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## **THE DEMISE OF THE TRADITIONAL JURY AND JURY IMPARTIALITY WITH PARTICULAR FOCUS ON MEDIA INTRUSION**

***Jessica Clarke***<sup>1</sup>

### **Abstract**

In a world where 24 hour news and social media are ingrained into people's everyday lives it can be difficult to uphold traditional values and practice. This is particularly pertinent in respect of the impact of such factors on the fundamental system of trial by jury and its impartiality. This article examines the issue of mass media and its influence and impact on jury decisions.

**Keywords:** trial by jury, jurors, mass media, social media

### **Introduction**

Thomas Jefferson stated that; 'Trial by jury is part of the bright constellation which leads to peace, liberty and safety'. In a world where 24-hour news and social media are ingrained into peoples' everyday lives, it is difficult to uphold traditional values and practice. Most importantly, these factors can have a detrimental impact on trial by jury within the criminal courts, specifically affecting the impartiality of the jury. The development and importance of the right to jury trial is something which can be extended throughout history. The basis of the right can be connected to the idea that rights can apply to every individual, which stems from prominent philosophers, such as John Locke. Fenwick suggests that; 'Locke thus introduced the idea... that the overriding purpose of the state is the securing and protection of its citizens basic liberties'.<sup>2</sup> Locke believed that human rights were to be classed as natural laws, which were not dependent on legislation to make them applicable. However, the European Convention on Human Rights places a positive obligation on the state to protect all individuals and all their rights encompassed within that. Article 6 provides for the protection of an individual's right to a 'fair trial'. It may be considered that the common law trial was the first time that there was practical application of human rights. Particularly important, to the issues raised throughout this paper, is the section within Article 6 which states; 'press and public may be excluded from

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<sup>1</sup> Jessica graduated with a 2:1 LLB Hons degree and is currently planning to undertake the Legal Practice Course.

<sup>2</sup> Fenwick, H., *Civil Liberties and Human Rights*, 5<sup>th</sup> edition, (2007), pp.5-9.

all or part of the trial... in special circumstances where publicity would prejudice the interests of justice'. However, this raises the issue, of how publicity is regulated when it is not directly controlled within the courtroom. Article 6 does not alter how trials are conducted or the basic principles that the criminal trial process is based upon.

When discussing the right to a fair trial, it is crucial to consider what is meant by the term 'fair', and how it has developed as a vital part of the English Criminal Justice System. The term 'fair' relates directly to the use of a jury within a trial setting, and fundamentally allows for a more empathetic approach to be adopted. Langford writes that 'fair' as a concept has changed and developed through time confirming that the first reference made towards a 'fair trial' within English law was in 1623; 'when they had been convicted in fair trial... then to have adjudged them according to the law'.<sup>3</sup> Langford focuses on the changing nature of 'fairness' between 1623, to a more recent 2005, by reviewing thousands of case documents from the Old Bailey. Consequently, he confirms that 'fair trial' is now considered on a 'procedural fairness' approach which started in the nineteenth and twentieth centuries. This means that the criminal process must be equal to all individuals involved leading back to the problem of protecting all parties from outside influence.

When something is considered legally 'fair' it has been ensured that there is impartiality and that all procedures have been effective. The importance of what is considered 'fair' by the public, should not be underestimated, and it appears that the consensus throughout history is that 'fairness' can be achieved using a jury. Research carried out in 2009 for the Ministry of Justice found that; 'the fact that the right to a fair trial by jury attracted as much support as the right to expeditious hospital treatment underscores the strong public attachment to trial by jury'.<sup>4</sup> Subsequently this opinion was reinforced during a speech on the defence of the jury trial in 2013 when Dominic Grieve QC commented; 'The protection of historic freedoms through the doctrine of trial by jury... it's my firm view that trial by jury provides a safeguard in a free society'<sup>5</sup>.

In 1956 Lord Devlin described the common law jury as; 'more than one wheel of constitution: it is the lamp that shows that freedom lives'<sup>6</sup>. This paper considers how media is having an ominous influence on the jury. Highlighted throughout, is the pressing issue of mass media

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<sup>3</sup> Langford, I., 'Fair Trial: The History of an Idea', 8, (2009) *Journal of Human Rights*, p.37-52 at p.38.

<sup>4</sup> Roberts, J., Hough, H., 'Public Opinion and the Jury: an International Literature Review', Ministry for Justice, 2009.

<sup>5</sup> The Rt Hon Dominic Grieve Q.C, 2013, <https://www.gov.uk/government/speeches/in-defence-of-the-jury-trial>.

<sup>6</sup> Hon Sir Devlin, P., 'Trial by Jury', The Hamlyn Lectures, 8<sup>th</sup> series, 1956, at p.164.

and the interaction this has with the internet, it also considers to what extent are these factors to blame for the downfall of juror impartiality. The prominence of social media is scrutinized and the impact which it may have on a juror's decision and the repercussions of this, are discussed. The research concludes that the traditional trial by jury is exposed to a substantial amount of negative influence, and that current law is crumbling under the pressure exerted on it by the media. Subsequently, this may mean that the 'lamp that shows that freedom lives', may be darkening by the ever-increasing presence of the media.

