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The Judicial Role in Criminal Proceedings

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Attempting to Ensure Fairness in the Glare of the Media

RICHARD D. FRIEDMAN

INTRODUCTION

ALL LEGAL SYSTEMS worthy of credit have a commitment to achieving fairness between the parties to the litigation. In addition, common law legal systems have a longstanding commitment to openness in judicial proceedings. At the same time, and in part for the same reasons, they also have a longstanding commitment to freedom of expression. There is inevitably a tension among these three goals, because in cases of great public interest openness leads to publicity, and publicity may threaten or at least appear to threaten the fairness of a trial. In addition, sometimes publicity may create an intrusion on the lives of jurors and witnesses. This is a well-trodden area, and I can only skim the surface of it in this essay. I am going to offer an American perspective on this area – or at least the perspective of one American.¹ I am far from an uncritical advocate of the way that we deal with these problems in the United States. At the same time, I am sufficiently inured in the American ideology of the area that some of the approaches in England (and, I believe, elsewhere throughout the United Kingdom)² strike me as unduly restrictive of freedom of expression. I am aware of this bias, and aware of the dangers of criticising a system with which one is not intimately familiar. Nevertheless, I will offer my own views, for what they are worth.

Different considerations may apply to expression by participants in the legal system – notably parties, lawyers, witnesses, and jurors – on the one hand and by non-participants, mainly the media, on the other. I will focus for most of this paper on limitations on the media, and possible substitutes for such limitations.

¹ For the views of an American who generally prefers the English approach to these issues, see W. T. Pizzi, “Discovering Who We Are: An English Perspective on the Simpson Trial” (1996) 67 *University of Colorado Law Review* 1017.

² I will be focusing on the law of England and Wales; I gather that in most material respects the law in this area is roughly similar in Scotland and Northern Ireland – or at least more similar to the English law than to American law.

LIMITATIONS ON THE MEDIA AND ALTERNATIVE APPROACHES

Restrictions on Reporting

In the United States, a bedrock principle is that, with only theoretical limitations at the extreme margin, anything that the media learn about legal proceedings – whether pending, imminent, prospective, or past – they may publicise.³ I believe this is a valuable and important principle, and that the United Kingdom suffers in comparison by a less stringent attachment to it.

In England, under the Contempt of Court Act 1981 the media are expected to be self-restraining, under penalty of contempt, against reporting that might create a substantial risk of seriously prejudicing active legal proceedings – proceedings being “active” once there has been an arrest or issuance of a warrant.⁴ This limitation, it appears to me, can be a serious impingement on investigative reporting. For example, in one 1997 case, *Attorney-General v. Morgan*,⁵ a newspaper was held in contempt under section 2(2) of the Act for breaking the story of a large counterfeit ring the day after the defendants were arrested – arrests that, it appears, would not have occurred had it not been for the reporting itself, which was tipped off to the police. The court emphasised that the story had been intended to make a big impact on the reader – but what would one expect? – and had portrayed the defendants as criminals. And how else could one portray them and yet tell this story? The *Morgan* decision may be erroneous under English law. It may even be a stray case. But neither can one say that in the English context it is a bizarre result. The courts tend to decide cases by examining all the material circumstances, a decision style that makes a wide range of results possible.⁶ *Morgan* represents the type of legal risk to which the media are consistently exposed.

³ *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976). See American Bar Association, *Standards for Criminal Justice: Fair Trial and Free Press*, 3rd ed. (approved 1991, published 1992), Standard 8-3.1 (“Absent a clear and present danger to the fairness of a trial or other compelling interest, no rule of court or judicial order should be promulgated that prohibits representatives of the news media from broadcasting or publishing any information in their possession relating to a criminal case.”).

⁴ With respect to contemporaneous reports of proceedings held in public, s. 4(1) of the Act creates a defence to the strict liability rule if the reporting is “fair and accurate” and published in “good faith”. This provision seems not to come into play much, though the courts certainly do refer to it often, for example, *R v. Dover Justices* (1992) 156 J.P. 433; *R v. Beck* [1993] 2 All E.R. 177. From an American perspective, the provision is somewhat worrisome – raising the concern that in some circumstances whether a reporter will be punished will depend on whether or not the judiciary determines the reporting to be fair and accurate, published in good faith, and sufficiently contemporaneous.

⁵ Also *Attorney-General v. News Group, The Independent*, 17 July 1997.

⁶ See *Attorney-General v. MGN Ltd* [1997] 1 All E.R. 456 (emphasising the importance of considering the likelihood of an article being read, the impact it would likely have at the time of publication, and the residual impact at the time of trial; declining to hold publication contemptuous, because there had previously been saturation publicity concerning the defendant); *Attorney-General v. Independent News Ltd* [1985] 2 All E.R. 370 (emphasising lapse of time before trial among other factors, including length of a broadcast and the limited circulation of a newspaper).

From an American perspective, a case of this sort seems most unfortunate. It is of profound importance that the media have the incentive to find wrongdoing of public importance and bring it to light; *Morgan* itself is one more demonstration of that principle. And it is unfortunate when the courts act as censors of the media, subjecting them to punishment depending on the merits of what they have said, how it was intended, and how it might be perceived. Such intrusion may sometimes be inevitable in libel cases – a field that is far more limited in the United States than in the United Kingdom, and arguably should be limited. But at least libel does not impose sanctions unless someone has been hurt by an inaccurate report, and even then the sanction is usually compensatory rather than punitive or prohibitive. The English Contempt Act, by contrast, prohibits speech because of speculative fears of impact on the judicial system. And part of those fears, it appears to me, is fear not that trial will be rendered unfair – because often, as I will explain shortly, the unfairness can be prevented – but that the system will be put to inconvenience in preventing unfairness.

