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OPEN JUSTICE 2.0: TECHNOLOGY, TRUST AND CITIZEN JOURNALISM IN THE CONTEMPORARY COURTROOM

Jumani Robbins

Digital technology and new media have revolutionised the way in which we consume and disseminate information. In light of this, judicial authorities in various jurisdictions have adopted rules concerning the use of such technology in the reporting of legal proceedings from the courtroom. Many of these rules draw a distinction between members of 'the public' and members of 'the media'. Using the rules in England and Wales as its point of origin, this paper seeks to demonstrate the inadequacy of such an approach to courtroom reporting regulation. It does so in three sections. In the first section, the current position in England and Wales is untangled and its practical viability assessed; in the second section, traditional open justice principles are applied in order to determine the conceptual desirability of such an approach; and in the final section, a 'third way' for the regulation of such technology in the courtroom is tentatively suggested by reference to the United States. It is concluded that reform is required in order to make the most of all that digital technology, new media and citizen journalism has to offer to open justice and contemporary courtroom newsgathering.

INTRODUCTION

We are living in the age of user-generated content. This is not news: almost a decade ago in 2006, *Time* magazine awarded its Person of the Year accolade to 'You'[1] in recognition of the millions of people who contribute words, images and audio to so-called Web 2.0.[2] In the years since, such digital phenomena as blogs, wikis and discussion forums have continued to revolutionise the way in which we consume and disseminate information,[3] with facts and opinions now quicker to access and easier to transmit. Naturally, this paradigm shift has not gone unnoticed in the realms of newsgathering where the very essence of what constitutes reportage has had to be reconceptualised.[4]

While the response of the courts in England and Wales to new methods of information communication has fostered considerable academic debate, the bulk of this scholarship focuses

[1] Lev Grossman, 'You – Yes, You – are TIME's Person of the Year' (*TIME*, 2006) <http://content.time.com/time/magazine/article/0,9171,1570810,00.html> accessed 30 November 2015

[2] Web 2.0 is the phrase used by some commentators to describe 'a more socially connected web in which people can contribute as much as they can consume'. See Paul Anderson, 'What is Web 2.0? Ideas, technologies and implications for education' (*JISC Technology and Standards Watch,* 2007) <http://www.webarchive.org.uk/wayback/archive/20140615231729/http://www.jisc.ac.uk/media/documents/techwatch/tsw0701b.pdf> accessed 30 November 2015.

[3] Eytan Bakshy, Itamar Rosenn, Cameron Marlow and Lada Adamic, 'The Role of Social Networks in Information Diffusion' (*WWW '12*, 2012) <http://arxiv.org/pdf/1201.4145.pdf> accessed 30 November 2015

[4] Gareth Locksley, *The Media and Development: What's the Story?* (World Bank Publications, 2009) 1

on the use of cameras to broadcast court proceedings. These rules remain largely prohibitive,[5] much to the dismay of some.[6] What has garnered less attention, and will form the basis of this paper, is an aspect of the digital sphere which has been termed 'live text-based communications' (LTBC). These forms of communication include social networking sites such as Twitter. In 2011, Lord Judge CJ led a consultation process regarding how best to regulate the use of LTBC by reporters in the courtroom.[7] This culminated in the formulation of a set of guidelines ('the Practice Guidance'). The nature of the digital sphere is such that any set of rules regarding its restraint ought to be the subject of frequent monitoring and revision. Thus, four years on from the Guidance's publication, it seems appropriate that time is taken to appraise some of its finer points.

In light of the above, this essay will evaluate the distinction that the Guidance draws between members of the general public and representatives of the media or legal commentators. This was an issue addressed in the Consultation Paper but not extensively explored. Any rule that affords greater courtroom privileges to some individuals than others is worthy of close scrutiny. While this paper uses as its point of origin the rules regulating LTBC use specifically in English and Welsh courtrooms, general arguments emerge regarding preferential treatment in contemporary court reporting. The core argument is capable of transposition to any jurisdiction where the rules on the use of technology to report from the courtroom are skewed in favour of the established media, as is the case currently in parts of Australia[8] and Canada[9], for instance. Moreover, it is hoped that in the course of pursuing this end we will encounter wider points regarding the changing nature of reporting and the opportunities that this brings, both inside and outside of the courtroom.

The balance of this paper is divided into three main parts. Firstly, the current position in England and Wales will be untangled and, given its brevity, we will address the way that the Guidance has been understood in practice and the problems that have arisen. Secondly, a more conceptual analysis of the distinction will be undertaken by considering the extent to which it promotes open justice principles. Both the question of the distinction's practicable feasibility and the question of its conceptual desirability will be answered in the negative. This will lead us to a final section in which a 'third way' for the regulation of LTBC in the courtroom will be tentatively submitted with the aid of a comparative angle from the United States.

