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Live blogs can't handle the truth

**A contemporary cross-cultural consideration of transparency and procedural justice.**

Flower, Lisa

*Published in:*  
Oñati Socio-Legal Series

*DOI:*  
[10.35295/osls.iisl/0000-0000-0000-1402](https://doi.org/10.35295/osls.iisl/0000-0000-0000-1402)

2023

*Document Version:*  
Peer reviewed version (aka post-print)

[Link to publication](#)

*Citation for published version (APA):*

Flower, L. (2023). Live blogs can't handle the truth: A contemporary cross-cultural consideration of transparency and procedural justice. . *Oñati Socio-Legal Series*, 1690-1710. <https://doi.org/10.35295/osls.iisl/0000-0000-0000-1402>

*Total number of authors:*  
1

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PO Box 117  
221 00 Lund  
+46 46-222 00 00

## Live blogs can't handle the truth?

### A cross-cultural consideration of transparency and open justice

Reporting from trials using live blogs to continuously inform readers about courtroom events have rapidly become an established part of legal life and are often assumed to fulfill demands of open justice. However, a deep sociolegal understanding of how legal professionals perceive live blogs as affecting procedural justice is currently missing, as is a detailed understanding of what transparency means to legal professionals. As more detailed knowledge on contemporary transparency will contribute to understanding the acceptance and resistance to open justice and specific reporting formats, this study centers on two questions: How is transparency understood by legal professionals in the digital age? And, how are live blogs perceived as impacting on procedural justice? A qualitative cross-cultural approach drawing on interviews with Swedish and Danish judges, prosecutors and defence lawyers finds that they equate transparency with open justice. In this understanding, Bentham's tenets are partially transformed, in particular regarding the original truth function. Rather than enabling truths, live blogs may be understood as a threat to this tenet, however this risk is perceived in relation to specific jurisdictional contexts. It is therefore not the live blog itself that is perceived as threatening procedural integrity, rather it is the context around it which shapes the danger it poses. Whilst live blogs may be considered to provide good enough transparency - in particular in jurisdictions where cameras in court are not permitted - greater attention should be paid to their inherent risks. Hence the suitability of this format should be considered in detail before rushing forward in the pursuit of increased transparency.

Keywords: Live blogs, open justice, legal professionals, transparency, procedural justice

### **Introduction**

The live blog is a form of court reporting wherein a journalist depicts detailed exchanges, interactions and happenings taking place in the courtroom which are published in real time on a news website (Hall-Coates 2015; Small and Puddister 2020) and has quickly become an everyday part of many legal professionals' working life (Flower and Ahlefeldt 2021). As a form of news report, live blogs convey and shape societal understandings of legal proceedings (Hans and Dee 1991; Ericson, Baranek, and Chan 1991; Hall 1974) and reflect a growing trend in safeguarding open justice by opening up the courtroom to a wider audience. This is particularly

pertinent in jurisdictions where another form of coverage – filming proceedings, also known as *cameras in court* – is partially or completely banned.

Yet despite this, academic attention on live blogs has remained somewhat circumscribed, largely curtailed to law reviews, often within a specific jurisdiction, and without a deeper sociolegal examination of the legal voices within. A thicker consideration of how legal professionals within specific cultural contexts understand this digital practice as a means of fulfilling demands of open justice whilst balancing the considerations of procedural justice – such as safeguarding a fair and respectful trial with judicial neutrality, transparency and trustworthiness – is therefore currently missing. This is an important gap to be filled as such knowledge will help to more fully understand acceptance and resistance towards different forms of court reporting and contribute to formulating new ways forwards that balance procedural integrity, the rights of those involved, and the principles of open justice in an age of rapid technological development and where demands on transparency are increasing. The findings thus have important implications for shaping rulings regarding appropriately transparent coverage of trials.

In order to extend the focus of how legal professionals understand live blogs and open justice beyond any one specific jurisdiction, a comparative approach between Sweden and Denmark is adopted in this article. These jurisdictions are chosen for consideration due to their high level of transparency in legal processes and documents and partial (Denmark<sup>1</sup>) or complete (Sweden) ban on cameras in court. Furthermore, whilst culturally similar in many ways, they differ in key aspects pertaining to legal rulings regarding live blogs and different levels of access to public

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<sup>1</sup> Permission may be given to film the presiding judge, however no other participants may be shown (Domstole 2023) however this remains unusual. If filming takes place, it tends to be during the delivery of judgement.

documents. In this way it is possible to highlight how various facets of open justice interplay and shape understandings. The qualitative material includes 31 interviews with legal professionals which are considered in the analysis. Two research questions stand at the center: How is transparency understood by legal professionals in the digital age? How are live blogs perceived as impacting on procedural justice?