I have a somewhat similar, but more qualified, reaction to the use of the court's power, under section 4(2) of the Contempt of Court Act, to impose restrictions postponing when the media may report fully on proceedings that occur in open court.⁷ These restrictions are imposed rather frequently, and, while the appellate courts do not give the trial courts anything like a free hand in imposing such restrictions, they are still an important part of the English judicial scene. After spending some time in England, I have found that there is remarkably broad support across the political spectrum, even among many people generally devoted to civil liberties, for restrictions of this sort. I confess that I can now see some merit to the English approach. To the extent that reporting allows the public to respond to and affect the events being reported, that effect is generally undesirable in the context of criminal prosecutions. To the extent that reporting keeps the public informed, and allows long-term consideration of matters of public interest, that function can arguably be performed almost as well after a short delay, when the trial is over. Moreover, such restrictions do not involve the court in evaluating the merits of what the media reported.

Nevertheless, on balance, I find such restrictions very troublesome. They create an undesirable entanglement, by requiring the courts to police a line between what may and may not be reported. Perhaps more importantly, these restrictions are a form of censorship. They order the media not to report what they know. This is information that might be highly newsworthy, and will probably be less newsworthy even a few days later and that anybody in the world, by walking into open court – or, in some cases, logging onto the internet⁸ – could

⁷ Section 8 of the Magistrates' Court Act 1980 also imposes strict limitations on what may be reported about committal proceedings, absent consent of the accused.

⁸ Apparently information on the notorious Rosemary West case was available in England via the Internet, from foreign media sources, even while the domestic media were foreclosed from reporting it. Information, once released to any significant segment of the public anywhere in the world, is now like the tide, impossible to hold back or confine.

find out. They therefore seem to reflect a theoretical problem: if we genuinely mean the proceedings to be open, then should we not keep them genuinely open?

I have argued against restrictions on reporting. But how in these cases – investigative reporting before trial and contemporaneous reporting of trial proceedings themselves – can unfairness in litigation be prevented? The question needs to be considered with respect to, first, concern about future trials and, secondly, concern about the current trial.

Preventing Unfairness: Concern about Future Trials

With respect to prejudice in future trials – arising either because the trial has not yet begun or because trials related to and subsequent to the current one are anticipated – I think the main response should be not to over-magnify the problem.⁹ I take this view despite the existence of a large body of research suggesting the possibility of such prejudice.¹⁰ Despite this research, it is hard to find any specific cases in recent years in which it can be said with any confidence that prejudicial pre-trial publicity led to a miscarriage of justice.¹¹

As the court noted in *Ex parte Telegraph*, “the staying power and detail of publicity, even in cases of notoriety, are limited.”¹² Usually the biggest floods of publicity about a crime occur shortly after it has been committed and after a suspect has been arrested, and typically this occurs at least several months before trial.¹³ And even if the pre-trial publicity does have some staying power, it is

⁹ Arguably, the United States Supreme Court has carried the remedy of not over-magnifying the problem too far. See *Mu'min v. Virginia*, 500 U.S. 415 (1991) (holding, 5–4, that there was no constitutional violation in trial judge’s failure to question jurors specifically about the content of the news reports to which each had been exposed).

¹⁰ These studies are ably summarised in C. A. Studebaker & S. D. Penrod, “Pretrial Publicity: The Media, the Law, and Common Sense” (1997) 3 *Psychology, Public Policy, and Law* 428. A somewhat older summary is D. Linz & S. Penrod, “Exploring the First and Sixth Amendments: Pretrial Publicity and Jury Decision Making”, in D. S. Kagehiro and W. S. Laufer (eds.), *Handbook of Psychology and Law* (1992, New York: Springer-Verlag), 3.

¹¹ See S. Helle, “Publicity Does Not Equal Prejudice” (1997) 85 *Illinois Bar Journal* 16, 18–19 (noting that because of “affirmative action” against prejudicial effects, the Supreme Court has not had to overturn a conviction because of pre-trial publicity in 30 years, and that in some notorious cases in which prejudice might have been anticipated the defendants were acquitted); Studebaker & Penrod, *supra* note 10, 455–456 (calling for further research that would “help determine whether pretrial publicity has resulted in bias in any particular, actual case.”).

¹² [1993] 2 All E.R. 971, 978; [1993] 1 W.L.R. 980, 987.

¹³ This factor distinguishes many of the experimental studies that suggest the prejudicial power of pre-trial publicity; in many of those studies, the prejudicial information is presented to the subjects very shortly before the subjects consider the “trial” materials. See Studebaker & Penrod, *supra* note 10, 446 (“neither the amount of publicity [in laboratory studies] nor the time period over which it is presented approaches the conditions of pretrial publicity exposure in the real world”). One study that did focus on the impact of delay concluded that “a fairly short, 12-day delay eliminated bias created by exposure to factually biasing publicity”, G. P. Kramer *et al.*, “Pretrial Publicity, Judicial Remedies, and Jury Bias” (1990) 14 *Law and Human Behavior* 409, 431. Emotional publicity – containing information likely to arouse negative emotions – appeared, however, to retain some prejudicial potential after this rather short delay.

