who provides such a report.

Publicity of the improper action

The courts may encourage judges every time they condemn someone with contempt of court, to publicise the incident via Social Media from the court's website. That measure may have a deterrent effect as jurors will be aware of the previous cases and the punishment that followed, hence may choose to avoid repeating similar behaviour.²⁶ Some reservations are expressed that it is very likely that this method may result in fear of participating on jury duty.

²⁴See (Ferguson and Huston, 1998, p. 2).

²⁵See (Hoffmeister, 2015b, pp.992-993).

²⁶See (Krawitz, 2012, pp.36-37).

A more active jury

All the above solutions have in common that they consider jurors conducting independent research about the trial a problem that has been massively increased through social media, and would be made even worse through trial LTBC reporting. But as we saw in the historical account above, this separation of responsibilities was as much driven by contingent technological and social developments at the time, as by a principled concern for fair trials. A much more radical response is to deny the very premise of the argument: the passive juror grew out of the evolving professional monopoly of the legal profession, which replaced the investigative and fact-finding jury. The democratising function of the Internet is a legitimate threat to all professional monopolies,²⁷ making access to information easier and more uniformly possible than it was in the seventeenth century when the current division of labour was conceived.

Recently scholars have started to argue that jurors should be encouraged to be more engaged in the trial.²⁸ Some of the prominent ways that have been proposed are by taking notes, asking questions to witnesses, ask the court to clarify legal terms that are vague, and discuss the case with their fellow jurors before deliberation.²⁹

Nevertheless, this reform has received several criticisms, because reservations have been expressed that by the creation of a “more active jury”, the impartiality and neutrality that surrounds the adversarial trial might be lost.³⁰ Moreover, it has been argued that engaging more in the process may increase the jurors’ desire to do research on the Internet. For example, jurors’ questions about the

²⁷See Harshman *et al.* (2005).

²⁸In the US, in 1989, the Citizen-Activist Movement of the Fully Informed Jury Association (FIJA) was founded. Part of the thesis of the movement was that jurors should not only be knowledgeable of the facts and the law of a case but they should also evaluate the law. See (Dzur, 2012, p.132-137).

²⁹See (Morrison, 2011, p.1626).

³⁰See (Schafer and Wiegand, 2004, p.98).

trial combined with their frustration of withheld information, may turn them to Internet investigations.³¹

On the other hand, if jurors are allowed to ask questions and really participate in the due process, instead of passively receiving information, thus by empowering their sense of community, by making them feel that they are treated as an equal member of the process as lawyers and judges are, it has been argued that their online activity may be reduced. Actually, it has been proved that the large majority of questions are posed in order to clarify testimonies and evidence in a layperson's perspective and not to introduce new evidence or challenge a witness' testimony.³² Thus, this practice may lead to a better understanding of the case and may increase jurors' attentiveness, who through this process may feel more confident and therefore may communicate more efficiently with their fellow jurors. As a result, this collaboration may bring better and more fair results for the defendant³³ and trust in the judicial system may increase.³⁴

As I will illustrate, in Section 5.4, the same type of technological change that historically forced the jury into a passive role, creating a potential conflict of open trial and fair trial, can now be reverted through technological change back to a situation where jurors play a more active part. From being an obstacle to the open trial, they can become, again, one of its manifestations.

³¹See (Zora, 2012, p.599).

³²See (Mott, 2003, p.1119).

³³See (Lucci, 2005, p.19).

³⁴See (Mott, 2003, p.1120) and (Hoffmeister, 2012, pp.448-449).

5.2 Technological solution #1: Using the Market

In this section, I propose a solution based on Lessig's Market theory of regulation. As we have seen, the Internet has allowed everybody to become a publisher, bringing down the costs and the special skills previously needed. But everybody also includes the courts, which in the past may have been deterred from becoming involved in reporting apart from publishing the verdict. For example, the court can have an official website, where its staff can upload content regarding the trial. Moreover, the court can have a Twitter, Facebook or YouTube account, where it can inform the public about the latest news on the proceedings, or upload footage of the trial. Thus, the court by distributing information itself, may decrease the incentive of jurors or members of the public to publish information about the trial. The idea behind this solution is that the court will saturate the "information market", as a means of deterring inappropriate disclosures. In essence, good information can drive out bad.

This can resolve the conflict between openness and fairness of the trial, as the court explores new ways of increasing access to its workings. At the same time, courts are better placed than citizens to utilise slightly more advanced technology to mitigate the disadvantages and risks, e.g., the privacy risks for jurors or witnesses. Technological tools such as, pixellating, masking, scrambling, blurring or cartooning the faces of persons that the court wants to protect are inexpensive and easy to use.³⁵ A way to implement the above is the method of double redaction,³⁶ where the camera can directly process the content and hence, produce different video streams, where the faces would be distorted or erased, resulting in different versions of the court proceedings. A camera with suitable

³⁵See Erdelyi *et al.* (2014).

³⁶See (Senior and Pankanti, 2011, p.683).

software can be placed in the courtroom, which will record the proceedings and process them in real time so that a number of versions will be created, e.g., one with a video without faces, one with pixelated faces and one with the actual content. The court and its personnel can have access to all versions of the recorded content and they can choose to upload a suitable version of the footage on the court's website, where people can not be identified.

Indeed, some basic steps have already been taken by courts in Anglo-Saxon countries mostly, where open trial is protected as a basic principle of common law, as opposed to civil law countries such as Greece.³⁷ In table 5.1, I present a comparative analysis between different jurisdictions, in order to underpin the previous argument.

Table 5.1: Comparison of court media availability between jurisdictions.