The analysis draws on Bentham's (1843a) central tenets of open justice, namely education, discipline, and truth together with the more contemporary notion of transparency. As is shown in the analysis, rather than a distinct fourth function, transparency is understood by legal professionals as another moniker for open justice, albeit in a twenty-first century format (Moore, Clayton, and Murphy 2019; Resnick 2013). As Bentham's (1843a) writings remain the pillar of many democratic legal systems his tenets warrant revisiting.

### **Open justice and transparency**

Open justice remains a central principle in contemporary democratic legal proceedings. Indeed the right to a fair and "public hearing" is considered a human right (European Convention on Human Rights and Fundamental Freedoms 1950: 5). As noted in the introduction, open justice for Bentham (1843a) has three central functions: education, discipline, and truth. First, Bentham suggests that judges want their audience to understand their actions and should therefore explain their judgements enabling the courts to function as "schools" (Bentham 1843a: 354). Openness thus constitutes a channel of communication between the legal sphere and society. The second function is disciplinary. Legal professionals need to be watched by "bystanders" or "auditors" (Bentham 1843a: 356) in order to behave appropriately. Those watching could then distribute handwritten notes describing events which serve to protect against "unrighteous judges" (Bentham 1843a, 316) from committing acts of injustice. Public opinion then acts as the

enforcer of moral sanctions against deviant legal professionals (Resnick 2013). Bentham thus shifted the role of the public from mere spectators to, if not critical, then vigilant, observers (Resnick 2013: 87). Whilst Bentham is more commonly associated with the observation of judges, his interest was not constrained to this category of legal actor, rather to “Judge & Co” (Bentham 1843b: 7, 13, 48-49, 63) – the “co” referring to prosecutors and lawyers. Third, with regards to truth: open justice contributes to the wider dissemination of witnesses’ testimony which increases the prospect of revealing untruths, because, for the witness, “many a known face and every unknown countenance, presents to him a possible source of detection” (Bentham 1843a: 355; Twining 1985).

Bentham's open justice and its trinity of functions have more recently been understood in terms of transparency, seen as the motto of liberal democracies in the twenty-first century (Resnick 2013; Moore, Clayton, and Murphy 2019; Moore 2018). This contemporary transparency centers on the provision of online or virtual access to public sector data, including legal documents and proceedings, in order to open up the state, also known as “institutional transparency” (Moore 2018). There is thus a continuing quest for organized transparency, including within the legal institution, where amplified demands for scrutiny of legal processes prevail (Bogoch and Peleg 2014; Rodrick 2014; Jaconelli 2002). Moreover, due to temporal and spatial shifts in society whereby many people no longer have time to attend legal proceedings and where architectural changes have reduced the size of public galleries thus diminishing the possibility of attending (Hans and Dee 1991; Mulcahy 2010; Rodrick 2014; Bosland and Townend 2018), the role of the media has become even more central. There are thus greater demands on the mediated forms of openness available today with the current face of transparency markedly different to that of Bentham’s time. Indeed, Moore et al (2019, 6) suggest that contemporary public access is virtual, mediated and “an altogether different form

of openness.” Whilst transparency in the twenty-first century have begun to be explored (Moore 2018; Moore, Clayton, and Murphy 2019), we currently lack an “insider perspective” (Blumer 1959) or deep awareness of how the legal professionals within the legal institution understand transparency.

Furthermore, in the quest for openness, normative ideas regarding open justice often prevail, grounded in Bentham’s argument that opening up courts will enlighten the public and advance society’s interests. Such views may lack appropriate reflection regarding what comprises an appropriate amount or level of access to legal documents and proceedings (Schofield 2006: 267; Moore, Clayton, and Murphy 2019; Resnick 2013). It seems apparent that the pursuit of increasing transparency may lead to issues surrounding suitable levels and formats of publicity becoming lost.

### **What are live blogs?**

When used to report from legal trials, live blogging entails a journalist sitting in the public gallery and writing short time-stamped descriptions of evidence, interrogations and interactions, which are published directly from the courtroom on a news website (Thurman and Walters 2013: 83). By leveraging “radical immediacy” (Hall-Coates, 2015, 120), live blogs have an “unrivalled ability to disseminate larger quantities of information to an awaiting public, at a speed and with a sense of immediacy that far surpasses conventional media” (Hall-Coates 2015: 138; see also Karlsson 2011; Allan 2006). The continuum of posts in live blogs can include highly detailed depictions and verbatim interactions of events taking place in the courtroom enabling the reader to vicariously attend the trial (Barrett 2011; Biber 2013; Carroll

2014). This has led to live blogs (and Twitter<sup>2</sup>) becoming “as much a part of mainstream media as traditional newspapers and television broadcasts” (Goehler, Dias, and Bralow 2010: 14).

