

THE CASE AGAINST MANDATORY ONLINE JURY TRIALS IN THE TIME OF CORONA

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In Gabriel García Márquez's *Love in the Time of Cholera*, the captain of a ship approaching its final port on a river raises the yellow flag of cholera so that the port will not allow the ship to dock and two lovers on the ship can avoid the scandal of being seen together publicly. The supposed cholera outbreak on the ship exiles the lovers to cruise the river forever. Embracing mandatory online jury trials in this time of corona would exile us forever, like the passengers on Márquez's ship, from the foundation of our system of justice, the traditional jury trial.

The traditional jury trial is *the* time-honored method trusted to adjudicate whether a criminal defendant receives the death penalty. It is *the* time-honored method trusted to adjudicate whether a corporation owes an individual or another corporation millions, or even *billions* of dollars. We should discard, out of hand, any alternative that fails to achieve the fundamental goal of delivering fair and just outcomes to our most important criminal and civil disputes with the same degree of success as the traditional jury trial.

The magic of the traditional jury trial lies in two central ideas. The first is the idea that a diverse jury of the litigants' peers sits in judgment of the dispute. The second is the idea that through a time-honored alchemy, a jury of the litigants' peers weighs the credibility of the witnesses and the evidence to arrive at a fair and just verdict. Online jury trials place these central ideas in mortal jeopardy.

The first large loss in an online jury trial is the loss of a diverse jury of the litigants' peers. There can be no debate whatsoever about whether online jury trials cause a loss of juror diversity. The only debate is about how large a loss of juror diversity we are willing to tolerate. Is a 5% loss acceptable? Is a 10% loss acceptable? Do we simply resign ourselves to the fact that juror diversity in online jury trials will be "close enough" to juror diversity in traditional jury trials? If so, at what cost to litigants and our system of justice?

It is a pleasant fiction to believe that the internet is freely used by all and accessible to all, regardless of income, race, or socioeconomic status. The fiction absolutely does not square with the reality, however. Household income, education, race, and whether someone lives in a rural area are all key predictors of whether someone is likely to use the internet and to have access to reliable internet services. In 2019, 18% of adults from households earning less than

\$30,000 were more likely to not use the internet, versus only 2% of the most affluent adults.¹ And 29% percent of those with less than a high school degree did not use the internet, versus only 2% of those with a college degree.² And 14% of Hispanics and 15% of Blacks did not use the internet, while only 8% of whites did not use the internet.³ Access to the internet also is greatly dependent upon whether a juror lives in a rural setting. In 2018, nearly 1 in 4 rural residents reported that access to high-speed internet—the type of internet optimal for online jury trials—was a major problem in their area.⁴ Rural residents also are less likely to own mobile devices or to use the internet.⁵

These gaping disparities in access to reliable internet services have continued unabated since the advent of COVID-19. In April 2020, 40% of low-income parents reported it's somewhat likely that their children will have to use public Wi-Fi to complete homework remotely because of the lack of a reliable internet connection at home, versus only 6% of upper-income children.⁶ And 36% of low-income parents reported their children are somewhat likely not to be able to complete homework due to lack of access to any computer at home, versus only 4% of upper-income children.⁷ In the face of these gaping, unambiguous socioeconomic disparities in access to the core technologies necessary for online jury trials, how can anyone seriously maintain that juror diversity will not be adversely affected by online trials? The loss of juror diversity alone is enough to require us to abandon mandatory online jury trials, but it is far from the only problem with such trials.

The second large loss in an online jury trial is the loss of the ability to ensure that the court and the litigants keep the online jurors' undivided attention. Getting and keeping the attention of jurors is increasingly difficult, even during *in-person* jury trials. When an online juror is sitting in his or her living room with cellphone in hand, in close proximity to his or her spouse, children, and pets, it is next to impossible.