ABA Standard 8-3.3 calls for the court to consider granting a continuance or a change of venue

generally received casually by the jurors, before their attention is focused on the matter or they have vital responsibilities relating to it.¹⁴ The evidence at trial will likely have far more impact on them – though some courts may have been overly optimistic in thinking that this evidence will crowd out whatever the jurors learned before.¹⁵ Moreover, even if the jurors do remember, we can hope that they will disregard. Here again the courts have been optimistic, perhaps overly so.¹⁶ The cause of the optimism may be the apparent lack of any alternative palatable choice.¹⁷

And yet, where pre-trial publicity does appear to pose significant danger, there are two other measures, used more commonly in the United States than in the United Kingdom, that can often mitigate or eliminate its prejudicial effects. One is extra care in jury selection.¹⁸ Jury selection in the United Kingdom is usually a far briefer, more casual matter than in the United States, and that is probably a good thing. But in the occasional cases in which concern over pre-trial publicity is serious, taking extra time and examining each prospective juror closely are probably worthwhile measures. I believe our courts tend to overdo it in these cases. They forget that the constitutional requirement is not to find

when there is a substantial probability of prejudice from pre-trial publicity. Because of the length of the typical pre-trial delay, I do not believe a further continuance to await the ebbing of the effects of pre-trial publicity is usually necessary. And if, after a substantial pre-trial delay, an intolerable degree of prejudicial potential remains, it will not usually be appropriate to delay the trial further; any further continuance that is likely to diminish that potential significantly is likely to be intolerably long.

¹⁴ I think this factor also distinguishes many of the experimental studies that suggest a powerful impact of pre-trial publicity. In many of these studies, the subjects are given prejudicial information about the defendant as part of the study. This factor seems highly likely to enhance the impact of that information, especially in light of the rather meagre case summaries or transcripts that are often used in these studies. See Studebaker & Penrod, *supra* note 10, 446 (“presentations of the pretrial publicity in experimental settings do not match the manner of self-selected consumption of pretrial publicity”).

¹⁵ See, for example, *R v. West* (1996) 2 Cr. App. R. 374, 386 (quoting *R v. Kray* (1969) 53 Cr. App. R. 412, 414–15: “The drama . . . of a trial almost always has the effect of excluding from recollection that which went before.”).

¹⁶ See, for example, *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991) (Kennedy J., dissenting) (“Empirical research suggests that in the few instances when jurors have been exposed to extensive and prejudicial pre-trial publicity, they are able to disregard it and base their verdict upon the evidence presented in court.”); *R v. Coughlan* (1976) 63 Cr. App. R. 33, 37 (“Jurors are capable of disregarding that which is not properly before them. They are expected to disregard what one accused says about another in his absence. If they can do that, which is not easy, they can disregard what has been said in a newspaper.”). Compare Studebaker & Penrod, *supra* note 10, 442–443 (reviewing mixed results of research on extent to which instructions to jurors reduce their reliance on pre-trial publicity).

¹⁷ See *R v. West* (1996) 2 Cr. App. R. 374, 386 (“[T]here can scarcely ever have been a case more calculated to shock the public who were entitled to know the facts . . . [And yet] a fair trial could be held after such intensive publicity adverse to the accused . . . To hold otherwise would mean that if allegations of murder are sufficiently horrendous so as inevitably to shock the nation, the accused cannot be tried. That would be absurd.”). Compare the presumption of innocence. It means little if the jury refuses to put aside the self-evident fact that the prosecutor has sufficient confidence in the defendant’s guilt to press the charge. Do jurors truly put this fact out of mind? Perhaps not. But we do not decline on that ground to try defendants.

¹⁸ See ABA Standard 8-3.5(a).

jurors who have not heard information about the case, but rather to find jurors who can sit fairly. As our Supreme Court said in *Irvin v. Dowd*, it “is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence heard in court.”¹⁹ Of course, it is no easy matter to determine which jurors satisfy this standard,²⁰ and there is a danger of discriminatory selection. Nevertheless, I believe the effort can often be effective. It can at least weed out those who are unprepared even to try to sit fairly, and it can distinguish among jurors based on the extent of the information they have received. And, where it is feasible, without an unduly long *voir dire*, to select a panel of qualified jurors who have not been exposed to a substantial amount of potentially prejudicial information, the court may as well try to pick such a jury.

Second, sometimes a change of venue eases the problem. I suspect this response is more useful in the United States than in the United Kingdom, where a higher percentage of stories of interest receive essentially the same coverage across the nation. Sometimes, though, just moving the trial away from the very epicentre of interest will diminish the problems created by pre-trial publicity. For example, the Oklahoma City bombing was a story of intense interest throughout the United States – and to a lesser extent throughout the world – and moving the trial to Denver did not mean that the pool of jurors would be ignorant of the case before entering the courtroom. But I suspect it did make for a somewhat easier time in selecting a jury and a somewhat more rational trial atmosphere.