The central role that live blogs currently play in society is reflected in their regularity and thus popularity in many of the online sites of Sweden’s and Denmark’s largest newspapers and on an international front. Although there are no figures published regarding readership of live blogs, reports show that reading online news is increasingly popular (Palaces 2021; Barometer 2021). Furthermore, due to the reduction in number of people observing trials over recent years (Rodrick 2014; Mulcahy 2010; Hans and Dee 1991; Bosland and Townend 2018), live blogs may play an important role as a source of information. Live blogs can therefore be considered a growing trend and warrant further attention with regards to their role in open justice (cf. Balbi and Magaudda 2018; Taneja et al. 2012; van Rees and van Eijck 2003).

It has been suggested that the push for cameras in court in recent years “disrupted the status quo of print-dominated court reporting of the past” (Johnston 2018: 529) and represents a new era of open justice. Similarly, live blogs can be understood as disrupting the status quo once again, offering a more contemporary option to filmed broadcasts that invite many of the benefits, but without the intrusion of audiovisual coverage. A distinguishing feature of live blogs is their flexibility and ability to provide quick and easy access to events, enabling either contemporaneous virtual attendance or catching up afterwards. Proceedings can be followed on a smartphone, tablet or laptop, diligently read or skimmed through when journeying from A to B, scrolling up and down to particularly interesting parts, scanning others, returning to re-read

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<sup>2</sup> Live blogging is a different type of communication than Twitter – the latter being a form of microblogging limited to 280 characters per post, in contrast to live blogs which have an unlimited number. Although Twitter has the possibility of breaking up tweets into consecutive posts there is a risk that readers do not click forwards to read the entirety of the tweet. In contrast, live blogs are continuously updated – in many instances without the need for refreshing the webpage enabling a flowing continuum of reports.

the presentation of evidence and comparing witnesses' testimony<sup>3</sup>. Live blogs can thus be characterized as distinct from cameras in court in particular as an entire trial can be read through, or attended, in a couple of hours. This format can also be shared online and, unlike filmed trials, commented on by readers. Furthermore, questions can be posed to the live blogging journalist regarding various aspects of proceedings, which can be answered directly. Blogs may also be interspersed with other media, such as interviews with experts, and, in jurisdictions where the prosecution's case is publicly available as is the case in Sweden, photos of evidence can also be published (see also Biber 2018). Furthermore, reading a live blog may be more accessible, require less bandwidth and does not require audio, making it a more convenient option to a filmed broadcast.

### **Live blogs and trials**

Research on live blogs tends to position this format against traditional print reports, rather than cameras in court and presents it as a comparatively better tool for open justice or, at the very least, as a format that does not present a “greater risk of prejudice than with traditional media reports” (Barrett 2011: 21). Other comparisons with print media suggest that Twitter facilitates open justice to a greater extent than traditional formats by enabling larger amounts of information to be related to a vaster audience (Findlay 2015). Live blogs have also been suggested as providing a more accurate description of proceedings (Krawitz 2013).

An overview of the extant literature on live blogs of trials shows a tendency to draw similar conclusions and indeed, a tendency to draw on the same methods – namely law reviews - as those found in research on cameras in court (for studies on cameras in court, see for instance,

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<sup>3</sup> It should be highlighted that the digital divide - separating those who have the means and capabilities of accessing the internet from those who do not – remains (Van Dijk 2020).



Bernzen 2018; Garcia-Blanco and Bennett 2018; Marder 2012; Moran 2012; Mason 2000; Packer 2013; Rodrick 2014; Youm 2012). However, in contrast to cameras in court, research on live blogs as a form of court reporting has gained less attention, although a body of research is growing. For instance, a summary of judicial rulings in the U.S. reveals ambiguity surrounding live blogs with some courts reasoning that demands of open justice and the public's right to information in real-time outweigh prejudice to the parties, whilst others consider live blogging as a threat to the sanctity of the courtroom (Goehler, Dias, and Bralow 2010; Lambert 2011). Similarly, the ways in which reporting can negatively impact on witnesses is also highlighted such as witnesses changing their testimony (Goehler, Dias, and Bralow 2010; Keyzer et al. 2013; Rodrick 2014; Lambert 2011).

Research more specific to live blogs' digital format highlights the negative implications for procedural integrity stemming from inaccurate and prejudicial reporting and problems regarding the dissemination of information online, including with regards to jurors (Johnston and Wallace 2015; Bartels and Lee 2013; Findlay 2015). Other studies show that suppression orders are used and at times, abused, to restrict social media usage (Barrett 2011; Bosland and Townend 2018) and that Twitter may also be used and abused by jurors, lawyers and judges (Janoski-Haehlen 2011).

Of particular note, Bosland and Townend (2018) explore how open justice should be safeguarded in the digital age, focusing primarily on the implementation of reporting restrictions and finding several frictions between legal and ethical considerations and the open justice principle. Whilst digital communication technologies have benefits by enabling courts to use social media to communicate directly with the public, judicial understandings of new

technologies and the possibility of publishing online are found to negatively impact on open justice (see also Janoski-Haehlen 2011). They note that more research is needed.