## **1 Pre-trial Publicity and Risk of Creating Bias**

Taken from a report from the Reuters Institute for the Study of Journalism, it was found that; 'more than half of online users... say they use social media as a source of news each week...'<sup>7</sup> This sort of finding may prove detrimental to the importance of the beginning of a criminal trial requiring a level playing field for all the individuals in the courtroom to start impartially and with complete focus. Pre-trial publicity, through publications in newspapers, news reports and online reports, is effecting the fundamental principles of a fair trial. Because of the evolving nature of 'news', and how it is at everyone's fingertips, it is almost impossible to regulate good news from 'bad' or 'untrue' news. Smith confirms that newspapers are not just the traditional sense of the word but that it also encompasses 'online news'. He describes pre-trial publicity as a; 'catalyst for disquiet'.<sup>8</sup> Arguably, this is a distortion of how damaging this kind of publicity can be to the conscientious nature of a criminal trial. It is important to consider whether the regulations put in place, to mitigate the damage caused, are effective in a modern society. More pertinent is the question, how does this pre-trial publicity effect the decision of a juror?

It is necessary to examine the confusing and conflicting development of pre-trial publicity and its effect, because even within the information which is truthful and useful within the media, it would be wrong to conclude that an everyday normal person could decide which information could 'taint' a future trial. Therefore, jurors, as ordinary members of the public, may not reach an impartial decision, because of the knowledge they have gained before entering the courtroom. Hoult comments; 'a growing part of the problem is the publication of rumours and stories on the internet'.<sup>9</sup> Within his article, the Attorney General Lord Goldsmith QC is quoted regarding his worries that the reporting on major cases may influence a juror's decision. Conversely, in the case of *R v Kray* Lawton J states; 'The drama of a trial almost always has

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<sup>7</sup><http://www.digitalnewsreport.org/>.

<sup>8</sup> Smith, A.T.H., 'Repositioning the Law of Contempt: The Criminal Justice and Courts Act 2015', (2015), *Criminal Law Review*.

<sup>9</sup> Hoult, P., 'Contempt of Court Act: Restraining Influence', (2003), *Law Society Gazette*, p.25.

the effect of excluding from recollection that which went before'.<sup>10</sup> This comment may reflect the era that this case was heard in however, as the case was tried in 1969, and so professional opinion may not have shifted to releasing the damaging nature of publicity. These comments do reflect that there is a clear divide with the extent to which people think there is a problem with pre-trial publicity, with some academics fully supporting the idea that there is a clear damaging effect. Whilst others have a more optimistic view on the court system and process, presuming that the process negates any damage which pre-trial publicity may have caused.

There have been attempts within the UK to limit the scope with which the media can influence a trial, both in legislation and in common law. Particularly pertinent is s.2(2) of the Contempt of Court Act 1981 as it relates directly to publications made by the media; 'a publication which creates a substantial risk that the course of justice in the proceedings will be seriously impeded or prejudiced.' In another recent comment by the Attorney General Dominic Grieve he directly addresses the problem that publications from the media effect the degree to which the jury can carry out their function properly. He highlights the importance of the legislation commenting;

Far from being a restrictive enactment, the 1981 Act was intended to shift the balance of the law in favour of freedom of speech. It sought to clarify what could and could not be published about legal proceedings.<sup>11</sup>

This shows that the legislation sought to protect the rights of all the individuals involved, which in turn, protects the fundamental principles of the right to a fair trial. The idea of 'substantial risk' is a difficult one to ascertain, as it may change depending on the case. Similarly, it is impossible to know what will influence the sitting jury. This issue is explored in the case of *Hislop*<sup>12</sup> where it was decided that there was a risk that potential jurors on the trial would have been influenced by the publication. On the contrary, *Bunn v BBC*<sup>13</sup> concluded that the threat posed to the court proceedings was not a 'substantial risk', because they considered the distance between the publication and where the court proceedings were being conducted.

Common law contempt deals with any other action which intended to interfere with the administration of justice, and therefore insists on intent being necessary. Arguably, this element protects publishers from being prosecuted many times, as it will be difficult to prove intention for multiple publications. As a result, it could send mixed messages about whether

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<sup>10</sup> *R v Kray* (1969) 53 Cr App R 412 at para.415.

<sup>11</sup> Speech: 'Trial by Google? Juries, Social Media and the Internet, (2013), <https://www.gov.uk/government/speeches/trial-by-google-juries-social-media-and-the-internet>

<sup>12</sup> *Attorney General v Hislop* [1991] 1 All ER 911, CA

<sup>13</sup> *Bunn v BBC* [1998] 3 All ER 552

this instrument is effective in protecting the right, or whether it guards bias and allows it to continue influencing the court setting. The law of contempt is complicated in its nature because it teeters on the line between the right to a fair trial, and the right to freedom of speech. Carney highlights this frail balancing act by stating; 'if tweaked... the law of contempt would lead either to free and unfair comment or a stale reporting of facts'.<sup>14</sup> Because of its complicated nature, there have been significant amounts of case law which have attempted to construe when a publication is detrimental to court proceedings, and in particular the jurors' impartiality. Case law supports the notion that pre-trial publicity has a damaging effect on the impartiality of the court, however, there are variations in opinion on the extent to which it influences decisions. Illustrating this is the case of *ex parte The Telegraph PLC*, where Lord Taylor CJ concluded that the general nature of a criminal trial is to focus the jury on the facts of the case, as presented in court:

'In determining whether publication of matter would cause a substantial risk of prejudice to a future trial, a court should credit the jury with the will and ability... to decide the case only on the evidence before them'<sup>15</sup>.