	First Instance	Appeal	Supreme Court
Scotland	Justice of the Peace: 1) email ³⁸ 2) Twitter ³⁹	Sheriff Appeal Court: 1) email ³⁸ 2) Twitter ³⁹	High Court of Justiciary: 1) email ³⁸ 2) Twitter ³⁹
England	Crown Court: 1) email ⁴⁰ 2) Feed ⁴⁰ 3) Twitter ⁴⁰ 4) LinkedIn ⁴⁰	Court of Appeal: 1) email ⁴⁰ 2) Feed ⁴⁰ 3) Twitter ⁴⁰ 4) LinkedIn ⁴⁰	Supreme Court: 1) RSS feed ⁴¹ 2) Twitter ⁴¹ 3) Instagram ⁴¹ 4) You-Tube ⁴¹
US (Massachusetts)	Trial Court 1) Website ⁴² 2) Blog ⁴³ 3) RSS Feed ⁴⁴ 4) Twitter ⁴⁵ 5) YouTube ⁴⁶	Appeal Court: 1) Website ⁴⁷ 2) Blog ⁴³ 3) RSS Feed ⁴⁴ 4) Twitter ⁴⁵ 5) YouTube ⁴⁶	Sup. Judicial Court: 1) Website ⁴⁸ 2) Blog ⁴³ 3) RSS Feed ⁴⁴ 4) Twitter ⁴⁵ 5) YouTube ⁴⁶
Greece	Protodikeio: Website ⁴⁹	Efeteio: Website ⁵⁰	Areios Pagos: Website ⁵¹

³⁷Specifically, in Greece there is no explicit right to an open trial but open trial is protected via the article six of the ECHR.

As one can observe, in this very restricted sample, the UK and US, which share the same judicial tradition are mostly the ones that provide the tools for the court itself to become a “publisher”, especially third instance courts.

To conclude, given that the court recordings will routinely be of higher quality than those recorded on mobile phones by court observers, and also free of the risk from sanctions, court produced material should be both “cheaper,” less risky to produce and of higher quality. This in turn, assuming a functioning market, should mean that observers either stop recording altogether (because an easier option is available to them) or even if they distribute their own material, the greater quality and hence (presumed) higher popularity of the official footage should push unofficial footage far down the search engine results and make it less accessible and less problematic this way. This, in short, would be a typical example of achieving the desired regulatory outcome through market forces, and perhaps unsurprisingly the more market oriented societies of the Anglo-American sphere are taking indeed the lead.

³⁸ enquires@scot.courts.gov.uk

³⁹ @SCTScourtstrib

⁴⁰ All links last accessed: August 30th, 2017. <https://www.gov.uk/government/organisations/hm-courts-and-tribunals-service>.

⁴¹ <https://www.supremecourt.uk>

⁴² <http://www.mass.gov/courts/court-info/trial-court/>

⁴³ <http://blog.mass.gov/masslawlib>

⁴⁴ <https://blog.mass.gov/masslawlib/feed/>

⁴⁵ @macourtclosings

⁴⁶ <https://www.youtube.com/channel/UCafhFfTfwxlwSSAIQ80mhtA>

⁴⁷ <http://www.mass.gov/courts/court-info/appealscourt/>

⁴⁸ <http://www.mass.gov/courts/court-info/sjc/>

⁴⁹ <http://www.protodikeio-ath.gr>

⁵⁰ <http://www.efeteioathinon.gr>

⁵¹ <http://www.areiospagos.gr>

5.3 Technological solution #2: Digital Commitment Reminders

I continue by describing my second recommendation, the idea of digital commitment reminder, which is based on a “code” type of constraint in Lessig’s theory. I provide a psychological and theoretical framework to base this solution and I implement it on a smartphone. It is important to note that the digital commitment reminder will have the form of an application, which would be downloaded by the official court’s website. I will start by describing how the digital commitment reminder applies first to jurors and then to the public in a trial.

Thomas⁵², made a proposition that would potentially assist maintaining the impartiality of jurors in the jury box. In detail, she proposed that in the beginning of each trial, after the jurors’ oath, the jurors should be provided with written guidelines by the court. The guidelines should have the following content: explain what are the prerequisites of serving as a juror, the reason for prohibition of using the Internet and of discussing the case prior to deliberation. Moreover, these guidelines should include instructions about how, when and to whom to report to, whenever an improper behaviour of a fellow juror takes place. Importantly, all this information can be provided in the form of a single card and hence, every juror can have their individual card, which is supposed to be kept throughout the trial. The danger is of course that the juror just leaves the card amongst all the other material that they get. Here, a technological solution in the form of a “commitment reminder” can add value. The proposal is a digital analogue of this tool. First, I present a psychological basis that establishes its effectiveness, then a theory called “nudge” theory, which I believe can support theoretically

⁵²See (Thomas, 2010, p.50).

this solution and then, I outline the way that it can be implemented in electronic devices.

5.3.1 Psychological foundations of commitment reminders

The power of commitment reminders as a means to conform to an obligation, has been demonstrated by a number of scholars in experiments that took place in universities in the US. These experiments were based on a psychological theory arguing that the decision of someone to be honest is correlated with an internal reward system, which is influenced by society. In other words, if an individual complies with social norms and values, and follows them in their actions, this will have a positive reflection in their “self-concept.”⁵³ This means that people who engage in actions, which are compatible with their moral standards, reinforce positively their self-concept, even if this process requests sacrifice and effort. On the other hand, failing to comply with the inner standards of morality may lead to negative feelings about oneself.⁵⁴

Mazar *et al.* (2008) argues that the majority of people cheat up to the point where they gain something, money for instance, but they do not risk to lose their positive self-concept. They conducted some experiments, under different conditions, in which participants were paid for every correct answer. Where there was third-party verification of their answers, the participants did not cheat at all. On the other hand in the condition where verification was left to the participants, they cheated but, most of them, not to the point that they would be considered completely dishonest.