Resnick (2014) targets transparency and live blogs more clearly, pointing out the advantageous qualities of live blogs for increasing it, whilst also reducing the challenge of observing trials. Similarly, Hall-Coates (2015, 126) explores the ways in which live blogs impact on the dissemination of courtroom narratives and concludes that publishing information about trials on live blogging platforms “demystifies” the judicial process in the U.S. In contrast to the findings presented from law reviews, a qualitative study of Canadian journalistic tweeting of criminal trials finds that although it opens up the court to a wider public, it does little to increase engagement or understanding of the legal system (Small and Puddister 2020).

One of the few studies that has highlighted the voices of judges and magistrates with regards to social media usage including Twitter used a structured brainstorming method which entailed participants identifying and ranking problems in order of importance with regards to the challenges and opportunities that social media poses for the courts (Keyzer et al. 2013). The study found that juror misuse, the risk of suppressed information being inadvertently spread and “going viral”, misrepresentation of court work and misinformation about trial processes, as well as disclosure of information to witnesses of others waiting outside court were ranked as problematic (Keyzer et al. 2013; see also Lambert 2011).

With the exception of Keyzer et al., (2013) and Moore et al., (2019) all of the studies presented here regarding live blogs present overviews and discussions of legal rulings or analyses of Twitter posts and news reports. Thus, whilst current research presents a broad understanding of

live blogs and open justice, a deeper understanding stemming from the perspective of legal professionals is still needed.

## **Methodology**

The empirical material comprises transcripts from 31 qualitative interviews conducted with judges, prosecutors and defence lawyers in Sweden and Denmark<sup>4</sup>. The analysis is driven by these interviews however legal documents from both countries are also considered.

A total of 19 legal professionals were interviewed in Sweden and 12 in Denmark. The breakdown of legal professionals interviewed in Sweden comprised five defence lawyers, seven judges, and seven prosecutors, tallying seven women and twelve men. In Denmark, five defence lawyers, five prosecutors, and two judges were interviewed, totaling seven men and five women. The sample of legal professionals comprise individuals who have participated in live blogged trials. A wide range of experience levels are included, from newly qualified to well-experienced.

Legal professionals who had taken part in a live blogged trial between 2018-2020 were contacted and interviews conducted using video conferencing platforms such as Zoom and Skype. This format has been shown to be an effective way of collecting data in studies where elite respondents may be difficult to reach or schedule and was therefore deemed suitable in the current study (Sturges and Hanrahan 2004; Harvey 2011).

Semi-structured interviews were conducted which enabled follow-up questions, provided respondents with the opportunity to talk more freely, and opened up for respondents to

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<sup>4</sup> The Danish material was gathered in a previous study on live blogs.

introduce new aspects not covered by the interview guide (Kvale 1997). This is an interview style suited to interviewing highly-educated legal professionals and who thus ‘prefer to articulate their views, explaining why they think what they did’ (Aberbach and Rockman 2002: 674). An ‘active interviewing’ (Holstein and Gubrium 1995) approach was used which also included references to specific cases and live blogs in order to bring the interviews to life.

The interviews lasted between 45-120 minutes and were audio recorded with the permission of the respondent. All interviews were transcribed verbatim in the original language (Swedish in Sweden, Danish in Denmark) and later translated into English with conceptual equivalence maintained (Birbili 2000). All of the respondents are anonymized and their names changed<sup>5</sup>. Other identifying details, such as participation in specific trials have also been altered in order to maintain anonymity whilst maintaining alignment to the original details. In this way, a suitable level of anonymity has been maintained (Fangen 2005).

The empirical material was thematically coded and analyzed using the qualitative analytical software NVivo. Coding entailed creating “nodes” which organized the data into commonly discussed themes including transparency, witness impact, along with others such as mistakes made in live blogs, the risk of sensationalism as well as how live blogs are used (see McKay 2015 for a similar approach). The core themes to emerge were transparency and witness impact. The next step was to move from what was talked about to how it was talked about (Gubrium and Holstein 1997). This entailed lifting out and defining what was happening in the data before applying theoretical concepts of open justice in order to understand it (Charmaz 2006).

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<sup>5</sup> Ethical approval was applied for and deemed unnecessary due to the nature of the material gathered.

All trials are open to the public in Denmark and Sweden unless there are specific considerations such as the involvement of minors, sensitive details presented such as in sex crimes, or issues of national security. There are no reporting restrictions in Swedish courts if the trial is open to the public. In contrast, Danish trials may be open to the public but with reporting restrictions in place. Furthermore, even if a trial is open in Denmark with no sweeping reporting restrictions, journalists are nonetheless not permitted to directly reproduce events and comments.