Of course, changes of venue can make their own problems, especially when the case is an ethnically charged one and the new venue has a markedly different ethnic makeup from the scene of the crime. I have in mind particularly the first Rodney King beating trial, which was moved from central Los Angeles to a virtually all-white area. The change of venue probably accounted in significant part for the result in that case – acquittal of the officers on all charges except one count against one officer, on which the jury was hung – and the disastrous riots that followed. A particularly interesting and rather troublesome case is *State v. Lozano*,²¹ in which an Hispanic Miami police officer killed two black men,

¹⁹ 366 U.S. 717 (1961). See also *Phillips v. Nova Scotia (Westray Inquiry)*, 98 C.C.C. (3d) 20 (Supreme Court of Canada, 1995): “The objective of finding 12 jurors who know nothing of the facts of a highly publicised case is, today, patently unrealistic. Just as clearly, impartiality cannot be equated with ignorance of all the facts of the case . . . [I]n order to hold a fair trial it must be possible to find jurors who, although familiar with the case, are able to discard any previously formed opinions and to embark upon their duties armed with both an assumption that the accused is innocent until proven otherwise, and a willingness to determine liability based solely on the evidence presented at trial” (per Cory J.). Nevertheless, ABA Standard 8-3.5(b) counsels a judge not to rely unduly on a juror’s assertion that he or she can sit fairly, and instead to discharge the juror if she has been exposed to substantially prejudicial material.

For an article recommending aggressive use of *voir dire*, as well as of gag orders on trial participants, see C. H. Whitebread and D. W. Contreras, “Free Press v. Fair Trial: Protecting the Criminal Defendant’s Rights in a Highly Publicized Trial by Applying the Sheppard-Mu’Min Remedy” (1996) 69 *Southern California Law Review* 1587.

²⁰ Studebaker & Penrod, *supra* note 10, 440–42.

²¹ 52 Crim.L.Rep. 1521 (March 24, 1993).

sparking off riots. Lozano moved for a change of venue, contending that a Miami jury would be afraid to acquit. The motion was denied but his manslaughter conviction was reversed on the ground that the venue should have been changed. The venue was originally changed to Tallahassee, which has a substantial black population but a negligible Hispanic one. Lozano, however, won a change to Orlando, which has a small black population but a larger Hispanic population than Tallahassee, and there he was acquitted. These cases suggest the great care that must be exercised in changing venue. At the same time, the venue changes were not required by media reporting as such, or at least not by reporting that could plausibly be restrained consistent with any genuine notion of a free press. When a governmental office building is bombed, or when police beat or kill citizens, these are matters that must receive full reporting.

Preventing Unfairness: Concern about the Current Trial

Now consider prejudice that might be created by reporting during trial, or immediately beforehand. The principal concern is that the jury will learn of information revealed in court but not admitted in evidence. It seems to be accepted in England that the press can be restrained from contemporaneously reporting such information, even though it is revealed in open court.²² And it does seem to me here that the danger in this situation is far greater than that created by pre-trial publicity: now the jurors have been selected, and the legal system cannot afford to lose many or sift through a new panel to find jurors who have not been tainted; the attention of the jurors is focused fully on the case; and there is no lapse of time during which they might ease the situation by forgetting what they have heard through the media but not as evidence. Nevertheless, I think that censorship of the media is the wrong way to go. In this situation, I believe, at least three remedies may help.

First, courts can insist that, to the extent feasible, all doubtful evidentiary issues be presented before trial. Modern notions of procedure seem to be moving in this direction. Evidentiary questions will always arise during trial, of course, but conscientious adherence to this norm would substantially mitigate the problem.

Second, jury sequestration for short periods should be an option.²³ Note that I refer to *short* periods. I believe that the sequestration in the O.J. Simpson

²² For example, in *Ex parte Telegraph* [1993] 2 All E.R. 971, one such restriction was not even challenged.

²³ ABA Standard 8-3.6(b) provides that sequestration "should be ordered" whenever "the case is of such notoriety or the issues are of such a nature that, in the absence of sequestration, there is a substantial likelihood that highly prejudicial matters will come to the attention of the jurors." See *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966) ("sequestration of the jury was something the judge should have raised *sua sponte* with counsel"). For a much different view, see generally M. Strauss, "Sequestration" (1996) 24 *American Journal of Criminal Law* 63 (arguing that the benefits of sequestration are largely conjectural, that it is "a concept whose time has come and gone", and that it should not be used).

criminal case was a terrible burden that should never be repeated. Basing any principle on that decision would, in my view, be just one more example of what I call the Simpson Elephantiasis Fallacy – that is, the fallacy of believing that any representation of the American criminal justice system can be inferred from a case that represented an aberrant overgrowth of that system. But sequestration for a day or two, and even for periods of up to, say, two weeks, should not be too much of a problem; until recently in England, as is still the norm in the United States, juries were traditionally sequestered as a matter of course during their deliberations – the traditional formula was that they were denied “meat or drink” (and outside companionship as well) until they came to a decision²⁴ – and I believe there is at least as much ground to sequester them during trial, and no more hardship for the same amount of time.

Third, I believe that, especially on request of the defendant, the court should consider closing proceedings that are not held in front of the jury, and otherwise withholding some information from being presented in open court. I say especially on request of the defendant because I believe it is essential to an acceptable form of criminal adjudication that the accused have a right to a public trial. This right is expressed in the Sixth Amendment of the United States Constitution. The right to openness does not apply to all proceedings, however – for example, to grand jury proceedings. The exact bounds of this right are not often a matter of controversy. The more frequently pressing issue is what should occur when both the prosecution and the defendant wish that some aspect of trial or pre-trial proceedings be held out of the public view, even if it is the type of proceeding that has traditionally been held in the open. This is a topic of enormous importance and complexity.