The third large loss in an online jury trial is the loss of a magical set of connections and chemistries that can occur only when humans interact face-to-face. Videoconferencing platforms on the internet have existed only for a scant 25 years or so. For thousands of years predating the appearance of these platforms, our brains became hardwired for in-

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person communications. Our brains evolved to process information within shared three-dimensional environments instead of within closed-off, two-dimensional videoconferencing environments that foreclose opportunities to perceive and process non-verbal clues.⁸ A growing body of research confirms the commonsense notion that interacting through computers decreases the ability of people to form accurate assessments of the people with whom they interact and decreases the ability to form meaningful bonds with others.⁹

The outcome-determinative connections and chemistries imperiled by online jury trials include those between: 1) the judge and the jurors, 2) the lawyers and the jurors, 3) the clients and the jurors, 4) the witnesses and the jurors, and 5) the jurors themselves when they deliberate. Lawyers must pick jurors, and jurors must assess witness credibility by assessing subtle verbal and nonverbal clues. Asking lawyers and jurors to accomplish these critical tasks within the two-dimensional, closed-off environment of an online jury trial is akin to asking someone to compose a picture of what is on the other side of a door by peeking through a keyhole in the door.

Online jury trials also thwart and impede the connections and chemistries necessary for meaningful jury deliberations. Jurors are supposed to arrive at one verdict as part of a special in-person alchemy that is achieved by assembling jurors together in one room. The very outcomes of online jury trials are subject to serious question because online trials cannot begin to replicate the unique in-person alchemy that occurs during jury deliberations in traditional jury trials.

The fourth large loss in an online jury trial is the loss of “the solemnity of the occasion factor.” In traditional jury trials, jurors take part in a solemn and awe-inspiring exercise of their civic duties in the formal setting of a courthouse. They sit close to each other, the presiding judge in a black robe, the parties, the lawyers, the witnesses, the trial exhibits, and the court staff. All of this is lost within the stark, two-dimensional setting of an online video platform.

The challenge to our system of justice posed by COVID-19 is unprecedented, and we will be judged by how we navigate these difficult waters. Mandatory online jury trials are not the solution to our COVID-19-crowded trial dockets, however. We must frankly acknowledge that embracing mandatory online jury trials is equivalent to embracing the untenable position that crowded trial dockets alone justify disposing of cases using methods that mortally imperil the fair and just dispositions of those cases. There is a place for *voluntary* online jury trials, but we should never impose *mandatory* online jury trials on litigants. We must not exile ourselves forever, like the passengers on Márquez’s ship, from that irreplaceable foundation of our system of justice, the traditional jury trial. **TBJ**

NOTES

1. Monica Anderson, Andrew Perrin, Jingjing Jiang & Madhumitha Kumar, *10% of Americans Don’t Use the Internet. Who Are They?*, Pew Research Center (April 22, 2019), <https://www.pewresearch.org/fact-tank/2019/04/22/some-americans-dont-use-the-internet-who-are-they/>.

2. *Id.*
3. *Id.*
4. Monica Anderson, *About a Quarter of Rural Americans Say Access to High-Speed Internet is a Major Problem*, Pew Research Center (Sept. 10, 2018), <https://www.pewresearch.org/fact-tank/2018/09/10/about-a-quarter-of-rural-americans-say-access-to-high-speed-internet-is-a-major-problem/>.
5. *Id.*
6. Emily A. Vogels, Andrew Perrin, Lee Rainie & Monica Anderson, *53% of Americans Say the Internet Has Been Essential During the COVID-19 Outbreak*, Pew Research Center (Apr. 30, 2020), <https://www.pewresearch.org/internet/2020/04/30/53-of-americans-say-the-internet-has-been-essential-during-the-covid-19-outbreak/>.
7. *Id.*
8. *See Covid-19, Remote Communication, and Body Language*, Humintell Admin, <https://www.humintell.com/2020/04/how-has-communication-changed-from-the-covid-19-pandemic/>.
9. *See, e.g.*, Bradley M. Okdie, Rosanna E. Guadagno, Frank J. Bernieri, Andrew L. Geers & Amber R. McLaren-Vesotski, *Getting to Know You: Face-to-Face Versus Online Interactions*, *27 Computers in Human Behavior* 153-59 (2011), https://liberalarts.oregonstate.edu/sites/liberalarts.oregonstate.edu/files/psychology/research/okdie_guadagno_bernieri_geers_mclarny-vesotski_2011.pdf.



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