### **A sign of the times**

For the respondents in this study, live blogs are seen as a contemporary form of court reporting reflecting a more general shift in society towards increased demands on accessibility and the immediacy of information. Matthias, a defence lawyer in Sweden describes them as “a sign of the times” and “in the public interest” providing the possibility of finding out “what’s happening in the courtroom – live - so to speak”. For instance, Niels, a Danish defence lawyer live blogs reflect,

the current trend, that everything is becoming more and more live, everything is becoming more and more accessible, so it’s YouTube, now everyone has their own TV channel, but less and less television, more laptops and iPhones and availability and therefore [live blogging] is completely in line with this.

This understanding also reflects a larger trend in many other societal institutions - not least in conjunction with the COVID-19 pandemic – whereby online meetings and proceedings have quickly complemented and at times, replaced the traditionally physical option (Wu et al. 2022).

Live blogs are also discussed as positively contributing towards increasing the transparency of legal proceedings as Linn, a Danish defence lawyer says, “I think it gives the public a picture of what's going on in a courtroom.” Also for Harald – a judge in Sweden – live blogs can be an important tool for ensuring transparency. He goes on to say, “I mean the transparency that is given by journalists being able to access trials and report from them, that’s obvious of course.” However, such is the embeddedness of this shared understanding of transparency, that it is rarely defined or dwelled upon by the respondents in the interviews. A detailed analysis reveals that legal professionals’ understandings are characterized by Bentham’s original tenets but also move beyond them thus reflecting a more contemporary understanding of open justice as seen in their considerations regarding live blogs as I will now show.

### **Transparency as education**

The primary way in which the legal professionals interviewed understand the transparency afforded by live blogs is in terms of awakening interest and increasing knowledge of legal processes – an understanding that is in line with Bentham’s educative function. For instance, Niels, a Danish defence lawyer says that by live blogs “showing we have an open legal system, we can arouse curiosity in the case”. David, a judge in Sweden, also talks about this saying,

Of course, it’s good for the public to be able to access what is happening in our trials so that they can gain an understanding that [a trial] can be very complex - that there are many different sides to a case. It’s usually not as obvious or easy as it seems. It’s not black and white. You get an insight into the work that is done in courtrooms.

For judge David in Sweden, live blogs function as a way of communicating the intricacy of trials which Dan, a judge in Denmark, also discusses, adding that it is “important for the

legitimacy of the courts in general that there is as much openness as possible about the work that we're doing and to demystify what is going on." Other respondents in both countries echo the importance of live blogs for demystifying legal proceedings. This perception of the beneficially educative function of live blogs is in line with previous understandings of live blogs based on reviews of legal rulings (Hall-Coates 2015) however stands in contrast to Small and Puddister's (2020) content analysis of live blogs. This dissonance could reflect a misplaced faith in live blogs' informational impact but could also reflect cultural differences in how trials are covered (see Smith Fullerton and Jones Patterson 2021).

### **Transparency is also about access**

The data also show that respondents' understandings of transparency move beyond education to include accessibility to courts with live blogs enabling this. David already hinted at this in the previous section when he talks of the benefits of the public accessing trials whilst Dan, a Danish judge, says "if people don't have the opportunity to go to court, or don't realize they actually can show up in court and attend the cases they might find interesting, then they have the opportunity to do so, from home."

Live blogs are thus presented as enabling the courts to "reach an audience that it otherwise doesn't reach" as Krister, a Danish defence lawyer says. This is particularly pertinent with regards to high-profile cases and those with widespread public interest, or as Kristina, a prosecutor from Denmark says, those cases where "everyone feels like a victim". Examples of this include the trial in 2020 of Britta Nielsen in Denmark who was accused and convicted of stealing 117 million Danish kroner (2,3 million euro) of government funding and the Swedish terror trial in 2018 against Rakhmat Akilov accused and convicted of five murders and 119

cases of attempted murder. Both of these garnered enormous public interest with live blogs being used by numerous national and international media houses to report.

It is therefore apparent thus far that respondents' understandings of live blogs are in line with twenty-first century conceptions of institutional transparency and the demands of a direct-access society (Taylor 2004; cf. Moore, Clayton, and Murphy 2019). Within this, accessibility plays a central role. However, the analysis also indicates that Bentham's original tenet of discipline has changed.