The United States Supreme Court, in a series of decisions under the First Amendment, has made it very difficult for a court to close proceedings of a type that have traditionally been held in the open.²⁵ My personal feeling is that this whole doctrine, as a matter of constitutional law, is a mistake. The First Amendment protects the right of expression. I do not believe that the Amendment should be construed to create a constitutional right of access by outsiders to the proceedings of governmental institutions. In the long run, I believe, extending the First Amendment this far tends to dilute the Amendment and so even devalue the rights that it protects, because it turns the doctrine of free expression into a balance of policy on the merits of openness.²⁶ In some settings

²⁴ See 3 *Blackstone's Commentaries* 375; *Skillern v. State*, 559 S.W.2d 828 (Tex. Cr. App. 1977); A. E. Korpela, Annotation, “Separation of Jury in Criminal Case During Trial – Modern Cases” (1977) 72 *A.L.R.* 3d 131, § 2(a). For a modern, and more moderate, form of this limitation, see *Wash. Rev. C. Ann.* § 4.44.300.

²⁵ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (trial); *Globe Newspaper Co. v. Superior Court* 457 U.S. 596 (1982) (trial testimony of alleged victim of sex offence); *Press-Enterprise Co. v. Superior Court (Press Enterprise I)*, 464 U.S. 501 (1984) (upholding right of access to jury voir dire); *Press-Enterprise Co. v. Superior Court (Press Enterprise II)*, 478 U.S. 1 (1986) (right of access to preliminary hearings).

²⁶ I expressed this view some years ago in “Another Look at *Gannett*” (1980) 4 *District Lawyer* 20.

— such as juvenile proceedings,²⁷ grand jury proceedings, jury deliberations, and conferences within judicial chambers or among the judges of an appellate court — that balance has always been drawn in favour of confidentiality, and no matter how great the public interest in what is going on behind those closed doors the media do not have a right of access there. The traditional law on this matter recently received a strong endorsement as news organisations were denied access to proceedings ancillary to the grand jury's investigation in the Lewinsky affair.²⁸ I do believe that proceedings that have traditionally been open should usually be kept open, even if the parties prefer secrecy, but I do not believe that this usual preference should be elevated into a constitutional principle. Thus, I find perplexing *Press Enterprise II*, in which the Supreme Court held that the media have a constitutional right of access to preliminary hearings, at least as they are conducted in California. I find this a particularly curious case because, as Justice Stevens pointed out in dissent, the function of the preliminary hearing is closely akin to that of the grand jury, which operates without public access.

The American Bar Association Standards also reflect the tendency to enshrine what has become traditional. Standard 8-3.2 expresses very limited circumstances in which a court should “issue a closure order to deny access to the public to specified portions of a judicial proceeding or related document or exhibit.” At the same time, however, the Standard limits the definition of “judicial proceeding” to exclude “bench conferences or conferences on matters customarily conducted in chambers.” My suggestion is that, if media coverage of a specific procedure — such as a motion to suppress inflammatory evidence — that is not conducted in front of the jury substantially threatens the fairness of a trial, courts should be willing to take advantage of whatever leeway they are allowed under the governing law to conduct the procedure confidentially, such as in chambers.²⁹ I do not believe any great sacrifice of principle is entailed, given the

²⁷ See, for example, N. Y. Family Court Act § 341.1, providing: “The general public may be excluded from any proceeding under this article and only such persons and the representatives of authorized agencies as have a direct interest in the case shall be admitted thereto.” The Practice Commentary by Merrill Sobie published with this statute notes that its wording suggests that an affirmative act by the court is necessary to close the courtroom, but “[i]n practice . . . the public is routinely excluded from all family court proceedings . . . [D]ecades of experience reinforce the virtually automatic exclusion of any person who does not have a direct interest in the case.”

²⁸ *In re Motions of Dow Jones & Co., Inc.*, 142 F.3d 496 (D.C. Cir.), cert. denied, 1998 WL 313080 (October 5, 1998).

²⁹ Interestingly, in some states, when a child witness who is the alleged victim of a crime testifies, the court is given authority to clear the courtroom of spectators without a direct interest in the trial — except for the media! See Ill. Rev. Stat. ch. 38, paras. 115–111; Fla. Stat. Ann. 918.16. Such provisions are plainly not meant to restrict reporting, but rather to provide an easier environment for the child in which to testify. See *People v. Holveck*, 141 Ill.2d 84, 152 Ill. Dec. 237, 565 N.E.2d 919, 925–27 (Ill. 1990), upholding one of these statutes against constitutional attack. An alternative, or supplemental, approach, is to transmit the child's testimony to another room where spectators may see it; in some cases, the defendant is in the room with the spectators rather than with the witness. I will not comment here on the merits of such arrangements, which the Supreme Court has held valid against constitutional attack in certain circumstances: *Maryland v. Craig*, 497 U.S. 836 (1990). See also *R v. Newcastle upon Tyne Coroner, Ex parte A*, *The Times*, 19 January 1998 (dealing with a witness giving evidence behind screens in an inquest).

extent to which proceedings already are conducted in camera; in England, the presentation of trial evidence is sometimes even presented in camera in matters involving very sensitive security information,³⁰ and I am merely suggesting that protecting fairness may be another reason for closing the courtroom door occasionally.