In this context, a commitment reminder that pointed each participant to a

⁵³Self-concept is a term in psychology that refers to “how someone thinks about, evaluates and perceives one self.”

⁵⁴See Aronson and Carlsmith (1962).

previous honour code commitment they have made, was experimentally tested and proven to be effective in increasing the honesty of the participants. Indeed, it has been previously tested by researchers that people who sign an honour code, before engaging in an action, are less likely to cheat.⁵⁵

In the experiment that I will use as a basis to argue the effectiveness of this solution, participants were asked to answer some questions under three different conditions. In the first condition, a third party verification was applied to the answers of the participants, thus, they knew they could not cheat. In the second condition, there was no independent verification whatsoever, thus the participants could cheat. In the third condition, there was no independent verification as well, nevertheless the participants (who were students at MIT), were asked to sign a statement as part of the test sheet which declared: “I understand that this short survey falls under MIT’s honour system.” As expected, the participants cheated more under the second, no control condition, than the first. What is remarkable though, is the outcome of the third condition: even though no independent verification of the answers took place, there was a reduction of cheating in comparison to the second condition. In fact their behaviour was statistically indistinguishable from those in the first condition, where their correct answers were independently verified.⁵⁶

From a psychological perspective, this is an implementation of the theory of Cognitive Dissonance, which started from Leon Festinger,⁵⁷ and supports that given the opportunity to be dishonest, people are dishonest up to the level they do not have to update their self-concept. The cognitive dissonance theory in a nutshell, is about the dilemma people face between two contradictory elements,

⁵⁵Maccabe *et al.* (2001) researched for one decade the factors that are associated with academic cheating. They suggested that in colleges, who have incorporated honour codes in their policy, students were found less likely to cheat, as opposed to non code campuses.

⁵⁶See

⁵⁷See Festinger (1957).

for example, personal gain on one hand and desire to maintain a positive self-concept on the other. In our case, the commitment reminder in a form of a signed statement was experimentally tested, and found to be a successful means to decrease the desire to cheat. Its presence thus helped in decreasing the dissonance that was felt by the participants and incentivised honest behaviour.

5.3.2 Nudge Theory

“Nudge” theory, is another premise, that can be used as a theoretical basis on our solution about digital commitment reminders. It is based on research in psychology and behavioural economics and makes a basic point that peoples’ thinking can be either a result of the “Automatic System” or of the “Reflective System.”⁵⁸ The former is based on intuition, thus is more rapid, the latter is a product of reasoning and self consciousness.⁵⁹

Usually people, because of the conflict they experience between these two systems, tend to make mistakes, because of biases, heuristics and fallacies in their logical process. The proposition of Thaler and Sustein (2008) is based on a libertarian paternalistic (so called “soft paternalistic”) model under which, a nudge is an “aspect of choice architecture” that can influence peoples’ behaviour in a subtle way, i.e, is of low interference. In this context, people will consciously decide, but with the help of a choice architecture, which will improve the way they take decisions. For example, in a cafe, healthy items may be placed in a more reachable place in the selves, as opposed to, say, junk food, in order to encourage the purchase of healthy products. Moreover, they argue that their theory can be utilised to regulate recommendations related to health, environment and finance.

⁵⁸See (Thaler and Sustein, 2008, p.22).

⁵⁹Examples of both systems can be found in (ibid, pp. 21-24).

In the same way, observers or jurors could be asked to download an app that acts as “choice architecture”, reminding them on the one hand that there is a choice to be made before they access media, or upload a clip from the trial and at the same time makes it subtly easier to chose the “right” action, e.g., by forcing them to make more clicks through various screens if they want to do something potentially illegal.

5.3.3 Implementing Digital Commitment Reminders

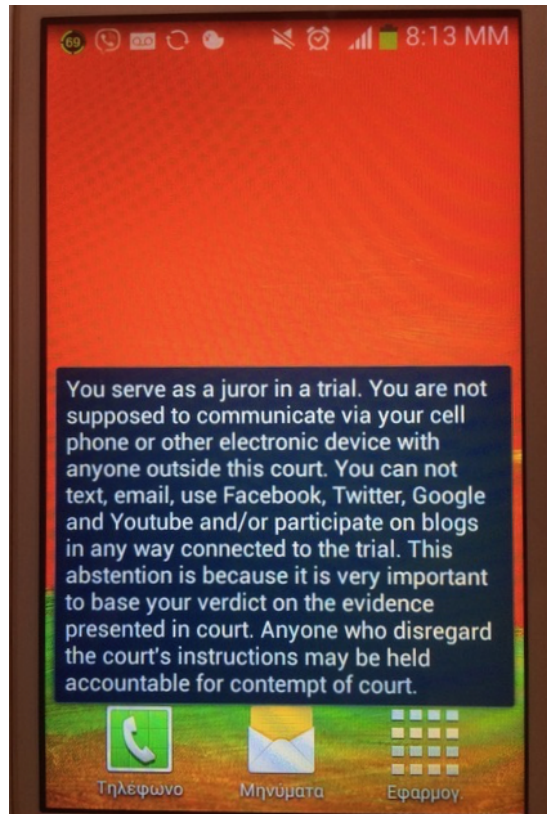
For illustration purposes, I will focus on jurors, but the same or similar techniques could be used for observers of the trial, as an alternative to get their smart phones impounded. In either case, an app is downloaded on their devices. The application will include a commitment reminder in digital form incorporating what Professor Thomas has suggested in the single cards solution we saw earlier.⁶⁰ This application could be downloaded by each juror in their device from the courts’ website and activated before entering the courtroom. The commitment reminder will pop up every time a juror opens their mobile phone, or any other electronic device they may carry with them.