This is, of course, ideal in theory, however it places a high burden on the juror to be able to forget any bias which they may have already developed, or disregard any information which they have heard about the defendant, or the case in general. This may be an ideal which, cannot be implemented because it is almost impossible to limit the extent that media effects different individuals.

It would be wrong to conclude that an average juror would be able to set aside what pre-trial publicity is damaging to a case, as they may not be aware of what information may lead to bias. This also relates to the idea that people may not consciously take in the publicity which a case is receiving but it will still be in the back of their mind. Brudy and Finkel<sup>16</sup> conclude that pretrial publicity is dangerous because it reaches the jurors before the legal system does. Encompassing all of this, is the idea that lay persons may be more susceptible to influence due to the media than a legal professional, such a trial judge. This problem is directly addressed by Lord Bridge in *Re Lonrho PLC* where he stated; 'if [a jury is involved] the possibility of prejudice by advance publicity directed at an issue which the jury will have to decide is obvious'.<sup>17</sup> This raises the problem that if a jury's verdict is influenced by anything that is said outside of the courtroom, the verdict would be biased and 'unfair'. This may be

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<sup>14</sup> Carney, D., 'The Accused, the Jury and the Media', *New Law Journal*, (1995), vol.145.

<sup>15</sup> *R v Central Criminal Court Ex parte The Telegraph PLC* [1993] 1 WLR 980 para.98.

<sup>16</sup> Brudy, K, Finkel, N., 'The Drama of the Courtroom: Media Effects on American Culture and Law', (2006), *Psychology Honours*

<sup>17</sup> *Re Lonrho PLC* [1990] 2 AC 154.

perpetuated by ill-informed media coverage on a case, which then pressures the jurors into making their decision. In other respects, some credit must be given to the jury being able to deliver a true and just verdict, solely based on the facts presented, and the guidance given in court. These factors show the bond between the jury and the media, and without the media acting responsibly, it will make the jury's job more complex. Carney highlights this point; 'The media have a role as a public watchdog... some judges have expressed the fear that the media's investigative journalism will... create trial by the media'<sup>18</sup>.

The idea that the media has an important role within court proceedings cannot be overlooked. As most members of the public have not attended a criminal trial, or any other legal proceedings, it is argued by Fenwick and Philipson<sup>19</sup> that it is up to the media to report on affairs accurately. As discussed by the Select Committee on Constitution<sup>20</sup> opinions can stem from ignorance on how the justice system works, and also public attitudes will influence this. This shows the importance of the media reporting meticulously on all proceedings, in order to educate the public properly. In fulfilling this function, they will be ensuring a fair trial, because people will know what to expect. The report also concludes that that the media, especially the popular press, indulges in distorting coverage of the judiciary leading to irresponsible coverage. It may appear as though the press does not understand how vital their role may be, or they may not care as they are only there to report what they believe is necessary.

Alongside considering what has been published before the trial has started, and how that will affect the jurors, is the 'fade factor'. This concept considers how long ago the information was published in the media, if at all, and how damaging this may be to creating bias to any potential jurors on the case. As Simon Brown LJ<sup>21</sup> states; 'unless a publication materially effects the course of the trial... it is unlikely to be vulnerable to contempt proceedings under strict liability rule'. Even though this case focuses on how something will not create bias, it also brings in the aspect that there may be residual impact on jurors if something has been published. *Attorney General v Hislop*<sup>22</sup> also examined the idea of the fade factor, and to what extent publications can create a risk to fair trial proceedings. It was considered that a publication during a trial was likely to be more damaging to the trial itself, but a publication from three months previous was not ruled out as potentially creating bias. Therefore, it suggests an element of deciding whether bias has been created on a case by case basis. However, some

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<sup>18</sup> Carney, 'The Accused, the Jury and the Media'.

<sup>19</sup> Fenwick, H., and Philipson, G., *Media Freedom Under the Human Rights Act*, (2006), pp.173-197.

<sup>20</sup> House of Lords Select Committee on Constitution *Judiciary, Media and Public*, 6<sup>th</sup> Report Chapter 4, (2007).

<sup>21</sup> *Attorney General v Unger* (1998) EMLR 280 at 319.

<sup>22</sup> *Attorney General v Hislop* [1991] 1 All ER 911, CA.

may take the view that the fade factor no longer exists, because news from the media is constantly being recycled online and so never 'fades away'. Dominic Grieve has a more confident approach to this concept;

Some feel our present legislation is out of date with a 24-hour news culture in which material can be published and accessed by the world at large with the click of a mouse... I will go on to explain I disagree with that view point and consider that the same editorial rigour...should continue to apply to the traditional printed press, should also apply to online publications.<sup>23</sup>

The influential effect of pre-trial publicity is only escalated by the prominence of social media. This is because a much news gets spread throughout social media sites where a lot of individuals read their 'news'. In statistics taken from Ofcom's<sup>24</sup> news consumption survey for 2017, among people who said they used social media, 47% said that they used it for news. Furthermore, 27% of people said that they went to Facebook for news, which was the second most popular source for online news. This can be considered as a worrying statistic because there is no way of filtering 'fake' news before a vast amount of people have read the news story. Adding social media as a news outlet, further complicates matters, because it is not only traditional news outlets which have to be considered. It shows the quickly evolving nature of social media, and how influential it can, additionally, showing how diverse it is, which may be hard for the legal system to keep up with.