It might seem bizarre at first glance to invoke the possibility of closing proceedings as a remedy for the potential of prejudicial reporting. Placing restrictions on reporting might seem to be a less intrusive remedy than closing the proceeding and preventing the flow of information altogether. But I do not believe this is true. Withholding information is an everyday practice of many governmental institutions – not only those I have mentioned, grand juries, petit juries, and conferences among judges and in chambers – but all other policy-making institutions; indeed, executive privilege, which was very much in the news as a result of the Lewinsky affair, is an explicit recognition of the importance of giving governmental officers breathing room to make some decisions behind closed doors. When a particular procedure is closed, all the governmental institution has done, in effect, is close its own door. On the other hand, censorship of the media's reporting – whether in the form of before-the-fact injunctions against publicising information they have at hand or in the form of after-the-fact evaluations of its accuracy and impact – strikes me as much more worrisome, requiring the judiciary to punish or threaten punishment of the media and creating an excessive entanglement of the two institutions, in which the judiciary must determine how the media has performed or may perform its job. That, I believe, is bad for courts and bad for the media. The concern, in short, is not simply about the degree to which the flow of information is restrained but also, and perhaps more importantly, about the procedure by which the restraints are determined and effectuated.

Withholding Names

One other type of withholding of information, similar to one that is well established in England, has fared much better so far in the United States. Recently, some state statutes have provided, in effect, that in some circumstances certain witnesses, most notably children and the alleged victims of sex offences, can have their true names withheld in open court.³¹ The defendant is given the accu-

³⁰ Courts are regarded as having inherent power to hold closed proceedings where necessary, in exceptional cases. See *Scott v. Scott* [1913] A.C. 417.

³¹ Some appellate courts routinely refer to such persons by initials or a fictitious name only. See, for example, *Womack v. United States*, 673 A.2d 603 (D.C. App. 1996) (rape complainant); *Tyson v. State*, 619 N.E.2d 276 (Ind. App. 1993) (rape complainant); *State v. Brewer*, Tenn. Crim. App. LEXIS 476 (Ct. Crim. App. 1996), n. 1 (alleged victim of child sexual abuse); *State v. Bartlett*, 164 Ariz. 229, 230 n.1, 792 P.2d 692, 693 n.1 (1990) (policy of court advising all appellate judges "to avoid, where possible, referring by name in appellate opinions to individual victims or witnesses who are minors or victims of crimes, where naming them would cause them danger or unnecessary

rate identity of the witness – to this he or she has a constitutional right³² – but in court the complainant may be referred to by a fictitious name such as Jane Doe.³³ A California statute to this effect has survived constitutional attack thus far,³⁴ and I do not think these statutes are likely to be invalidated. These statutes do not generally prevent the release of prejudicial information, but they may mitigate the difficulties of testifying for some witnesses in highly publicised cases. On balance, I believe these statutes are probably a good thing, though I admit to some misgivings. I think they may have an unhealthy tendency to reinforce social views that there must be something shameful about someone who is the complainant in a sex offence case. And, from a totally different perspective, there is some value to the idea – one with antecedents in ancient Athens – that a witness who testifies falsely risks not only whatever divine or legal punishments might be thought to follow from violation of the oath but also loss of reputation. Nevertheless, in the reality of the modern day, such a modest protection of witnesses from the public glare is probably worthwhile, diminishing somewhat the already high cost that we impose on witnesses.³⁵ Perhaps this anonymity should be extended to other witnesses on a discretionary basis in cases in which there is no particular public value in knowing the name of the witness.

TELEVISIONING TRIALS

Discussing media access to trials naturally leads to an issue of constant interest on both sides of the Atlantic: should proceedings that are open to the public be televised, if broadcasters find them of sufficient interest to carry? Almost all American states now allow televising of judicial proceedings in at least some circumstances, sometimes even over the objection of the defendant. And, though televising of proceedings in criminal cases is generally prohibited in federal courts,³⁶ the Supreme Court has held the practice constitutional.³⁷ My own feeling is that if a proceeding is to be held in the open, so that any interested person who happens to be near the courthouse can, subject to space limitations, walk

embarrassment”), vacated on other grounds, 501 U.S. 1246 (1991); cf. *In re D.C.*, 281 N.J. Super. 102, 656 A.2d 861 (1995) (committed person, in involuntary civil commitment case); *S.V. v. R.V.*, 933 S.W.2d 1, 3 (Texas 1996) (divorce case involving allegations of sexual abuse); *G.W.H. v. D.A.H.*, 650 S.W.2d 480 (Tex. App. 1983) (pursuant to statute, now Family Code § 109.002, only using initials in case involving termination of parent-child relationship).

³² *Smuth v. Illinois*, 390 U.S. 129 (1968).

³³ See California Penal Code § 293.5. Somewhat similar is Florida Stat. Ann. § 92.56 (added 1995).

³⁴ *People v. Ramirez*, 64 Cal. Rptr. 2d 9, 55 Cal. App.4th 47 (Cal. App. 1997), review denied.

³⁵ See J. D. Jackson, R. Kilpatrick and C. Harvey, *Called to Court: A Public Review of Criminal Justice in Northern Ireland* (1991, Belfast: SLS) 132 (noting anxiety of some witnesses about publicity for their testimony).