[5] Gavin Millar and Andrew Scott, *Newsgathering: Law, Regulation and the Public Interest* (Oxford University Press, forthcoming) (on file with author)

[6] See, for example, Edward Thompson, 'Does the Open Justice Principle Require Cameras to be Permitted in the Courtroom and the Broadcasting of Legal Proceedings?' 3 JML 2, 211.

[7] All references to 'courtrooms', 'courts' and the like here relate to those outside of the Supreme Court of the United Kingdom, which has a distinct set of guidelines for the use of LTBC.

[8] Courts and Other Legislation Further Amendment Bill 2013 (New South Wales, Australia) 1.8 <http://www5.austlii.edu.au/au/legis/nsw/num_act/caolfaa2013n1496.pdf> accessed 30 November 2015 and James Hutchinson and Alex Boxsell, 'NSW waters down court social media laws' (*Financial Review*, 19 February 2013) <http://originwww.afr.com/p/technology/nsw_waters_down_court_social_media_X6dcNSKJThJ5nMX0w7C7gM> accessed 30 November 2015

[9] 'Canada-wide summary of court policies on live, text-based communications from the courtroom' (*Canadian Centre for Court Technology*, June 2013) <http://wiki.moderncourts.ca/images/5/57/Policies_on_Live_Text_Based_Communications.pdf> accessed 30 November 2015

GREY AREAS: PRACTICABILITY AND THE CURRENT APPROACH

The Practice Guidance published in December 2011 was the result of a consultation process led by Lord Judge in his former capacity as Lord Chief Justice. The Consultation centred around several questions, one of which addressed the issue of whether 'the media' ought to be privileged with regard to use of LTBC in the courtroom. Interestingly, despite the presence of this question in the framework of the Consultation, it was said at the outset that the focus of the process was 'the use by the media' of LTBC.[10] This immediately prompts us to ask: how seriously was the question considered? One cannot help but wonder whether the answer was a foregone conclusion.

Nevertheless, paragraphs 10 and 11 of the Practice Guidance attempt to strike a balance between a blanket proscription and an unregulated free-for-all by establishing what might be fitly described as a 'presumption of permission':

Where a member of the public, who is in court, wishes to use live text-based communications during court proceedings an application for permission […] will need to be made. […] A representative of the media or a legal commentator who wishes to use live text-based communications from court may do so without making an application.[11]

In other words: members of the public who wish to use LTBC to report from the courtroom must first make an application to the court, while representatives of the media and legal commentators, by contrast, may do so without first seeking express authorisation. That is about as far as the Guidance goes in explaining the rules on personnel. Thus, we are left wondering exactly how these guidelines ought to function in practice.

This lack of definitional clarity is conspicuous. Interestingly, the question of how best to define these groups was included in the framework of the Consultation Paper; however, several responses stressed the complexities involved in doing so.[12] Such comments were justified. In recent times the very essence of what constitutes 'the media' has transformed immeasurably, owed in large part to advancements in digital technology and consequent shifts in platforms for expression and opportunities for ownership.[13] This has led to the emergence of what Benkler has called the 'networked fourth estate', which combines "elements of both traditional and novel forms of news media."[14] Indeed, consultation responses drew attention to sites like *The Huffington Post* which started as private weblogs but gradually developed into "increasingly consulted news sources."[15] Naturally, these definitional difficulties are not unique to England

[10] Lord Chief Justice of England and Wales, 'A Consultation on the Use of Live, Text-Based Forms of Communications from Court for the Purposes of Fair and Accurate Reporting' (*Judicial Office for England and Wales*, February 2011) <http://www.pdf-archive.com/2015/11/29/uk-twitter consultation-opening-february-2011/> accessed 30 November 2015 [1.3]

[11] Lord Chief Justice, 'Practice Guidance: The Use of Live Text-Based Forms of Communication from Court for the Purposes of Fair and Accurate Reporting' (*Judicial Office for England and Wales*, 14 December 2011) <https://www.judiciary.gov.uk/wpcontent/uploads/JCO/Documents/Guidance/ltbc-guidance-dec-2011.pdf> accessed 30 November 2015

[12] Simon James, ' City of London Law Society Litigation Committee response to the Lord Chief Justice's consultation on the use of live, text-based communications from court' (*City of London Law Society*, 4 May 2011) <http://www.citysolicitors.org.uk/attachments/article/112/20110504-CLLS-response-to-consultation-on-live-text-based-communications-fr~.pdf> accessed 18 November 2015 and Michael Bromby, 'Response to the consultation by the Judicial Office for England and Wales on the Use of Live, Text-Based Forms of Communications from Court for the Purposes of Fair and Accurate Reporting' (2012) 3 EJLT 1

[13] Bakshy et al (n 2)

[14] Yochai Benkler, 'A free irresponsible press: Wikileaks and the battle over the soul of the networked fourth estate' (2011) 46 Har. Civ Rights-Civ Liberties Law Rev 1, 315

[15] Employment Lawyers Association, 'Response of the Remployment Lawyers Association to a Consultation paper issued by the Judicial Office for England and Wales' (*Employment Lawyers Association,* 4 May 2011)

and Wales, and have recently plagued the passage of a shield law bill in the United States Senate.[16]

Shortly before the Guidance's publication, Lord Judge appeared to allude to these difficulties.[17] It may be that, upon reflection, he concluded that these complexities were too great to overcome, and that it was better to offer some scope for flexibility by refraining from defining the groups. However, this approach may represent the greater of two evils, since the resultant lack of clarity has created uncertainty as to how the guidelines ought to apply.