## **2 The Conflict of Right to a Fair Trial and Free Press**

The risk of creating trial by media, is one of the most destructive factors facing the impartial decision of a jury. The higher profile the case, the more likely it is to attract media attention, and therefore be less likely to receive a fair trial. This directly correlates to the idea that 'trial by media' relates to something which has been reported on, more frequently than an average case, and considers the impact of all kinds of media. It is almost impossible for potential jurors to not take notice of some of this publicity, and so it is important to consider whether 'high profile' cases can still receive a fair trial. Gabriel<sup>25</sup> discusses that many different factors may impact on a juror who is sitting on a high-profile case. These include; that a juror may not have acknowledged their own research, and that they may not be able to distinguish between impressions created in court, and those pre-conceptions which have already been created by adverse publicity. Moreover, Fenwick and Philipson observe that tabloid reporting of high profile arrests and trials was often inaccurate, biased and sensationalized commenting; 'The

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<sup>23</sup> Dominic Grieve, 'Speech: Contempt of Court: Why it Still Matters'.

<sup>24</sup> [https://www.ofcom.org.uk/\\_\\_data/assets/pdf\\_file/0016/103570/news-consumption-uk-2016.pdf](https://www.ofcom.org.uk/__data/assets/pdf_file/0016/103570/news-consumption-uk-2016.pdf)

<sup>25</sup> Gabriel, R., 'This Case is Brought to You by...: How High- Profile Media Trials Affect Juries', (2000), *Loyola Los Angeles Law Review*, at p.732



cult of the celebrity also provides a strong motivation for the less responsible sections of the press to publish sensational details of celebrity trials.<sup>26</sup>

It can be assumed by these academic comments, that they believe the media are not taking their role of 'influencers' seriously, and insist on reporting on the stories which make more money, with no thought about the consequences to the individual. In the setting of a trial, a celebrity may not be the normal idea of a 'celebrity', but may include people who have received vast publicity for their crimes. This is intensified by the sensationalism of murderers within all forms of media, from film, to everyday newspapers. Uscinski reflects this opinion, by stating that for years scholars have concluded that people prefer negative news over positive, and that negative headlines attract more readers. If the media do not report accurately and honestly on proceedings, then this is at the detriment of the right, and equally will project a view of the criminal court process which may not be accurate. Cram elaborates on this; 'for the overwhelming majority of persons, the media remain their principle source of information about the functioning of the courts'<sup>27</sup>.

In a research report carried out by the Ministry of Justice<sup>28</sup> it was found that in high-profile cases people were seven times more likely to recall media coverage of the case which they were trying, than people serving on standard cases. High-profile cases highlight the problems between the delicate balance of freedom of the press and the protection of the right to a fair trial. It is always going to be near impossible to ensure that there is no conflict between key concepts within a working legal system, however, the conflict which emanates between the concept of a 'free press' and the right to a fair trial, is distinctly difficult to resolve. Brems<sup>29</sup> comments that where a fair trial cannot be guaranteed, the other rights of all individuals lose much of their value.

When considering the impact of the media on a criminal trial, and the extent to which it can intervene, it is important to discuss the legislative stance. Firstly, under Article 10(2) ECHR it states that 'the freedom of expression may be subjected to such restrictions as are necessary in a democratic society for maintaining the authority and impartiality of the judiciary'. In comparison, under s.2(3) of the Contempt of Court Act 1981, it is stated that; 'media coverage

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<sup>26</sup> Fenwick, and Philipson, *Media Freedom Under the Human Rights Act*, pp.173-197.

<sup>27</sup> Cram, I., *A Virtue Less Cloistered: Courts, Speech and Constitution*, (2002), p.13.

<sup>28</sup> Thomas, C., Ministry of Justice, *Are Juries Fair?*, Ministry of Justice Research Series 1/10, 2010, <https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/are-juries-fair-research.pdf>

<sup>29</sup> Brems, E., 'Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms', (2005), 27, *Human Rights Quarterly*, at p.298

of active legal proceedings must not create a substantial risk of serious prejudice to the case by unduly influencing jurors'. The statutory provision may seem harsh in the light of 'freedom of speech', however, it does support the ECHR stance, and therefore, the idea that the protection of the right to a fair trial is fundamental to the workings of a criminal trial. Barendt<sup>30</sup> comments on this support of the right to the fair trial, 'it is not surprising that it has often been given precedence when it conflicts with the claims of the media to attend and report legal proceedings or other free speech interests.' Fenwick and Philipson<sup>31</sup> agree to some extent with the comment made by Barendt but suggest that restrictions on coverage on a case can be justified on the basis that in covering the case they would be undermining democratic values. The freedom of speech surrounding coverage of a case could attack crucial values not uphold them, however, it should not mean that the press is completely suppressed. Similarly, they also state that where there is a direct threat to the fair trial of an individual, and this emerges from a publication, the guarantee under Article 6 will prevail.