³⁶ Fed.R.Crim. P. 53. But note that even in federal courts there has been some experiment, and some loosening, as described by J. Abramson in “The Pros and Cons of Televising Trials”, in J. Abramson (ed.), *Postmortem: The O. J. Simpson Case Confronts Race, Domestic Violence, Lawyers, Money and the Law* (1996, New York: Basic Books), 195, 196–197.

³⁷ *Chandler v. Florida*, 449 U.S. 560 (1981).

into the courthouse and watch and listen, and so that the media can inform at second hand those who cannot attend, there generally is no good reason to prevent television cameras from enabling those who cannot attend to watch at first hand. In states that have extensive experience with televised proceedings, there seems to be very little disposition to end the practice.³⁸

I do not want to claim too much for televising of proceedings. Advocates often contend that televising trials performs a valuable educational function by showing the public how trials work, without the filter of reporters. To some extent that is true, but the point should not be carried too far. For one thing, it is the extraordinary trials that tend to be televised. And, though Court TV, a cable channel in the United States that specialises in coverage of legal proceedings, is driven – at least in part by the limited supply of truly extraordinary trials – to cover some more mundane ones, it is still the extraordinary ones that get the most attention. Trials can be of extraordinary interest to the public for various reasons, but usually one aspect of the extraordinary case is that the advocacy is better – with the expenditure of a great deal more energy and resources, and often with better lawyers – than in the typical criminal case. The Simpson and Louise Woodward cases exemplify this phenomenon. Accordingly, viewers see only a small, atypical slice of the criminal justice system at work, one that is in many ways far less distressing than the mundane mill of ordinary cases, plea bargained or tried relatively perfunctorily by comparison because of lack of resources. In short, much of what is learned from watching trials on television is misinformation about the broader system. Also, unless a viewer watches all or virtually all of a trial – and, putting aside retired people, if many viewers do that we are wasting too much of our gross national product on televised trials – it is not true that he or she is no longer dependent on reporters as intermediaries. Most viewers are not able to watch more than snippets live, and beyond that they depend on editors to make selections of what to show.

Nevertheless, I believe that television is a way of bringing the norm of open trials into the modern day. Great trials have for millennia – dating back at least to those of Socrates and Jesus – been held in view of the relevant community, and if the relevant community is far more than the number of people who can crowd into a courtroom, television is an appropriate solution.

Fears that television cameras would be too much of a distraction in the courtroom are no longer well founded, now that technology and improved techniques allow the technicians to be unobtrusive. The conduct of participants once in the courtroom seems from numerous studies to be very little altered by the presence of cameras.³⁹ I do not believe that most lawyers play to the cam-

³⁸ *Televising the Courts*, a 1989 report of a working party of the Public Affairs Committee of the General Council of the Bar of England, recommended that televising of trials be permitted, but as yet this has not happened.

³⁹ See, for example, K. L. Sager and K. N. Frederiksen, "Televising the Judicial Branch: In Furtherance of the Public's First Amendment Rights" (1996) 69 *Southern California Law Review* 1519, 1543–1548 (views of two media advocates); S. E. Harding, Note, "Cameras and the Need for

eras. Even if a large part of their concern is their public reputation, they know that the best way to protect that reputation is to win the case being tried. Thus, I believe, from what I have seen both in the courtroom and on the screen, that they generally stay focused on what is happening in the courtroom. Again, I do not want to overdraw the point; for example, I suspect that the trial judge in the Louise Woodward case would not have given her such a low sentence had the trial not generated such a strong public reaction.⁴⁰

After the O. J. Simpson criminal trial, there was much talk that the televising of the proceedings was responsible in large measure for the length of the trial. I do not believe this is so. The Simpson trial was bound to be an aberrational event whether or not it was televised. If the trial judge had been inclined to keep a tighter rein on the proceedings, the television cameras would not have stopped him. A more serious issue is whether televising a spectacular trial will increase disrespect for the judicial system or, when the case is racially charged, inflame racial tensions. My own view is that there is no way to hide these problems permanently. If problems lurking beneath the surface are brought out into the open, that is probably good on net.

Televising a trial will often inflate interest in the trial; I believe this is one reason why the Louise Woodward case became such a cause célèbre in the United Kingdom. That is not an altogether bad phenomenon – real trials are not a bad thing for the attention of the public to be focused on, at least in comparison to a lot of what they might otherwise be watching on television. I am not terribly worried about television intensifying the jury's fear of a mob reaction to an unpopular verdict; this is a concern that has been present in some cases long before the advent of television, and I think the concern is more intense when an inflamed crowd is actually in and around the courtroom – “a mob savagely and manifestly intent on a single result,” as Justice Oliver Wendell Holmes, Jr., put it in one notorious case in the United States.⁴¹

One keen observer, Peter Aranella, who gained a good deal of celebrity as a result of the Simpson case, has suggested that one reason not to televise some notorious trials is that the lawyers, anticipating the possibility of a retrial, will try to reach and indoctrinate future jurors – whose attention has been drawn by the telecast of the first trial – from the courthouse steps.⁴² Television may aggravate this problem, but of course it exists even without telecasts. And indeed, the problem seems less serious to me – because a second trial is so speculative and

Unrestricted Electronic Media Access to Federal Courtrooms” (1996) 69 *Southern California Law Review* 827.