This solution, may be effortlessly implemented in a variety of portable devices. For this research, I have implemented it in an Android phone using a pre-existing application that allows one to insert a single reminder text that is activated each time the phone is unlocked.⁶¹ A screenshot of the implementation with a sample text is show in Figure 5.2. Arguably, this method appears to be of minimal intrusiveness and is relatively cost efficient. Moreover, it gives incentive to members of the public and jurors to become “journalists” themselves, nudging

⁶⁰See (Thomas, 2010, p.50).

⁶¹Specifically, the application “Toastr” from Google play app store was used and installed in an Android smart phone. The app was programmed to produce the reminder shown for a number of seconds each time the user unlocked their phone.

Figure 5.2: Screenshot of our implementation of the digital commitment reminder in an Android smart phone. The exemplary text is presented every time the user unlocks the phone.



them to the legal rules and responsible reporting. Hence, this solution may help jurors who get confused with the written court's instructions and need some additional advice, when they are not in the courtroom. It may also prevent them from communicating via their social media account about the trial.

More ambitiously, an artificial intelligence (AI) expert system can be used to refine further the concept of digital commitment reminders in our context. The AI system could detect words and phrases typed by the user in social media applications and warn them about the implications of their post for the trial. For example, the AI system could be trained to recognise the names of the accused and other parties involved in the trial, as well as general legal terms like "defendant",

“litigants” “jurors.” When a phrase is entered that triggers the AI system, a custom commitment reminder may appear on the screen. The AI system may contain rules of the following form:

```
If (input contains <name of defendant> OR <name of judge>)
AND (current application is twitter) then produce alert “It appears
you are twitting about the ongoing trial, please consider your respon-
sibility regarding the due process.”
```

Nevertheless, implementing such a system in practice might be significantly harder than the simpler “blanket” commitment reminder previously presented. The reason is that such a system should have direct access on the text that is typed on an application by the user. This can only be achieved by installing the AI system either within the application or within the device operating system. In either case, this would require the court application to be authorised by the operating system or the social media application supplier (e.g., for an iPhone and twitter, the court AI system should be either authorised by Apple or Twitter).

5.4 Technological solution #3 : Random Sample Justice

Both of the previous proposals suggested the use of technology to rebalance the shift in power and control that came with social media and the Internet. This means they tried to maintain the working of the court as it is at present, with only minimal change and disruption.

In contrast, the third solution I will present is a complete reconceptualisation of the jury trial. It is also code-based following Lessig’s theory of regulation as

the second solution is, but instead of slightly modifying the existing process it radically redesigns it. Or rather, it will be a suggestion to use modern technology to go back to the ideal of the jury that we encountered in the historical section, before changes in communication technology and the “information monopolies” of respectively, the legal and journalistic profession pushed the juror into a more marginalised role. If we remember, the original Athenian jury involved everybody. The latter jury system balanced the economic constraints with this ideal of public participation in trials and the openness of the trial, by using a *randomly chosen* sample of citizens. Remember too that the original jury was an *active fact finder*, before delegated into the “blank slate” role when equal access to information became too difficult. Both aspects can be addressed through technology: on the second count, “disintermediation” was the great promise of the Internet, subverting knowledge monopolies and making information accessible directly for everyone,⁶² just as for the old, “local” jury, the information that mattered was accessible to them directly. On the first element, generating unbiased and verifiably random outcomes is one of the main concerns of one of the key enabling technologies of the Internet, cryptography.

Hence, in this section I present first the theory that underpins my solution, the idea of Random Sample Voting and then its possible implementation on jury trials that gives rise to “Random Sample Justice” (RSJ).

⁶²See Gellman (1996).

5.4.1 The theory behind Random Sample Justice

The idea of decision making by a group of people randomly⁶³ selected is not new. It is used in various procedures, as committees' selection, university's admissions and especially in jury selection.

As we have seen in Chapter 2 of this thesis, Classical Athens was the first paradigm of jurors being selected by lot and currently, this practice is compulsory in Britain, in the United States and in Greece. Selecting a jury at random presents important advantages.⁶⁴ First, people who share same requirements, for example are eligible for voting, have all an equal chance to serve on jury. Second, because jurors are randomly selected their choice can not be manipulated and it is harder to threaten or bribe them. Therefore their verdict is harder to be influenced by external pressures.⁶⁵ Third, defendants are judged by "a jury of their peers" as jurors are selected from a sample of the population, which they represent in court. Thus, the pool of people from which jurors are selected, is a "representative cross-section of the population."⁶⁶

The solution I present is based on the idea of Random-Sample Voting (RSV) which was introduced by cryptographer David Chaum as an electronic voting system.⁶⁷ The starting point of Chaum (2012) is that a small random sample of eligible participants can be more effective for conducting large scale decision-making procedures, such as elections and referenda.

⁶³According to (Stone, 2009, p.378) "a lottery is a process that generates a fixed number of alternatives with equal probability." Thus, whatever the outcome of a lottery is, it can not be rebutted with any logical inference.

⁶⁴See (Duxbury, 1999, p.75).

⁶⁵(Stone, 2009, p.388) argues that the use of lottery is only a means to an end to the jury process, which is the fair outcome of the decision.

⁶⁶(Duxbury, 1999, p.75) The purpose of a cross sectional jury was, according to (Abramson, 1994, pp.36-37), to increase impartial decisions.

⁶⁷See Davis (2012).

The idea of deliberative democracy has also inspired legal scholars. For instance, Professor Fishkin⁶⁸ argues that if we use a representative sample of people and provide them with useful information, they will engage more in the voting proceedings and will produce a more reflective judgment. In addition to his previous argument, he articulates that a small sample of the population may be more representative in elections, as opposed to mass participation, where people believe that their vote is meaningless and thus prefer to abstain from the procedure or give little thought to it.