Regardless of the fact that the media can have a very damaging effect it would be even more harmful to restrict the media completely, as highlighted by Dominic Grieve, 'Parliament did not intend that juries, or witnesses in the case, or even the judge, should be subject to an automatic media blackout.'<sup>32</sup> There is case law which supports this notion and highlights the importance of an equilibrium between the two rights. In the case of *Felixstowe Justices*<sup>33</sup>, Lord Justice Watkins highlights the importance of allowing reports on proceedings because it ensures a 'public element' of the trial. On the other hand, it could be suggested that the 'public element' is fulfilled by the use of a jury, and therefore the need for media publicity is gratuitous. In *News Verlag*<sup>34</sup> it was considered that they went further than was necessary to protect the defendant against defamation or against violation of presumption of innocence. In further confirmation of Lord Justice Watkins' comments, the case of *AG v Levens Magazine*<sup>35</sup> recognized the importance of court reporting, because the court should be held responsible for the actions it carries out. Overall, the cases highlighted that the importance of the press being able to report on proceedings is crucial to ensuring the criminal trial process is in the 'public eye'. The case law does also assert the need for media reports to be limited when it is necessary to do so. This assertion can be highlighted by academics, such as Wakefield, where

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<sup>30</sup> Barendt, E., *Freedom of Speech*, (2007), 2<sup>nd</sup> edition, p.313.

<sup>31</sup> Fenwick and Philipson, *Media Freedom Under the Human Rights Act*, (2006), pp.173-197.

<sup>32</sup> Dominic Grieve Q.C, at <https://www.gov.uk/government/speeches/in-defence-of-the-jury-trial>

<sup>33</sup> *R v Felixstowe Justices, ex parte Leigh* [1987] QB 582, per Lord Justice Watkins at p.591.

<sup>34</sup> *News Verlag GmbH and CokG v Austria* [2000] ECHR 5.

<sup>35</sup> *AG v Levens Magazine* [1979] AC 440

it is stated; 'The right to a fair trial is favoured not merely for the sake of the individual, but also society at large'<sup>36</sup>.

### **3 The Changing Role of the Internet and Social Media**

Access to the internet for jurors during a criminal trial is becoming, and has already become, a challenge for the criminal justice system. It is the norm in modern society to have access at every time of the day. Statistics taken from the Office for National Statistics<sup>37</sup> show that; 'The internet was used daily or almost daily by 82% of adults (41.8 million) in Great Britain in 2016'. The use of mobile phones and laptops enables this access ever more easily and can allow for people to 'research' anything they want to, with another statistic from the same study stating; '70% of adults accessed the internet 'on the go' using a mobile phone or smartphone'. Similarly, the increasing use of social media sites makes it easier to gain access to personal information on an individual. Both factors may lead to a damaging effect on the criminal trial process, with impact on the impartiality aspect which underpins the whole process. It is crucial to consider the ease which the internet brings to unfavourable research and communication, and whether the legislation is effective in reducing the negative impact.

Legislation has been introduced to limit the negative effect which internet use can have on juries. The Juries Act 1974, as amended by section 69-77 of the Criminal Justice and Courts Act 2015, lists some juror misconduct as criminal offences, therefore increasing the seriousness of jury members' actions. If their conduct falls within the misconduct outlined as an 'Indictable Offence' then the juror will be prosecuted, and any other behaviours will still be considered under contempt of court. S.20 of the Juries Act 1974, for example, states that if a juror researches the case which they are trying during the trial period, for reasons that are connected to the case, then this will be held to be an indictable offence. Particularly relevant to the impact of internet access is, s.15A of the Juries Act as amended by s.69 of the Criminal Justice and Courts Act, which allows for judges to have discretionary power to order jurors to surrender their electronic devices for a 'period of time' while they are serving the jury. This provision may be critical in the fight against prejudice seeping into the courtroom, and the ease with which individuals can access potentially influential material. In the case of *Thakrar*<sup>38</sup> the importance of disregarding defectively gained information on a defendant via the internet was reinforced. The court held that it was unsafe to uphold a conviction where the jury had not

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<sup>36</sup> Wakefield, C., 'Trial and Pretrial Publicity in English Criminal Justice', (1977), 56, *Nebraska Law Review*, p.236

<sup>37</sup> <https://www.ons.gov.uk/peoplepopulationandcommunity/householdcharacteristics/homeinternetand-socialmediausage/bulletins/internetaccesshouseholdsandindividuals/2016>

<sup>38</sup> *R v Thakrar* (2008) EWCA Crim 2359.

followed a direction to disregard information on a defendant's prior convictions, which had been found on the internet, based on the reasoning that it may cause jury members to hold adverse views of the defendant. In the particularly pertinent case of the *Attorney General v Davey and Beard*<sup>39</sup> the Attorney General commented; 'Jurors who use the internet to research a case undermine justice'. In the same case the trial judge stated;

"If you said to me 'what is the biggest threat to trial by jury in this country?', I would say to you: 'No question: improper use of the internet by jurors. No question!'" It can be assumed that the use of the internet is the most threatening factor, because it combines the persuasive nature of the mass media to be merged with the ease of research. And as such, allows for individuals to make their own conclusions outside of the courtroom, undermining the integral function of a jury.