A number of suggestions as to the application of the guidelines have been made. One commentator has contended that, absent any definitions, the rules essentially turn on a question of experience and training:

If you have enough legal or journalistic training to report court proceedings consistently with the laws of contempt, you come within the guidance. If you don't, you need to ask permission.[18]

This is potentially problematic, since it suggests a sort of retrospective self-selection ought to take place. Would-be tweeters are required to reflect on their own legal and journalistic proficiency before deciding for themselves whether or not they are covered by the presumption of permission. For many people this will be a no-brainer, but there will be borderline cases such as student newspaper reporters and hobbyist legal bloggers where this is a harder call for the court-goer to make. Since there is little way of anticipating the commission of a contempt offence, it may not be until after the fact, by which time it is too late, that a tweeter will realise that they did not in fact have 'enough' training.

An alternative interpretation of the guidelines would be to simply apply the presumption of permission to all those in possession of official proof of media accreditation. This was the understanding anticipated by the likes of Crook, who noted that "for practical purposes, professional journalists should have verifiable identification" with them in court, such as a National Union of Journalists card.[19] Unfortunately, this too is troublesome because it discriminates against competent writers who are not employed by mainstream news outlets or affiliated with a union.[20] Such an approach would consequently be particularly inhibitive for legal commentators, a group that the Guidance expressly intends to privilege. This is perhaps best illustrated by the tale of one reporter who attempted to tweet live from *Miranda v SSHD*[21] (a case of considerable public interest). The writer in question, a barrister and former government lawyer, is a legal commentator in the fullest sense of the phrase. Yet, in the

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<http://www.elaweb.org.uk/sites/default/files/docs/ELA%27s%20response%20to%20the%20Consultation%20on%20the%20use%20of%20Live,%20Text-Based%20Forms%20of%20Communications%20from%20Court%20for%20the%20Purposes%20of%20Fair%20and%20Accurate%20Reporting%201008475450.pdf> accessed 30 November 2015

[16] Morgan Weiland, 'Congress and the Justice Dept's Dangerous Attempts to Define "Journalist" Threaten to Exclude Bloggers' (*Electronic Frontier Foundation*, 23 July 2013) <https://www.eff.org/deeplinks/2013/07/congress-and-justice-depts-dangerous-attempts-define-journalist-threaten-exclude> accessed 30 November 2015

[17] Lord Chief Justice, 'Lord Chief Justice's annual press conference – transcript' (*Judicial Office for England and Wales*, 6 December 2011) <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/News+Release/lcj-press-conference-06122011.pdf> accessed 30 November 2015, 26-27

[18] Joshua Rozenberg, 'The Twitter era of court reporting is here, despite the risk of prejudice' (*The Guardian*, 9 February 2011) <http://www.theguardian.com/law/2011/feb/09/twitter-court-reporting-stays> accessed 30 November 15

[19] Tim Crook, 'Use of Twitter and laptop wifi/email in court reporting, prohibition on photography and unauthorised use of sound recording', (*Goldsmiths University*, 2011) <http://www.ma-radio.gold.ac.uk/cmle/twittercourt.htm> accessed 30 November 2015

[20] Paul Lambert, *Courting publicity: Twitter and television cameras in court*, (Bloomsbury 2011).

[21] [2014] EWHC 255

absence of any official accreditation the court compelled him to make an application for permission, which was subsequently rejected.[22]

In the absence of official, extensive research, it is not altogether clear whether anecdotes such as this are isolated incidents or symptomatic of broader judicial resistance. Of course, the guidelines are just that and, as such, do not bind courts. In fact, paragraph 20 of the Guidance reserves the right for courts to withdraw permission to use LTBC at any time. It is also worth remembering that for every reluctant judge inimical to the intrusion of digital technology into the courtroom, there will likely be a progressive judge working as a counterbalance, keen to usher in a new era of court reporting. Saunders J for instance, helped make headlines with his laudable decision to permit the use of LTBC in *R v Coulson, Brooks and others*, a case fraught with the risk of contempt.[23]

Either way, however, the current approach appears to be characterised by a lack of uniformity. One consultation response rather prophetically warned that a system where applications for permission are submitted to the court would be highly undesirable, "not least because it would lead to inconsistences."[24] While a degree of irregularity is to be expected given the varying natures of trials, the distinction that the Guidance currently draws evidently operates awkwardly and inadequately in practice. Ultimately, any distinction between members of the public and representatives of the media or legal commentators is incredibly difficult to define in a practicable manner. Furthermore, failing to define it at all, as is currently the case in England and Wales, is just as unsatisfactory.