While Chaum's proposal focuses on elections and issues related to representative democracy, one can observe that the jury trial can be seen as an instance of representative democracy by lottery. With this as a starting point, I explore below this connection and the possibility of porting the tools that Chaum had introduced for e-voting to the setting of jury trial.

5.4.2 Chaum's Random Sample Voting

The main features of Chaum's proposal, is that a small subset drawn at random from the voter register is authorised to participate in the election while their anonymity is protected, via a cryptographic mechanism. Thus, the selected voters can not be identified in the system due to encryption, but nevertheless, the outcome of their vote can be verified as correct.

The key technical ideas of RSV are (i) that each ballot has a unique numerical vote code for each choice (e.g., "Yes" and "No" will be assigned to two numbers different for each voter), (ii) each ballot has two sides, of which one is used for voting and the other for verification, (iii) some of the ballots are decoy ballots which do not count in the final tally, (iv) valid and decoy ballots are otherwise

⁶⁸See Gorlach (2012).

indistinguishable, thus ensuring that the identity of the valid voters is hidden within the set of decoy and valid voters.

The system has the capability of distributing decoy ballots on demand, while valid ballots are guaranteed to be randomly assigned. As a result, everyone who wants to participate in the process, is able to do so, but because decoy ballots are indistinguishable to valid ones, they act as a protective mechanism against those, who may try to subvert the election.

The final tally of an RSV procedure can be verified by the voters and external participants after the completion of voting. This process is proven to ensure the validity of the tally, without jeopardising the privacy or the identity of the voters.

This completes the description of the central idea behind random sample voting, which builds on previous results on e-voting, but adds the mechanism of random sampling and decoy ballots in order to ensure that bribery of selected voters can be solved via anonymisation.

It is noted that a full description of the original scheme is beyond the scope of the current exposition and the reader is referred to the RSV white paper.⁶⁹

5.4.3 Applying RSV to jury trials: Random Sample Justice

In order to implement this proposal, I will take Chaum's RSV idea and will apply it to a jury trial instead of voting, which is by default a representative institution. The advantage of anonymity, which is ensured cryptographically, on jury selection and voting after the deliberation stage, will be additionally utilised.

⁶⁹See Chaum (2012).

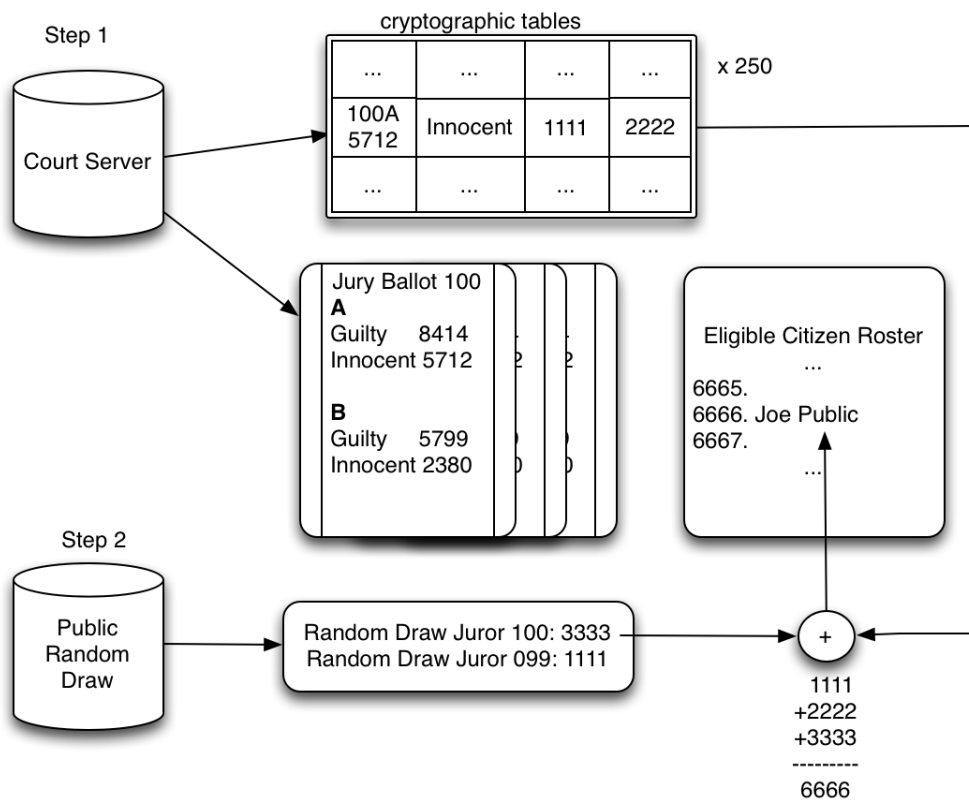
With the combination of these elements I will describe a radical reformulation of a jury trial in criminal law, where the trial will be broadcasted live online. In our paradigm the authority behind this procedure will be the Court, acting as a broadcaster. The trial will take place in the courtroom, but jurors can watch the trial via live video stream. I will divide the process in eight steps, before, during and after the trial.

Before the trial, the ballots (valid and decoy) are created in the same way as in an RSV procedure. In the ballots, instead of the “Yes” and “No” choices, the two choices of the vote will be replaced by “Innocent” and “Guilty.” The two choices are represented by two different codes, which the jurors can use at the end of the deliberation. The authority will create valid and decoy ballots as in an RSV procedure. After the preparation of the valid ballots, jurors are randomly selected, for example from the list of registered voters. After the selection of jurors is completed, they will receive the jury summons with email or post. This communication will include also a username and password to be used in the deliberation process, which is explained below. Moreover, the system will distribute decoy ballots, to decoy jurors, who want to participate in the trial.