Other academics and studies have looked at the reasons behind why jurors may feel the need to do their own research on a case, and in doing so, may bring about positive change. Lacey<sup>40</sup> suggested that jurors may feel as though the information they are being told is restricted, and that some facts are being reserved from them. In turn, this may compel jurors to carry out their own research, even though it is prohibited, as they may believe that they are doing it for the administration of justice. Lacey also comments that the courts should manage the flow of information, not limit all the jurors' exposure to the internet. This suggestion seems like an ideal countermeasure but in practice would be hard to implement. In the research carried out by Thomas for the Ministry of Justice in 2010,<sup>41</sup> the focus was on whether the jury was fair reviewing the many different aspects of jury impropriety, however it is important to primarily focus on the 'extent to which jurors use the internet during trials'. Statistics revealed that 12% of jurors in high-profile cases and 5% of jurors in standard cases, disclosed that they carried out private research on cases that they were on. Furthermore, research that was carried out via the internet was as high as 81% for high profile cases, and 68% for information on standard cases. In addition to these statistics, it was found that most of the individuals carrying out research on the internet, were over the age of 30. In conclusion, the study states that all jury members who were looking for information using the internet were; 'wilfully disregarding judicial instructions'. The results of this study are important, as they show that internet usage during a trial is having a negative impact. The research is also interesting, because the findings showed that it was not just the younger generation who were breaking the rules regarding

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<sup>39</sup> *HM Attorney General v Kasim Davey and Joseph Beard* [2013] EWHC 2317 (Admin).

<sup>40</sup> Lacey, G., 'Should Jurors Use the Internet', (2017), *National Law Review*, <http://www.halsburyslawexchange.co.uk/how-do-you-stop-jurors-using-the-internet/>

<sup>41</sup> Thomas, C., Ministry of Justice, *Are Juries Fair?*, Ministry of Justice Research Series 1/10, 2010, <https://www.justice.gov.uk/downloads/publications/research-and-analysis/moj-research/are-juries-fair-research.pdf>

internet usage, which is what would be expected. Thomas<sup>42</sup> notes that these figures are likely to understate the percentage of jury members who look on the internet for research on the case

The rise of the use of the internet can be directly related to the increased use and popularity of the use of social media. Statistics from the Office for National Statistics<sup>43</sup> show that, 91% of adults aged 16 to 24 were most likely to engage in leisure or recreation activities, such as social networking. And that the percentage of adults engaging in these types of activities is increasing. The statistic shows that more people are becoming familiar and comfortable with the use of social media outlets, and that it is now a part of everyday life for most people. From an individual's social media account, it is almost instant to create an image of that person, before you know them. With people lacking in security on their profiles, it is easier for their profile to be found and viewed by people they do not know. In the context of Article 6, this may be a threat to its full application, because it will impact the impartiality aspect. If a juror gains access to the defendant's social media page, it may induce prejudice because of their political and religious beliefs, and through photos showing different behaviour. Consequently, the threat of people finding out previous convictions is not the only information a juror can locate. At this point, it is important to consider that the information and behaviour shown on an individual's social media page may not be 'criminalising', however someone else may disapprove, and form an automatic judgement on that person.

Hoffmeister<sup>44</sup> builds on these ideas, and deliberates the effects of social media on the criminal justice system, particularly in relation to how it acts to 'erode the privacy' of its users. As a direct result of this, social media can be damaging because of the speed with which people can find out personal information on another, and it is aggravated by the fact it is the only form of communication that can perform this function. It can be assumed, nowadays, that most people engage in social media throughout every day, and Hoffmeister agrees with this assumption; '... most would find it extremely challenging to go an entire day without engaging in some form of social media'. The combination of social media and bias of the jurors could be a lethal combination, in the fight for 'fairness', as Lord Woolf commented in *R v Abdroikov*,<sup>45</sup> 'the variety of prejudices that jurors can have are almost unlimited'. Social media outlets only

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<sup>42</sup> Thomas, C., 'Avoiding the Perfect Storm of Juror Contempt?', (2013), *Criminal Law Review*, p.485.

<sup>43</sup> <https://www.ons.gov.uk/peoplepopulationandcommunity/householdcharacteristics/homeinternetandsocialmediausage/bulletins/internetaccesshouseholdsandindividuals/2016#activities-completed-on-the-internet>.

<sup>44</sup> Hoffmeister, T., 'Social Media in the Courtroom: A New Era for Criminal Justice', (2014), p.15.

<sup>45</sup> *R v Abdroikov* [2005] EWCA Crim 1986.

invite further prejudice, because it allows for judgement of an individual before the individuals have even met in person.

It is important to consider how the current law, the Contempt of Court Act 1981, is coping under the strains of the internet and social media. Roberts and Hodgetts<sup>46</sup> scrutinize whether the Act is 'fainting', under these pressures, they note that because of the lack of research on juries, there is a high level of speculation. A pertinent point made is the idea that the defendant may incriminate themselves on social media sites, therefore when lay people look them up, they already have a preconception. They note that an incriminating profile does not necessarily have to have anything incriminating on it, but people will make general assumptions on what people look like and appear to act like in their normal lives. Hence, jurors will then create images of the defendant or witnesses in their minds before they know all the facts about that individual. Regrettably, it is becoming the norm for people to talk to people, and 'meet' people online, without knowing them in person. Worryingly, this allows people to pre-judge someone, purely on the face value of what they see on their social media. This is damaging to society as a whole, however, in the face of protecting a criminal trial, it is even more dangerous. Smith<sup>47</sup> stated that, a juror may be held to be in contempt if they carry out research which relates to the trial judge or the lawyers. It follows from this, that people may not trust what the legal representation is saying in court, or that they will not trust the directions which the trial judge is giving them, based on the 'information' which they have found on that persons' social media profile. No one is immune from the effects of social media, as it is easy for someone to present themselves in a particular way, when in 'real life', they do not portray themselves this way.