OPEN JUSTICE: MODERN COMPLIANCE TO TRADITIONAL IDEALS

Having considered the extent to which the distinction operates effectively in practice, its conceptual adequacy will be assessed. This task will be undertaken through the lens of the open justice principle – that is, the idea that legal processes should be performed as transparently as possible. By deconstructing it into three constituent parts, consideration will be given to how this traditional idea ought to function in the contemporary context.

SEEING JUSTICE BE DONE

The axiomatic expression of the open justice principle advanced in *R v Sussex Justices Ex parte McCarthy*,[25] states that it "is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done."[26] Public galleries and press reporting have traditionally functioned as the primary facilitators of this.[27] However, this may no longer be the case. Richardson has noted that public galleries only perform this function for "those members of the public who have the time, resources and inclination to travel to a court."[28] This has to be considered alongside the fact that the number of journalists employed

[22] Carl Gardner, 'Live-tweeting from the courtroom' (*Twitter,* 23 April 2015) <https://twitter.com/carlgardner/status/591364257322835968> accessed 30 November 2015
[23] Anoosh Chakelian, 'Why and how Peter Jukes live-tweeted the entire phonehacking trial' (*New Statesman*, 12 June 2014) <http://www.newstatesman.com/media/2014/06/why-and-how-peter-jukes-live-tweeted-entire-phonehacking-trial> accessed 30 November 2015
[24] James (n 9)
[25] [1924] 1 KB 256
[26] ibid 259
[27] Thompson (n 5)
[28] Ivor Richardson, 'The Courts and the Public' (1995) 11 *JJA* 1, 82

by traditional media outlets – the types of institutions that the Practice Guidance currently favours – has decreased dramatically in recent years. This has left 'reporting gaps' which need to be filled.[29] Given the myriad of platforms for information exchange that the internet and digital technology have engendered, the new generation of smartphone-wielding 'citizen journalists' may be able to fill these gaps via LTBC, allowing interested members of the public to gain access to hearings that would not otherwise be reported in popular media.

Such writers are remarkably well placed to perform this task. Bloggers, many of whom are so-called 'digital natives',[30] have the ability to diffuse vast amounts of information among potentially huge audiences at the press of a button. The benefits of this are clear when we consider the tight grip that the Internet and digital technology now has on our everyday lives. 100 per cent of 14-17-year-olds and 76 per cent of adults in the United Kingdom use the internet on a regular basis,[31] while 68 per cent of those adults do so via a mobile device.[32]

The central aim of the open justice principle is to ensure that the public have access to what happens in court (most of the time, at least).[33] Yet, the potential inconvenience of visiting a public gallery, coupled with the reduced number of journalists employed by traditional media outlets, threatens to hinder this fundamental goal. Citizen journalists have the ability to mitigate this problem, but ill-defined distinctions such as that which the Practice Guidance in England and Wales currently draws will cause issues for non-accredited reporters and, thus, impede them from doing so.

PROMOTING PUBLIC SCRUTINY

Promotion of public scrutiny has been identified by the likes of Thompson as a sub-principle of open justice.[34] Aptly summarised by Lord Diplock in *Home Office v Harman*,[35] it was noted that "justice is done in public so that it may be discussed and criticized in public."[36] The attainment of this goal is not only reliant on having access to information about what is happening inside the courtroom, but also ensuring that the information we receive is sound. In essence, in order to facilitate proper and effective public scrutiny the information on which we base our judgements needs to be first-rate.

As with most goods and services, one way of ensuring this is to encourage competition in the market. As any elementary economics textbook will confirm, where there are a variety of competing firms in a market there is an incentive for businesses to seek to improve the quality

[29] Mark Jurkowitz, 'The growth in digital reporting: what it means for journalism and news consumers' (*Pew Research Centre*, 26 March 2014) <http://www.journalism.org/2014/03/26/the-growth-in-digital-reporting/> accessed 30 November 2015

[30] This is a term coined by Prensky to refer to 'native speakers' of the digital language of computers, videos, social media and the internet. See Marc Prensky, 'Digital natures, digital immigrants' (*Marc Prensky*, October 2001) <http://www.marcprensky.com/writing/Prensky%20-%20Digital%20Natives,%20Digital%20Immigrants%20-%20Part1.pdf> accessed 30 November 2015.