In Figure 5.3, I present the first two steps of the process. I show how the court server creates the cryptographic tables, and how a valid juror is selected based on a public random draw. In this example, I present a jury ballot with serial number 100 and two sides A and B. Each side contains different random codes, one for “Guilty” and one for “Innocent.” The authority using the court server publishes a cryptographic table that contains hidden information in the form of rows. There is a single row for each code in each ballot which is divided in four columns (the number of columns will be augmented in the course of the process). The first column contains the code and the serial number as well as the side indication (A or B). The second column contains the choice, “Innocent” or “Guilty.” The third and fourth column contain two numbers that sum to a single random number that

represents the first summand for random jury selection. The same summand is used for all the rows of the same ballot. In step 2, a random draw is executed to produce the second summand. The summand (in this case 3333) is added to the numbers in third and fourth column (in this case 1111 and 2222) and this results to a number that selects a juror (in this case Joe Public at location 6666) from the public citizen roster.

Figure 5.3: RSJ: The first two steps of the process from the perspective of a valid juror.



In Figure 5.4, I present the same first two steps, but for the case of assigning a decoy juror. After step 2, (the random draw), the rows of the tables are augmented by two additional columns determined in the following way. For the case of regular ballots the additional columns, five and six, contain identical data to columns three and four. For decoy ballots, which are marked with the word “decoy” in the third and fourth column, they are assigned two numbers suitably selected by

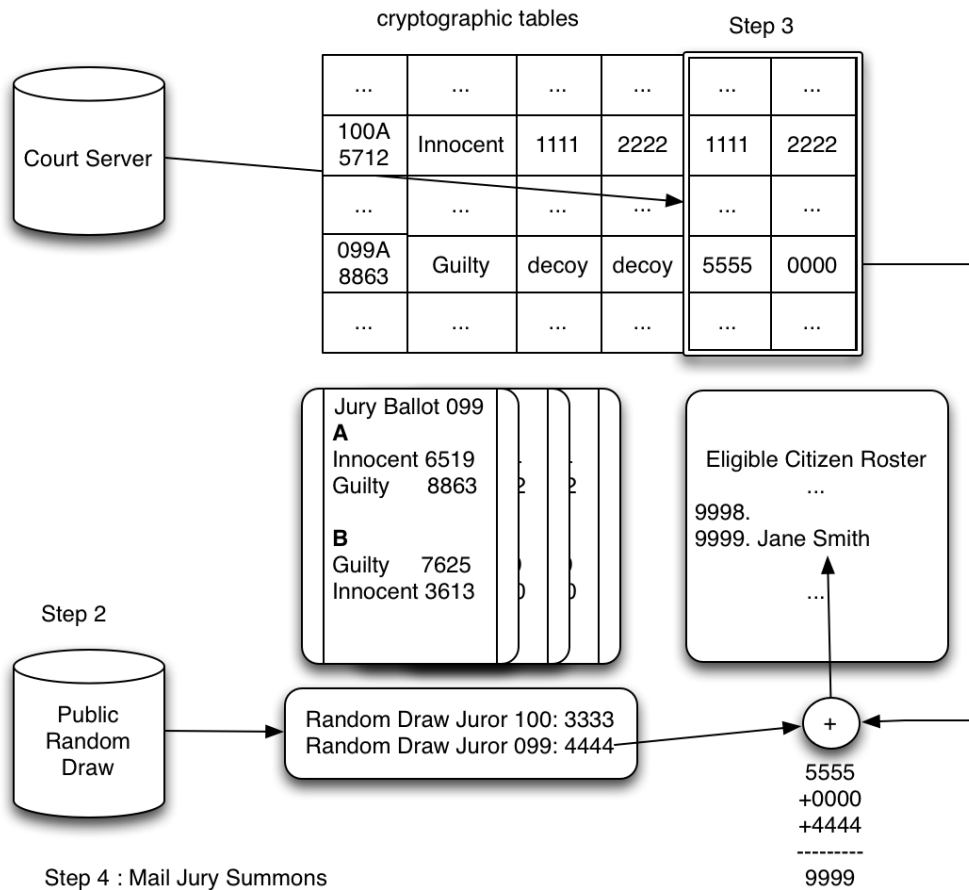
the authority so that the ballot will be assigned to a decoy juror. In the example, decoy juror Jane Smith is selected, because the two numbers (0000 and 5555) sum up to 5555 and are added to random draw for ballot 099 which is 4444. This sums to 9999 which is the number corresponding to Jane Smith in the roster. In this way the authority can appoint as a decoy juror anybody that wishes to become one. Nevertheless in the verification step, the way a decoy juror is selected will be indistinguishable from a valid juror.

This has two consequences: nobody can prove to a third party that they are an actual juror — making it impossible to identify the right jurors to bribe. Second, nobody can find out who an actual juror is, making it impossible to retaliate against them after the trial.

I will now proceed to describe the second stage of the process that takes place after the distribution of valid and decoy ballots. The jury trial begins and the proceedings are disseminated via a live video stream that jurors can watch from their homes via the court's website. The trial is open to everyone, public and the press. However, in order to gain access, public and media representatives have to register as jurors (of the decoy type unless they are selected as actual jurors), using the provided username and password. The live video stream will be accessible only to those with a valid registration.

A major concern at this point with an online process like the one it was presented above, is that of the danger of jeopardy of the fairness of the proceedings, due to the openness of the trial to a large audience via the world wide web. It may be very problematic if the trial is re-broadcasted either in segments or as a whole, to a larger audience than that the court had given access to. While RSV alone has no mechanism to resolve this problem, our RSJ implementation is based on a “virtual”, streamed trial process thus making it possible to invoke a “market argument” as in Section 5.2 to address this issue.

Figure 5.4: RSJ: The first two steps of the process from the perspective of a decoy juror.