### **Transparency as surveillance not discipline**

Whilst the transparency associated with live blogs is more commonly discussed by the respondents in terms of education and access, it is also considered with regards to another of Bentham's central tenets, namely discipline. However, rather than describing a Benthamite disciplinary function whereby the public watches over legal professionals to ensure appropriate legal behavior and where misconduct is subject to moral sanctions (Resnick 2013), live blogs are understood as a surveilling practice which not only moves beyond targeting individuals but also functions to monitor, rather than punish behavior (Lyon 2002). A subtle shift has therefore taken place. This is reflected not only in what is said in the interviews but also what remains unsaid. The analysis reveals an almost total absence of commentaries regarding the need for live blogging journalists - and indeed, the media more generally - to be present during proceedings in order for those taking part in the trial to behave appropriately. Indeed, only one respondent (in Denmark) described how live blogs can serve to curb the conduct of unruly judges. Moreover, live blogs are presented as providing "an excellent opportunity to control that we have a functioning legal system" as Doris, a defence lawyer in Sweden says, and playing an important role in examining and ensuring that legal system is transparent as Cate, another



defence lawyer in Sweden also comments. I suggest this shift is not exclusive to live blogging, rather can be extended to other forms of journalism which can now be considered as performing a surveillance rather than disciplinary function (see Wahl-Jorgensen, Bennett, and Cable 2017).

The tendency of the respondents to focus on education and accessibility rather than the surveillance aspect of transparency may also reflect the specific context in each country. Sweden and Denmark have low levels of corruption and high levels of trust in the legal system (International 2020; Survey 2020), therefore the need for disciplining Bentham's (1843a) "unrighteous judges" may be deemed as minimal. Furthermore, the media plays a central role in examining the judiciary in both countries (Flower and Ahlefeldt 2021), thus, the surveillance function of live blogs may be perceived either as so well-established and understood that it is not openly discussed. The finding may also once again, reflect a wider societal shift towards increased immediacy and direct access (Taylor 2004; Bauman 2007) but also towards increased surveillance (Lyon 2001).

Two of Bentham's original functions - education and discipline – are thus still relevant albeit with the latter shifting towards surveillance. To these original two functions may be added accessibility. But what of Bentham's third original function – attaining the truth? How do live blogs impact on this aspect?

### **Live blogs can't handle the truth?**

Whilst Bentham claimed that open courts and the associated wider public reach would force witnesses to be truthful by increasing the risk of being revealed in a mistruth, the analysis in the current study finds a more troubling and perhaps even contrary finding, with clear cross-cultural differences. The legal professionals interviewed perceive differences in how procuring

the truth is considered to be threatened by technological advances with clear distinctions between how the Swedish and Danish respondents regard live blogs' impact on open justice concerning witness influence. This divergence is largely accounted for by the respondents as stemming from their specific jurisdictional context regarding legal rulings and public access to legal documents and proceedings.

For instance, in both countries witnesses should not attend the trial before they have been questioned in order to preserve reliability, with sanctions at stake if abused (SFS 1942:740, RB 36 Kap, 9§; Retsplejeloven 2017, Lov nr. 18, §182). This is because witness testimony is often the central evidence in criminal cases in both countries, and indeed in other jurisdictions with adversarial systems such as Australia, England and the U.S. where guilt is decided based on the presentation of facts by opposing parties (see Bachmaier 2019: for an overview).

Furthermore, in both countries the principle of public access to legal proceedings and legal documents is central. In Sweden this includes access to the preliminary investigation report (the case of evidence compiled by the prosecution). When charges are made this document becomes publicly available in Sweden and may therefore be acquired and even shared and read on social media or discussion forums such as Flashback<sup>6</sup>. In contrast, the Danish equivalent is only accessible after the judgement has come into effect several weeks after the trial.

Whilst it should be noted that there are other strategies for witnesses to access proceedings prior to giving evidence in both countries - the simplest being to send someone in to the trial and asking them to report back - live blogs nevertheless constitute an even easier way of following proceedings in real-time, without the need for a third party. In short, live blogs constitute a

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<sup>6</sup> An online discussion forum widely used in Sweden.

central way for witnesses to access evidence presented at a trial, particularly in the Danish context.

In order to understand this more fully, I will now present two excerpts from live blogs. These have been chosen from material gathered as part of a wider research project and serve to illustrate the detailedness of live blogs.<sup>7</sup> The first is an excerpt from a witness testimony taken from a live blogged murder trial in Denmark which shows the level of detail available in Danish reports. It should be highlighted that this report is published on a news website, despite a ruling in place which prohibits the direct reproductions of trials in live blogs (Court 2019).

The witness has furthermore sent pictures of some clothes that he thinks look similar to what the person was wearing. “It was a down jacket. It had the same shape. It’s not the same color. It was pale blue that jacket, the person was wearing” the witness explains, before the prosecutor takes over: “you have also sent pictures of a pair of trousers. They were dark brown with spots, right?” “Yes” the witness answers. (BT 2020)

And now the following is an excerpt from a murder trial in Sweden where the prosecutor is presenting the evidence against the defendant:

At around 9.am there is a consistent, heart-wrenching scream. Several of the neighbors open their doors to see where the scream is coming from but then it suddenly ends. According to the prosecutor, this is when the victim dies. After the attack the ex-boyfriend leaves the building at 9.48am, he shops with the victim’s bankcard fifteen minutes later, then walks to the train station. (Aftonbladet 2020)

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<sup>7</sup> In a previous study (Flower 2023) I present how the live blogs were selected.