[31] 'The Oxford internet surveys: internet use, behaviour and attitudes in Great Britain 2003-2015' (*Oxford Internet Institute,* 2015) <http://oxis.oii.ox.ac.uk/wp-content/uploads/sites/43/2015/01/OxIS-Brochure.pdf> accessed 30 November 2015

[32] 'Internet access – households and individuals 2014' (*Office of National* Statistics, 7 August 2014) <http://www.ons.gov.uk/ons/dcp171778_373584.pdf> accessed 30 November 2015

[33] There are clearly some types of court hearings, namely those concerning national security and minors that are with good reason kept out of reach of the public and the press

[34] Thompson (n 5)

[35] [1982] All ER 532

[36] ibid 549

of their product in order to attract more customers and increase their market share.[37] Competition is also highly desirable since it creates choice and diversity for consumers who are not forced into consuming one particular product from one particular supplier. The market for news is no different. The advent of new media has made it harder for traditional media organisations to monopolise the gathering and diffusion of news.[38] The likes of bloggers and citizen journalists now offer more competition to traditional outlets which should theoretically, improve standards of reportage, provide access to more diverse sources of information and incentivise innovation.[39]

Clearly this sort of competition may be immensely important as a safeguard for high quality, impartial reporting from the courts, which is imperative if we are to properly scrutinise the justice system. Sadly, competition in the courtroom reporting 'market' may be jeopardised by rules which leave bloggers and citizen journalists at a disadvantage to representatives of the 'traditional media' when trying to secure permission to use LTBC from the public gallery.

Further, while it is all very well to assert that susceptibility to public scrutiny is a desirable trait for a justice system to possess, it is instructive for us to query why this is the case. One reason is that it enables us to preserve citizens' rights to due process and ensure that judicial interpretations of the law are consistent and nonarbitrary. This is fairly self-evident. Another more expansive explanation is that such scrutiny is conducive to trust and confidence in the justice system. 'Trust and confidence' is a phrase that has unfortunately become hackneyed by virtue of its overuse in modern political discourses, also aided by the frequent conflation of both words with one another. Despite this, one should not underestimate the concept's lasting significance. Procedural justice theorists such as Tyler make compelling points about 'trust and confidence' that go right to the heart of the legitimacy of a state.[40] Such theories propose that legitimacy flows from public trust in institutions, by which the 'policed' see the 'police' as having earned an entitlement to govern.[41] If this is accomplished, state instruments of control will be regarded as having legitimate authority and will be better able to command compliance and cooperation from citizens.[42]

Research has shown that a degree of positive correlation exists between media coverage of justice processes and public trust in those processes, albeit with considerable reservations as regards the level of causality involved. In an analysis of a survey undertaken by EURO-JUSTIS ("a project designed to provide EU institutions and Member States with new indicators for assessing public confidence in justice")[43], Boda and Szabó found that media consumption was associated with higher levels of trust in the police and courts.[44] Furthermore, a recent study has shown that members of the public who are more exposed to national media (particularly

[37] Paul Heyne, Peter Boettke and David Prychitko, *The Economic Way of Thinking* (14th edition, Prentice Hall 2014)

[38] Peter Coe, 'The social media paradox: an intersection with freedom of expression and the criminal law' (2015) 24 *I&CTL* 1, 16

[39] Jonathan Peters and Edson Tandor Jr, '"People who aren't really reporters at al, who have no professional qualifications": Defining a Journalist and Deciding Who May Claim the Privileges' (*NYU Journal of Legislation and Public Policy Quorum*, 8 October 2013) <http://www.nyujlpp.org/wp-content/uploads/2013/03/Peters-Tandoc-Quorum-2013.pdf> accessed 30 November 2015

[40] Tom R. Tyler, *Why People Obey the Law* (2nd edition, Yale University Press 2006), Tom R. Tyler, 'Trust and legitimacy: policing in the US and Europe' (2011) 16 EJC 4, 254 and Tom R. Tyler, 'What is Procedural Justice?: Criteria used by Citizens to Assess the Fairness of Legal Procedures' (1988) 22 L&SR 1, 129

[41] Mike Hough and Mai Sato, 'Trust in justice: why it is important for criminal policy, and how it can be measured' (*Institute for Criminal Policy Research, Birkbeck, University of London,* June 2011) <http://www.icpr.org.uk/media/31613/Final%20Euro-Justis%20report.pdf> accessed 30 November 2015

[42] ibid

[43] <http://www.eurojustis.eu/> accessed 30 November 2015

[44] Zsolt Boda and Gabriella Szabó, 'The media and attitudes towards crime and the justice system: a qualitative approach' (2011) 8 Eur J Criminal 4, 332

newspapers) are on average more confident in the fairness of the justice system.[45] Saliently, in the same report it was noted that the achievement of 'sufficient reach' to the public in this regard remains difficult when left solely to mainstream media.[46] This would appear to echo the sentiment discussed above, concerning the ability of citizen journalists to fill gaps in reporting created by declining mainstream media activity.

To use the words of the Chief Justice of the Supreme Court of Canada, Beverley McLachlin: "Fundamental to maintaining and building confidence in the judiciary is publicizing what judges do."[47] While we ought to be cautious in making generalisations about the causal relationship between the media and levels of public trust, it would be fair to say that an expansion of coverage of courtroom proceedings would at worst, have a negligible effect on public confidence in the justice system and at best, plausibly serve to enhance it.