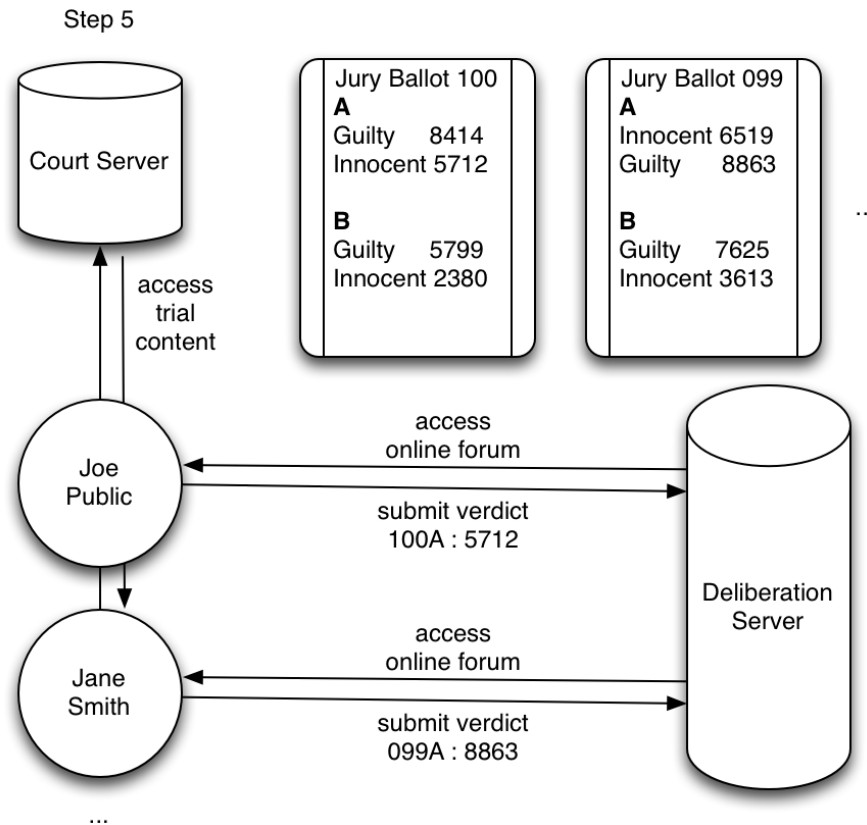


After the trial is finished, a public forum should be provided by the court. Access to the forum will be ensured with the same username and password that is used to access the digital content of the trial. Everyone authorised could post a question or comment on the proceedings. Moreover, the digital commitment reminder of Section 5.3 can also be used to pop up on the screen every time a juror connects to the court’s website. As before, the purpose of the digital commitment reminder would be to act as a deterrent mechanism against those jurors, who may be tempted to post something about the trial on their social media account.

In Figure 5.5 the deliberation stage is described as step 5. Valid and decoy jurors

cast their ballot on the court's server using the ballots they have received. In this example, Joe Public votes for Innocent and Jane Smith votes for Guilty.

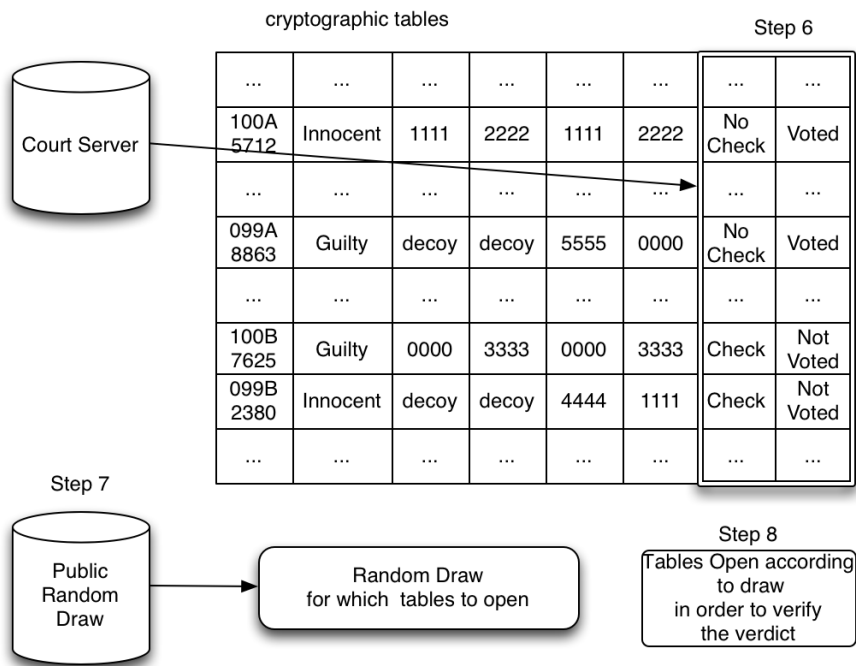
Figure 5.5: RSJ: The deliberation stage.



What is important is that nobody can identify, whether the person behind the post is a valid juror or not. Therefore, this online deliberation may be more efficient, as everyone can express their opinion openly. Moreover, it can be also argued that the participants, as they will have the chance to see the trial as many times they need and have their questions answered on the forum, may produce a more thoughtful judgment. The clerk, with the help of the judge may be able to give answers to clarify any confusion or misinterpretation the jurors, decoy and valid alike, may encounter. Additionally, the court will be able to control what is posted online and warn the jurors of the possibility that an improper comment may result to someone being held accountable for contempt of court.

After the completion of deliberation, all participating jurors, can place their vote on the electronic bulletin board of the court’s website, following the RSV procedure. The vote via the code that each juror has selected, either for “Innocent” or for “Guilty” is sent via email, or via telephone on a hotline that will be provided to all participants. The system will be open in order to collect the votes of all participating jurors. The decoy votes will not be counted in the tally by the server of the court and thus, they do not affect the outcome of the procedure.