As is suggested by Hoffmeister<sup>48</sup> one of the key aspects which makes the damaging nature of social media difficult to gauge, is that there has never been any other form of communication which can have a direct comparison with social media. The unique characteristics which 'social media' forms have, such as; speed, efficiency and addictive nature, make the impact which they have on people very hard to limit. Moreover, social media acts as a safety net between an individual, and their comments, or actions, which undoubtedly allows and encourages people to act in a way which may be different from what they are like in their day to day lives. Social media is becoming ever more complicated to regulate, the further it becomes ingrained in the everyday lives of individuals. The one place where social media clearly has no place, or

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<sup>46</sup> Roberts, J, Hodgetts, C.J., 'Courting Contempt?: Untangling the Web of Jurors' Internet use Under Section 8 of the Contempt of Court Act 1981', 20, (2015), *Tolleys Communication Law*, p.86-92

<sup>47</sup> Smith, A.T.H., 'Repositioning the Law of Contempt: The Criminal Justice and Courts Act 2015', (2015), *Criminal Law Review*

<sup>48</sup> Hoffmeister, 'Social Media in the Courtroom: A New Era for Criminal Justice', p.15.

should have no place as the law moves forward, is during a criminal trial. In an article for the *Duke Law and Technology Review*<sup>49</sup> it is suggested that, 'Courts should instruct juries on social media early and often. We suggest an instruction in the judge's opening remarks to the jury, as a part of the judge's closing instructions before the jury begins deliberations'. This highlights the importance of distancing from the idea that jurors will make the right decision, as it shows that they should be getting reminded throughout the trial. Moving forward, instructions from the judge throughout the trial, appears to be the most logical and useful mechanism, as it allows for a constant reminder on the behaviours expected, and the importance of the job at hand. This situation should not be considered purely in a negative light, as the vast majority of jurors act in an honest manner, as Kirk explains, 'Experience would show that juries almost always act with high degree of social responsibility and take the job of being juror very seriously'.<sup>50</sup>

Due to the developing nature of technology, social media only escalates the use of the internet, as a means of communication. The internet gives individuals access to many different outlets, to communicate with others, and it does this by making it exceptionally easy to contact anyone. The use of communication can act as a catalyst for jury members to share their bias with one another. It can have significant consequences on the trial, but may not be seen to be a regular occurrence. Another way which unfavourable communication may impede on impartiality of the jury, is the interaction between a juror and a defendant of the case. Under section 20B of the Juries Act 1974 it is an offence to share research with other jurors. This ensues, that it is an offence to share any research that one juror has found out, with another juror, which may be detrimental to the case. The legislation shows how crucial it is to not share anything which has not been communicated in court. Furthermore, this attempts to limit any interference that publicity may have on proceedings.

With the jury being everyday 'reasonable' people, it is important to not set aside a 'common sense' aspect in relation to behaviours that are expected of a serving jury. What is important to factor in, is whether they are not thinking that what they are doing could cause an unfair trial, because it is an activity which they partake in every day. The jury members will receive information about the use of the internet, once they have been summoned and they commence their jury service, this includes an introductory video. In statistics taken from juries at Crown Courts in 2012–13<sup>51</sup> it was found that almost a quarter of jurors were confused about

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<sup>49</sup> Eve, A., Burns, C., and Zuckerman, M., 'More From the #Jury Box: The Latest on Juries and Social Media', (2014), 12, *Duke Law and Technology Review*, p.65-91, at p.87.

<sup>50</sup> Kirk, D., 'A Tale of Two Juries', 72(1), (2008), *Journal of Criminal Law*, at p.2.

<sup>51</sup> Thomas, C., 'Avoiding the Perfect Storm of Juror Contempt?', (2013), *Criminal Law Review*, at p.485.

the contempt of court rule in relation to the use of the internet. A more shocking statistic was that 5% of the people who were confused, said that there were no restrictions on internet use at all. Leading from this, it may be reasonable to conclude that some people are unwilling to listen to the information surrounding internet usage, as they feel like they do not have to. Harris<sup>52</sup> agrees with this opinion that some jury members are confused and so they do not understand that their actions may be damaging. One of the reasons Harris gives for this phenomenon, is that juries do not understand the rationale behind the restrictions on what they can do. He gives equal importance to the fact that instructions to juries need to be consistent over all the courts, which may bring about consistency. Equally, he comments that for some jurors the temptation to act upon restricted activities may be overwhelming, and so they will go against their instructions. This is a frustrating concept, because it seems to imply that no matter what the legal system implements, there will always be people who rebel. A poignant conclusion is made in this article; 'I suggest the jury trial has not been destroyed by the internet. But, without change, that day may well come'. This statement may well underpin all of the points made throughout this chapter, as it appears like an accumulative effect of all these issues are working in a negative way, and are moving too fast to regulate effectively.

#### **4 Reform**

American and English justice systems share many aspects, as the American case of *Patterson v Colorado*<sup>53</sup> present. In this case it was stated; 'The theory of our legal system is that the conclusions to be reached in a case will be induced only by evidence... in court, and not by any outside influence, whether of private talk or public print'. This statement shows that it is only natural to draw comparisons between the two systems, to correct any issues which one system may be having. The use of a jury is still the ideal tool in ensuring 'fairness' at trial, but this tradition has to be adapted to stand up against the modern problems that it faces. Hans<sup>54</sup> compares the two systems, and highlights some of the key aspects which set them apart. Within the UK system, there is very little information given about the jurors before a trial, in comparison to the US, where they have basic information such as; age, gender and address. Additionally, *voire dire* questioning occurs, where the potential jurors are examined to seek out any prejudices which may affect the case. This system may be seen to rid any unfavourable jurors which may damage the right to a fair trial, but may also be used for jury rigging. Furthermore, the information which is available about jurors in the US, is arguably, unnecessary.