There is thus a clear risk that witnesses could read such reports and change their testimony to be in line with another witness (as in the Danish excerpt) or based on the presentation of evidence (as in the Swedish excerpt). A witness could even change their truth in order to undermine or diminish the testimony of previous witnesses. Hence, rather than live blogs ensuring open justice by reducing the risk of mistruths, the converse may occur. Importantly, in the Danish context there is a ban in place prohibiting direct reproductions such as this, however, such reports appear to be published nonetheless.

Before moving on to discuss how the respondents talk about this as a threat to open justice in the interviews, it is also important to explain why this may be problematic. Nina, a Danish defence lawyer sums this up succinctly, saying there is a risk that,

it affects the testimonies, and then we'll get something wrong, perhaps (...) From the point of view of a defence lawyer, there's a risk that someone is convicted who shouldn't be convicted and, the opposite from the point of view of a prosecutor.

Live blogs therefore risk impacting on witnesses so, how do legal professionals talk about this possible threat?

As already noted, in Denmark live blogs constitute one of the chief sources for reading information about a trial. This is perceived in problematic terms by nearly all of the Danish respondents who spontaneously talk about the negative aspects of live blogging in relation to the effect they can have on witnesses and the way in which it may negatively impact on the reliability of testimony. Furthermore many of the Danish respondents drew on the ruling (Court

2019) preventing direct reproductions of trials being live blogged in their accounts, using it is an argument against live blogs including specific details. Jens, a prosecutor working in Denmark talks about all of this, associating an especially large risk in cases of organized crime, where he says live blogs “can be a really big problem”. He goes on to say that,

I am partly advocating for as much openness in the administration of justice as possible, but the worry is exactly this - well the main worry of mine - is how much it could affect witnesses, right, in, for example, a case on organized crime. If the case has been going for several days, it can be unfortunate if someone witnessing later on can sit and read the explanations of other witnesses, so it's clear that it carries a fairly significant risk of influence.

Tina, a prosecutor in Denmark, gives an example of how this can be particularly troubling in trials with several defendants, all of whom have been in custody with restrictions in place to prevent them from interacting with each other, but who are then able to follow each other's testimony on live blogs. She goes on to say that witnesses, “can sit and follow a live blog and hear everything the defendant and other witnesses have said before them and can then plan their testimonies according to what they've heard. And that is a problem.” Tina also describes how the, often long, period of time between the crime and the trial can lead to witnesses becoming uncertain of specific details. She says, “if you're reading about some people being sure that the car is red or whatever, and you're starting to be a little bit unsure of it, I think very quickly – without you wanting it – that it turns red in your memory”. Tina develops her thoughts further, saying that some witnesses

will possibly support the accused and organize their testimony so that they support [the defendant], so that explanations can be coordinated based on what has already been testified. Some may have a motive for revenge, so they say something completely different.

Tina's comments reflect many of the other Danish respondents' understandings of live blogs as negatively impacting on witnesses in various ways and therefore jeopardizing open justice.

In contrast, the majority of respondents in Sweden tend to not spontaneously talk about such a danger. When asked direct questions regarding the possible risks of live blogs, they problematize the hazard of live blogs publishing information accessible to witnesses however this tends to be framed as a lesser threat. This framing draws on the specific jurisdictional context of Sweden with regards to access to legal documents, therefore as witnesses are already able to access information by obtaining the preliminary investigation report in Sweden, live blogs tend not to be considered a greater threat to procedural justice. Doris, a defence lawyer in Sweden sums this up when she says, "if you are a witness in Sweden and you want to adjust your testimony or whatever – you can get the preliminary investigation. It's just like Christmas in that respect". With this, Doris is implying that a live blog could be a gift one desires – akin to a Christmas present. Public access to documents therefore tends to be used to account for, and diminish, the risk for witnesses changing their testimony – or Benthamite *truth* - based on what they have read in live blogs. Hence the negative impact of live blogs on open justice is also accounted for and diminished.

A surprising finding in the Swedish data is that respondents do not differentiate between the different types of information reported in live blogs: presentations of evidence or witness

testimony. This is an important distinction as whilst the presentation of evidence - such as crime scene analyses - is likely to remain the same from the preliminary investigation to the trial, a witness' statement could change. This means that publishing details of a witness' testimony in a live blog risks revealing information otherwise unknown, yet this possibility is not talked about as a substantial threat in the interviews. The largely absent nuance in the Swedish respondents' accounts suggests that live blogs – together with preliminary investigation reports— are often seen to be an unfortunate, yet unavoidable, consequence of open justice – without deeper reflection.