Figure 5.6: RSJ: The verdict stage.



In Figure 5.6, it is shown how the votes of valid jurors are counted and the tables are prepared for verification. The authority augments the rows with columns seven and eight. Column seven contains an indication that explains whether a row corresponds to a ballot side that is checked or not checked. Checked rows correspond to those ballot sides (A or B) that were not used in the voting process and thus are used for verification. In our example, for ballot with serial number 100, that is assigned to juror Joe Public, side A is used for voting, while side B

is used for checking; this means that the rows corresponding to vote codes 5799 and 2380 will be marked as checked in column seven. Column eight is marked as “Voted” if the code of the row has been submitted by the juror and “Not Voted” otherwise. The authority at this stage announces the final result as revealed by the codes submitted by the valid jurors.

After the end of step 6, the system makes its final draw (step 7), determining a partial opening of the cryptographic table following the RSV verification procedure. When this is completed, everyone may deduce that the outcome of the deliberation is indeed, the one announced by the court. This happens because each juror can verify that the verdict has taken into account his or her input, by the code of their retained copy of their vote.

Further details regarding how verification is performed are omitted, as these are identical to that of Chaum (2012) and outside the scope of our present exposition.

In a world where RSJ is used, it would probably be desirable to follow the lead of Scotland and have jury verdict based on a (potentially strong) majority opinion and not a unanimous opinion. This is because the jury pool with the Random Sample Justice solution we propose can be increased much more than 12 or 15 individuals. The ideal number for a suitable jury size is an interesting open question for future research. Additionally, in what way the outcome of the voting will correspond to a “Guilty” or an “Innocent” verdict, is also open for further research. For instance, one proposal is that a “Guilty” verdict may require a strong majority among the jurors, with, say, more than 70% of the selected jurors voting for that choice, with a jury size of about a hundred.

5.4.4 Amending RSJ with smart contracts

A problem that the RSJ protocol does not completely solve is that a juror may encounter that the code, which represents their vote on the tally, after all the tables have opened, is missing. This may happen due to a malicious act on behalf of the court's clerk; for example, the clerk may deliberately erase the code that was submitted by the juror when they casted their ballot online. The juror can not prove that the vote code was erased, although they can detect it. On the other hand, a juror may act maliciously and claim that they participated in the voting process, although they did not. This may happen in case they do not like the outcome and they wish to interfere with the process.

I argue, that this potential dispute can be resolved if the protocol is transferred, i.e, the creation, the distribution of the ballots and the voting process, on a smart contract, which will ensure an even greater transparency for the procedure.⁷⁰

In more detail, smart contracts are contracts whose terms are recorded in a computer language instead of a legal language, thus ambiguity of legal terms is eliminated. These contracts can be automatically executed by a computing system, such as a distributed ledger system.⁷¹ A distributed ledger is a form of a database, which records and processes transactions using rules which are publicly known and expressed in the form of computer code. A way to implement a distributed ledger is by using a blockchain protocol.⁷² One major advantage of a smart contract is that it facilitates the exchange of signed messages (transactions) without the presence of a middleman between two or more parties. Thus, as this

⁷⁰Using smart contracts for voting is not novel to this thesis. A pilot implementation of a smart contract based e-voting system was utilised in the US, in the state of Utah, where citizens used blockchain technology, to nominate candidates for the presidential elections of 2016. See Lapowsky (2016).

⁷¹See (Walport, 2015, p.18).

⁷²Blockchain protocols were devised for the first time as part of the Bitcoin system, see Nakamoto (2008), but have found since many other potential applications, see Walport (2015).

application is machine executable, there is no longer need for a third party, in our case the court, to ensure compliance and record keeping. The smart contract is communally executed by all peers that have access to the system and wish to participate, i.e, the jurors and the public in our trial paradigm.

The concrete proposal is as follows. For each trial, a separate smart contract is created by the court that contains all the tables and public information used in the RSJ protocol. The smart contract will be responsible for recording the protocol execution and interacting with all participants. Thus, everyone will be able to check that the votes have been received appropriately in the system and counted accurately. Furthermore, a distributed ledger is by nature publicly accessible and “immutable”⁷³ and thus, no one can claim credibly that their submission to the contract was erased. In that way malicious acts of deletion will be avoided and disputes, such as the ones we observed above, can be eliminated.

5.4.5 RSJ and open trial values

I argue below how Random Sample Justice satisfies and in fact may even promote fairness in the trial process.

The system incorporates protective mechanisms, which uphold and have the potential to increase a fair administration of justice. The anonymity of jurors reduces the incentives for bribery and corruption. This preempts one of the main concerns raised in the Scottish consultation on LTBC discussed above, the danger to expose the jury to external pressure. This then allows to follow the English proposal and be more permissive about LTBC from court, something that as both consultations noted can hardly be avoided anyway. Even more radically, it was

⁷³Violating the “persistence” property amounts to rewriting information in the blockchain which is infeasible, see (Garay *et al.*, 2015, p. 303).

suggested to have the entire trial online. With jurors not any longer necessary in the courtroom, as they deliberate and vote online, their face will never appear in public and be exposed by the media. Observers will also watch the online proceedings, removing the distracting aspects of social media use during a live trial. And despite all this, the control function of the public over the courts is enhanced as the observation of the correct procedures can be proven (in the mathematical sense) both by the actual jurors, and the wider public.

Moreover, the increase of the number of eligible jurors to more than 12 people, leads to a more representative sample of the population, which is responsible of the outcome of the trial. Thus, the fate of the defendant depends on the decision of a larger number of people but also greater citizen involvement — restoring the ideal of the Athenian legal system.

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