SAFEGUARDING THE PROPER ADMINISTRATION OF JUSTICE

The predominant argument in favour of tightening restrictions on the use of LTBC in the courtroom has been the prevention of interference with the proper administration of justice. Viscount Haldane noted in *Scott v Scott*[48] that although the public administration of justice is a cardinal value of the English legal system, it is subject to "the outcome of a yet more fundamental principle that the chief object of Courts of Justice must be to secure that justice is done."[49]

When this reasoning is applied to the present case, three key issues can be discerned, with the first two less compelling than the third. First, there is the argument that the use of technology in the courtroom creates potential for physical (or, what we might call 'logistical') disruption to the administration of justice. During the consultation process this point was transposed into the debate about whether the Practice Guidance ought to distinguish between the public and the media, with one response suggesting that a benefit of such an approach would be that it keeps the number of people using LTBC 'manageable'.[50]

This point is not altogether convincing, for a number of reasons. Firstly, it presupposes that a relaxing of the rules would 'open the floodgates' to an unmanageable number of people using LTBC, but this seems relatively unlikely. It is hard to envisage swarms of citizen journalists overrunning the public galleries all of a sudden. Secondly, it is not actually clear what is meant by 'manageability' in this context. Given that the courts do not actively monitor in real-time what journalists are writing, one would imagine that any increase to the administrative burden of court staff would be minimal. 'Manageability' may refer instead to the risk of disturbance to court proceedings, with the potential for phones and laptops to bleep and buzz accidentally. However, this is an easy threat to contain, particularly given the discreet and convenient nature of modern technology. In the case of television cameras (which one might generally assume to have a greater propensity for disturbance than mobile phones or laptops), the Supreme Court of the United Kingdom has embraced them with very little adverse consequence. As Lady Hale observes, those taking part in the proceedings are seldom even conscious of the presence of

[45] Mike Hough, Ben Bradford, Jonathan Jackson and Julian Roberts, 'Attitudes to Sentencing and Trust in Justice: Exploring Trends from the Crime Survey for England and Wales' (*Institute for Criminal Policy Research*, 2013) <http://www.icpr.org.uk/media/34605/Attitudes%20to%20Sentencing%20and%20Trust%20in%20Justice%20(web).pdf> accessed 30 November 2015, at 44

[46] ibid 58

[47] Chief Justice of Canada Beverley McLachlin, 'The Relationship between the Courts and the News Media' in Patrick Keyzer, Jane Johnston and Mark Pearson (eds), *The Courts and the Media* (Halstead Press 2012) 26

[48] [1913] AC 417

[49] ibid 437

[50] Bromby (n 9)

cameras.[51] Similarly, empirical research conducted over the course of a year has led the Supreme Court of Florida to conclude that technological advancements have reduced the size and noise of equipment to such a point that they "can be employed in courtrooms unobtrusively."[52] Overall, opposition to a relaxing of the rules governing LTBC use in the courts on the basis of minimising physical disruption is somewhat feeble.

A further argument to be anticipated against the use of LTBC in the courtroom pertains to the potential for interference with the privacy rights of litigants. Though this is not necessarily a new risk (the names of the parties have been published in the modern English law reports since they commenced publication in 1865), advances in digital technology have arguably increased the power and immediacy of such reporting.[53] It might therefore be suggested that this heightened interference with individual privacy undermines due process rights and, by extension, the proper administration of justice. However, this too is an unconvincing argument and one which is easily dismissed when the relevant jurisprudence is applied. In the UK, citizens are afforded privacy protections by virtue of the Human Rights Act 1998 and the European Convention on Human Rights. This right to respect for one's private life is not absolute and may be interfered with by a public authority where doing so is necessary in a democratic society.[54] The courts have interpreted this qualification as suggesting that any interference must correspond to a pressing social need and be proportionate to the legitimate aim pursued.[55] A prima facie analysis of the present case quickly tells us that any challenge on privacy grounds would likely fail given the social importance of open justice that was outlined in the previous section. It is incredibly hard to imagine any court viewing the use of LTBC as disproportionate to the legitimate aims of open justice, particularly when one also considers the margin of appreciation afforded to states.

The third, and more credible, threat posed to the proper administration of justice by the use of LTBC is the risk of contempt. It was noted at paragraph 4.6 of the Consultation Paper that "trials may have to be stopped and convictions may be found to be unsafe if it emerges that members of a jury were exposed to prejudicial material or commentary on the internet." Received wisdom suggests that representatives of traditional media outlets (as opposed to 'bloggers') do not pose a significant danger to the administration of justice due to their superior understanding of contempt laws. This view was very much reflected in the eventual guidelines.

While it may be true that the risk of contempt is greater in the case of non-accredited journalists, the risk is arguably only marginally higher. Dominic Grieve, former Attorney General of the United Kingdom, has alluded to the fact that most bloggers pose a minimal threat to the administration of justice.[56] This cannot be stressed enough. Citizen journalists and the like ought to be trusted to take pride in their work such that they will take the necessary steps to ensure compliance with the law. Additionally, for those less inclined to take such steps it is an opportunity to expand the appreciation and understanding of contempt law. There are very inexpensive ways of doing this, courts may consider issuing brief guides to avoiding contempt for bloggers.[57] Alternatively, if one wished to adopt a slightly more forthright

[51] Owen Bowcott, Maya Wolfe-Robinson and Cameron Robertson, 'Video: Supreme Court: Does it Deliver Justice?' (*The Guardian*, 25 October 2011) <www.guardian.co.uk/law/video/2011/oct/25/supreme-court-deliver-justice-video> accessed 30 November 2015

[52] Re Petition of Post-Newsweek Stations, Florida 370 So 2s 764 (1979).