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<sup>52</sup> Harris, L., 'Has the Internet Destroyed Trial by Jury?', (2013), 177, *Criminal Law and Justice Weekly*, at p.10.

<sup>53</sup> *Patterson v Colorado* 205 U.S 454, 462 (1907).

<sup>54</sup> Hans, V., 'Jury Selection in Two Countries: A Psychological Perspective', (1982), pp. 283-300.



There are many suggestions and theories on how to limit the impact that pre-trial publications and juror bias has on a criminal trial. There are many academics and research studies, that suggest a combination of English and American approaches, could be the answer to the modern problems which are occurring. This approach is considered by Brandwood<sup>55</sup> which in a comparative article between American and English approaches, discusses the issues posed by the bias of a jury and the press. Firstly, the English assumption that unrestricted publicity poses great dangers is considered. This is evident within the English system because some activities are judged to be inherently prejudicial, such as; reports of confessions made by the defendant and details of their prior convictions. If these factors come to light, then proceedings will normally cease, because the presumption will be that publicity has interfered with the trial. This may seem that a serious measure to impose, however, the English system has no way of questioning potential jurors, in order to judge their exposure to potential negative publications or bias. The American approach controls the jury to a further extent, and therefore may be able to judge whether those individuals have been affected by publicity.

Baksi<sup>56</sup> considers a slightly more American approach, and builds on the idea that pre-trial questionnaires could be used on jurors, to ensure that they have an appropriate understanding on the burden of proof. The questionnaires could also be used to highlight potential issues with individuals sitting on particular cases, such as their own personal bias. This has been heavily criticised, in Wrightman's *Psychology and the Legal System*, it is suggested that this could lead to 'jury rigging'; 'Critics have condemned these techniques as 'jury rigging' that undermine public confidence in the jury system.'<sup>57</sup> As a result of this, people may argue that they are trying to find the perfect jury, and this may lead to unfairness for one of the parties involved. Furthermore, can the UK adopt a US approach when there is a dramatic difference towards the freedom of press.

## **5 Conclusion**

The complicated nature of Article 6 and all that it encompasses, gives rise to several problems, which have a negative consequence on the application of the article. The significance that trial by jury holds in the English justice system is critical to upholding traditional values within this system, which proves a barrier to the changes which may be necessary in improving the law.

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<sup>55</sup>Brandwood, J., 'You Say 'Fair Trial' and I Say 'Free Press': British and American Approaches to Protecting Defendants' Rights in High Profile Cases', (2000), 75, *New York University Law Review*, at p.1443.

<sup>56</sup> Baksi, C., 'Bias has 'significant' effect on verdicts, jury research says', (2014), *The Law Society Gazette*.

<sup>57</sup> Greene, E., Heilbrun, K., *Wrightman's Psychology and the Legal System*, 7<sup>th</sup> edition, (2010), p.292.

The fundamental issue that this discussion has uncovered, is that the mass media and the internet age, are moving too fast for the law to maintain full protection for Article 6, and at times it is not always possible to ensure its correct application. Crucially, it can be asserted that the problem surrounding social media, and all the issues that this encompasses, has been proved to have a destructive impact on the use of juries. Consequently, this is having an adverse effect on the right, and will only dissolve it further. The research has solidified the idea that the media and the internet are having a negative effect on the successful use of juries within trials, however, the English legal system is working to combat these negative pressures.

It is clear that the ease of internet access, and by extension, the pathway to social media, is the most threatening factor facing the traditional jury. The eclectic use of social media outlets, and the regularity with which they are a part of every individuals' life, is unmistakably accelerating the need for drastic changes in rules surrounding the use of a jury. The use of the internet is directly connected to mass media influence, because of how easy it is to access all the information that is published. As previously discussed, this is only intensified by news access on social media sites. Furthermore, because all of these factors are interlinked, it is difficult to know what to regulate and change first. It is difficult to counteract their effect, because it is hard to know whether to deal with them as a whole, or as individual problems.

One of the many avenues which need to be explored, is adopting a slightly American approach to dealing with jurors. However, this suggests that the jurors are not 'fit for the job', which contravenes the notion that the use of a jury is what makes the English criminal trial system so 'fair'. As some of the suggested reforms above show, there is no straight forward answer in how to remedy the problem, however, it would be detrimental to not try and adopt some form of strategy to counteract the media intrusion, in all its forms. The legislation that has been enacted to counteract the problems facing the criminal trial, could be classed as ineffective, because many jurors do not understand the law or the rules surrounding use of the internet during a trial.

It can only be speculated that the matters discussed will only gain in complexity, and that there is no doubt that it is going to be challenging to overcome. For a legal system which prides itself on tradition, the modern reality of technological advancement and change in society, is not going to pose any easy fix. The only definite understanding is that every aspect of the impartiality of a jury is facing a barrage of threatening factors, which may well change the trial by jury system as it has been known for centuries.