We therefore see that for the Danish respondents interviewed in this study, live blogs are defined as constituting an everyday threat to open justice by making information privy to witnesses prior to them testifying— information that is not possible to access in the Danish context of public access to legal documents. For the Swedish respondents there is more acceptance for these reports (perhaps erroneously) rooted in the availability of the preliminary investigation report.

Thus although there is a risk in both countries that witnesses are influenced by what has been reported, similar to the way in which pre-trial publicity may impact on jurors (Fein, McCloskey, and Tomlinson 1997) – these threats are perceived differently which I suggest stem from the particular jurisdictional context of each country. Thus, it is not the live blog itself that is perceived as the threat, rather it is the context around it which shapes the danger it poses.

The data thus shows that Bentham's (1843a) claim that the truth can be procured by opening up the courtroom to a wider audience, thereby increasing the risk of being found out in a lie, is further complicated by the introduction of contemporary forms of reporting such as live blogs

but also including cameras in court. Thus, whilst live blogs may indeed increase the risk of being revealed as speaking an untruth, they simultaneously increase the risk of changing one's testimony in line with another's truth thus blurring the previously clear line between bystander and active participant (cf. Bentham 1843a: 356).

The data also shows that live blogs are not understood by the legal professionals interviewed as constituting a greater jeopardy to personal integrity than other traditional forms of reporting, a finding in line with previous research (Barrett 2011). This is found in the absence of comments regarding such a threat posed by live blogs. As is now clear, when respondents are invited to talk about the negative aspects, the central and recurring theme is the negative implications of evidence being available online in live blogs. Whilst other types of critique are raised, they center more on court reporting generally, in particular the impact on defendants. For instance, Dan, a Danish judge, says, it's not "super nice to sit where a defendant sits in the first place, and the more attention there is on the case, the worse it must be." However, whilst several of the defence lawyers talk about clients who have reacted negatively to what they considered to be inaccurate reports published in the media, others had not represented clients "who were really against what was written about them" as Danish defence lawyer Nina says. Moreover, Swedish defence lawyer Johan says that he "has never experienced that someone thinks it's scary" if a live blogging journalist is present in the courtroom. Furthermore, many of the defendants may be remanded in custody throughout the trial and therefore unaware the trial is being lived blogged as Tito, a Danish prosecutor and Mattias, a prosecutor in Sweden note, thereby reflecting the serious nature of the trials which tend to gain blogging attention. The legal professionals interviewed thus do not perceive live blogs as a threat to personal integrity, an accusation which is commonly directed at cameras in court.



## **Conclusions**

The findings suggest that too much publicity can negatively impact on open justice, however the particular threats posed by court reporting formats should be considered within the wider jurisdictional context in which they are practiced. Live blogs are presented by the respondents working in jurisdictions with restricted access to certain key legal documents - such as the preliminary investigation report - as negatively impacting on the safeguarding of procedural justice. This is because live blogs are perceived as capable of publishing details in an easily accessible format which would otherwise would be harder, if not impossible, to obtain. In contrast, in jurisdictions where such information is already available, live blogs are not perceived to pose as great a threat to open justice.

Turning to current understandings of open justice, the respondents consider that only one of Bentham's original functions continues to be fulfilled and unchanged, namely education. The remaining two - discipline and truth – have transformed and gained new company in the form of access which is now considered by the legal professionals interviewed to be a central tenet of open justice. The disciplinary function is presented as having shifted to a surveilling practice, reflecting both wider societal trends and specific jurisdictional circumstances. Furthermore, the original purpose of attaining the truth from witnesses has become problematic with respondents suggesting that live blogs fundamentally complicate this function. Bentham's original pillars are thus visible however should be understood in the contemporary and jurisdictional context within which they now operate. Thus, in order to drive research on contemporary forms of reporting forwards, it is important to consider what open justice means in specific contexts in the twenty-first century. In particular, more research is needed regarding the educative function of court reporting as the current study contributes to an already ambiguous understanding (see Small and Puddister 2020; Hall-Coates 2015).

Drawing on the data analyzed it seems that future research would be wise to explore live blogs as an alternative to cameras in court, fulfilling the criteria of open justice, without the added negative impact on participant integrity (e.g. Lambert 2011; Gerbner 1979; Thompson 2011). However, restrictions should be in place to protect procedural integrity with regards to witnesses accessing information they should not be privy to. There is also evidence to suggest a need for restrictions with regards to certain types of trial, moving beyond those already taking place behind closed doors such as sex crimes, to include organized crime when witness impact may play a central role. Moreover, rulings preventing direct reproductions of events and comments taking place in the courtroom appear to be in need of greater enforcement as they appear to be currently deviated from in the Danish context. Extending the focus beyond criminal trials will also further deepen our understanding of how live blogs impact on open justice.

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## **Funding**

This research was funded in part by Forte [STYA-2019/0004]. For the purpose of Open Access, the author has applied a CC BY public copyright licence to any Author Accepted Manuscript (AAM) version arising from this submission.