[53] Thompson (n 6) at 226-227

[54] Article 8(2) European Convention on Human Rights

[55] *Olson v Sweden*, 11 E.H.R.R. 259 (1989) [67]

[56] Dominic Grieve, 'Full text: Dominic Grieve on the press and contempt of court' (*Journalism,* 1 December 2011) <https://www.journalism.co.uk/news/full-text-dominic-grieve-on-the-press-and-contempt-of-court/s2/a546997> accessed 30 November 2015

[57] Such guides have already been produced and published online. See, for example, Adam Wagner, 'Avoiding contempt of court: tips for bloggers and tweeters' (*UK Human Rights Blog*, 7 March 2011)

approach, it is not unthinkable that courts might have notices displayed in public galleries informing court-goers of the potential penalties for contempt offences.

Moreover, it should be noted that the issue of contempt in the digital age is a larger issue that will need to be properly addressed by the judiciary on a broader scale sooner or later. Excessively strict regulation of digital court reporting, as one author has argued, "misses the real problem"[58] and serves only to throw the baby out with the bathwater. It simply must be conceded that nowadays there is a heightened risk that jurors will have read or seen something potentially prejudicial to the defendants they are trying. Rather than seeking to remedy this by restricting the information flow, we should instead be ensuring that judges stress to jurors the importance of basing their verdict on only the evidence they hear in court.[59] *Attorney-General v Fraill*,[60] a case involving a juror who contacted a defendant via Facebook in the midst of the trial is just one example of the wider incidence of issues facing the administration of justice in the age of digital technology. It is important that the potential contribution of non-accredited journalists using LTBC in the courtroom to this broader problem is not overstated.

It is submitted that, on balance, the distinction drawn by the Practice Guidance between members of the public versus representatives of the media and legal commentators does not promote the open justice principles. The current approach may be injurious to the fundamental goal of ensuring justice is seen to be done, while compromising the potential benefits of increased competition to our ability to properly scrutinise the justice system and by extension, enhance public confidence in judicial institutions. While the threat posed to the proper administration of justice is enough to warrant some caution, it is not sufficient to justify draconian approaches to LTBC use in the courtroom.

A THIRD WAY: THINKING ABOUT REFORM

The primary object of this article has been to evaluate the adequacy of drawing a distinction between members of 'the public' and members of 'the media' in rules regulating the use of live, text-based communications in the courtroom. However, it would be remiss to simply highlight the flaws in such an approach without beginning to formulate some kind of feasible alternative. While the present distinction is found wanting both practically and conceptually, the danger of interference with the proper administration of justice is not insignificant. Lambert has rightly noted that the embrace of such technology in the courtroom should be done incrementally,[61] and it would certainly be irresponsible to leap from the current position to one where unfettered use of LTBC is permitted.

Fortunately, there might be a third way. We can perhaps learn something from the American experience, where the question of who ought to benefit from journalistic shield laws has given rise to debate about how best to define such groups. While the Lord Chief Justice's Practice Guidance represents an attempt to differentiate on the basis of occupation (looking to the status of the *actor*, rather than the *activity*), an approach visible in some US jurisprudence offers an alternative. The US federal courts have on several occasions held that a distinction between the

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<http://ukhumanrightsblog.com/2011/03/07/avoiding-contempt-of-court-tips-for-bloggers-and-tweeters/> accessed 30 November 2015

[58] Adriana Cervantes, 'Will Twitter Be Following You in the Courtroom?: Why Reporters Should Be Allowed to Broadcast During Courtroom Proceedings' (2011) 33 Hastings Comm/Ent LJ 1, 154

[59] Joshua Rozenberg, 'Judges will decide who can tweet from court' (*The Guardian*, 14 December 2011) <http://www.theguardian.com/law/2011/dec/14/judges-decide-who-tweets-from-court> accessed 30 November 2015 and Emily Janoski-Haehlen, 'The courts are all a "twitter": the implications of social media use in the courts' (2012) 46 Val UL Rev 43

[60] [2011] EWCA Crim 1570

[61] Lambert (n 17)

'institutional press' and other speakers is unworkable.[62] Benkler has also identified a number of federal appellate decisions which further illustrate this reluctance to draw the line.[63] Instead, these courts have tended to look at the *activity* rather than the *actor*, by contemplating whether or not an individual has engaged in an act of 'journalism' – a wholly different question to whether or not an individual would be occupationally considered a journalist or representative of the traditional media.

This reasoning can be traced back to *Von Bulow v. Von Bulow*,[64] a case in which a paralegal was blocked from exercising journalistic privilege to withhold her source because the author gathered information initially for purposes other than to disseminate information to the public. The corollary of this, the court advanced, was that:

An individual successfully may assert the journalist's privilege if he is involved in activities traditionally associated with the gathering and dissemination of news, even though he may not ordinarily be a member of the institutionalized press.[65]

Subsequent cases in other US appellate courts have followed this reasoning.[66] Thus, a path has been forged whereby the availability of journalistic privilege may hinge on the existence of an intention to engage in journalism (the defining characteristic of which is the gathering and dissemination of information for the public). The focus of the courts is on the intrinsic nature of an individual's activity, rather than an individual's access to traditional platforms of publication. Put differently, the aim "is to protect not the journalist but the act of journalism."[67] This sort of approach is welcome in the modern context where platforms for newsgathering shift so frequently.[68]

Though the terminology and context of these decisions may differ from the matter at hand, the general idea can no doubt be transposed. That is, rather than using rules or guidelines which turn on whether or not an individual satisfies a certain job description, it may be preferable to distinguish on the basis of the activities they are engaged in. In the present case this would mean, for instance, applying the presumption of permission to all individuals who are seeking to use LTBC for the purposes of gathering and disseminating information about the court proceedings to the wider public. This would enable inclusion for citizen journalists and bloggers who may suffer under the current regime while still precluding an unregulated free-for-all in the public galleries. While such an approach is clearly not infallible and would require further research and deliberation, it may represent a viable option worthy of contemplation.

CONCLUSION

The aim of this contribution is not to melodramatise the situation we find ourselves in. Admittedly, the distinction that the Practice Guidance draws between members of the public and representatives of the media or legal commentators may in practice affect only a small number of would-be courtroom reporters. Nevertheless, any provision that creates an imbalance

[62] See, for example, *Obsidian Finance Group LLC v Cox* (No. 11-0057, 2011 WL 5999334 (D Or Nov 30, 2011)
[63] Benkler (n 11) at 359
[64] 811 F 2d 136, 146 (2d Cir. 1987)
[65] ibid 142
[66] See, for example, *Shoen v. Shoen* 5 F.3d 1289 [9th Cir.1993] and *In re Madden* 151 F 3d 125 [3d Cir 1998].
[67] Jennifer Hickey, 'Congressional Attempt to Define Journalists Sparks Outrage' (*Newsmax*, 6 October 2013) <http://www.newsmax.com/US/feinstein-journalist-define/2013/10/06/id/529491/> accessed 30 November 2015
[68] Josh Stearns, 'Acts of journalism: defining press freedom in the digital age' (*Freepress*, October 2013) <http://www.freepress.net/sites/default/files/resources/Acts_of_Journalism_October_2013.pdf> accessed 30 November 2015

between two categories of citizens is worthy of scrutiny and this debate will be of even greater salience if the decision is ever made to elevate the regulation of courtroom LTBC use onto a statutory footing. We can also be certain that this will not be the last time the judiciary will have to implement rules on the use of novel forms of digital communication in the courtroom and so it is hoped that some of the points in this discussion can be extrapolated to aid the evaluation of future policies.

Characterised by inconsistency and arbitrariness as to who falls under the presumption of permission, the current position in the English and Welsh courts appears practicably unviable. In opting to create such a distinction, the judiciary has put itself into something of a catch twenty-two, since it is nigh on impossible to adequately define the scope of the rule yet failing to do so may be just as problematic. Conceptually, such a distinction fares no better. It fails to promote open justice principles by hampering the aim of ensuring justice is seen to be done, while also compromising the potential benefits that greater competition in the court reporting 'market' would bring to our ability to scrutinise and, ultimately, trust the justice system. The risk of interference with the proper administration of justice is cause for caution, but, on balance, insufficient to justify the distinction.

These arguments, however, only take us so far. They tell us that narrow approaches to the question of who can use digital technology to report from the courtroom are both practicably and conceptually inadequate, but they do not identify the optimal way of regulating these phenomena. This question will require further discussion, and the third section of this essay is an attempt to begin that debate by tentatively proposing an approach that has been espoused in parts of the United States. Federal appellate courts, when faced with the question of who ought to benefit from the protections of shield laws and press privilege, have increasingly focused not on job descriptions ('legal commentator', 'representative of the media'), but rather on the nature of the reporting and whether or not it constitutes 'journalism'. Applied to LTBC, this type of strategy would offer valuable latitude for the inclusion of citizen journalists and bloggers under the presumption of permission and may represent an altogether more adequate position. Consideration of this and other alternatives cannot occur meaningfully, however, until there is a broader appreciation of the practical and theoretical shortcomings of the narrow approach currently employed in England and Wales (and elsewhere). Only then can we ensure that future guidance on the matter fully capitalises on the multitude of potential benefits that digital technology, new media and citizen journalists have to offer to open justice and contemporary courtroom newsgathering.