⁴⁰ The judge began his decision on the post-trial motions by emphasising that we do not do justice by plebiscite. In reducing sentence, however, he referred to the case as an extraordinary one. But what made it extraordinary – apart from the quality of the advocacy and the extent of public interest?

⁴¹ *Frank v. Mangum*, 237 U.S. 309, 349 (1915) (dissenting). This important case has been the subject of a great deal of literature. See, for example, L. Dinnerstein, *The Leo Frank Case* (1968, New York: Columbia University Press).

⁴² P. Aranella, “Foreword: O.J. Lessons” (1996) 69 *Southern California Law Review* 1233, 1256.

distant – than the basic problem of lawyers attempting to win over potential jurors for the first trial by making public statements about the evidence before the jury is selected. The remedy, if one is needed, is probably to restrain the lawyers from making such statements.

RESTRAINTS ON PARTICIPANTS IN THE SYSTEM

Restraints on lawyers, or gag orders, are the most important species of the other type of restraints I will discuss, though very briefly—restraints on those who participate in the trial process, as opposed to merely report on it. To the extent we are talking about information that a party or attorney receives only through the compulsory processes of the litigation system, then there is no constitutional bar against an order preventing public disclosure.⁴³ I believe American courts could be more aggressive than they have been about preventing disclosure in this context. The tougher question concerns other information. Does the fact that a person plays some role in the case – attorney, party, witness, in particular – justify restraints on disclosing information relevant to the case?

Consider first the principal issue – the extent to which attorneys may be restrained. These restraints are a matter of course in England. In the United States they are more controversial. The American Bar Association’s Model Rule of Professional Conduct 3.6, which a substantial number of states have adopted, prohibits a lawyer from making an extra-judicial statement if he or she should know “that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.”⁴⁴ But in a highly publicised case, in which the defendant has a reputation and perhaps a political career to protect, it seems the attorney should be able to make some sort of explanatory statement. The Model Rules standard, as part of what is known as its “safe harbor” provision, allows the defence lawyer to state the general nature of the defence. But is this enough? Sometimes, the issues raised by litigation are of general public importance, and discussion of them is what we call “classic political speech”. The Supreme Court has confronted this issue, in *Gentile v. State Bar of Nevada*,⁴⁵ with a notably mixed result. By a 5–4 vote, the Court held that the basic prohibition did not violate the attorney’s right of free speech. But a different 5–4 majority, with Justice O’Connor providing the swing vote, held that, if the statement by the attorney there – one highly critical of the official conduct of the case – was not covered by the “safe harbor” provision, then it was void as vague. I will say no more than that I, like the Court, find the issue very difficult.

So too is the issue of the “Son of Sam” laws⁴⁶ – the question of whether a state may confiscate the profits made by defendants from books and other media

⁴³ See *Seattle Times v. Rhinehart*, 467 U.S. 20 (1984).

⁴⁴ The ABA’s Standard 8-1.1 includes the same language.

⁴⁵ 501 U.S. 1030 (1991).

⁴⁶ These laws are named after a notorious serial murderer in New York who referred to himself as “Son of Sam” in the notes he wrote while still at large taking credit for the murders.

exploitation of their crimes. In one case,⁴⁷ the Court invalidated such a law; the law imposed a penalty on no other speech and no other income, said the Court. It is possible, though, that a different type of law, one more broadly geared to depriving the defendant of the fruits of the crime, would survive.⁴⁸ Appealing as this idea may be, a law geared to depriving the criminal of *expressive* fruits of the crime creates many difficulties. For example, if a notable person with a raffish past writes a memoir, does such a law require a determination of how much of the royalties are dependent on the author's narration of illegal activity?⁴⁹ Perhaps the best approach is not to depend on confiscation, but rather to facilitate the ability of crime victims and their families to recover damages in civil litigation. For example, the limitations period might be re-opened if the defendant makes any income, including royalties, attributable to the crime.

More unusual than the "Son of Sam" laws is a statute passed by California, making it a crime for a person to receive any benefit or payment for providing information about what he or she should reasonably know is a crime or where he or she should reasonably know that he or she may be called as a witness in a criminal prosecution.⁵⁰ This statute has been held unconstitutional by a lower court,⁵¹ and I doubt it would survive in the higher courts. Once again, it is easy enough to see the appeal of a restriction like this.⁵² But it creates a serious impediment on the flow of information that might be of great public interest and importance – information that its possessor has not gained by virtue of involvement in the judicial system or by use of its mechanisms.

One other type of participant who might want to talk is the juror – and here I believe that section 8 of the English Contempt of Court Act makes a great mistake by prohibiting interviews with jurors. Such interviews are very valuable, whether the case is a highly publicised one or merely workaday, in giving a window into the jury room – so long as the jurors speak voluntarily.

⁴⁷ *Simon & Schuster v. Members of the New York State Crime Victims Board*, 502 U.S. 105 (1991).

⁴⁸ See generally L. K. Zavack, Note, "Can States Enact Constitutional 'Son of Sam' Laws After *Simon & Schuster, Inc. v. New York State Crime Victims Board*?" (1993) 37 *St. Louis University Law Journal* 701.

⁴⁹ Cf. *Simon & Schuster*, 502 U.S. 105 (1991), 123.

⁵⁰ Cal. Penal Code § 132.5.

⁵¹ *California First Amendment Coalition v. Lungren*, 1995 U.S. Dist. LEXIS 11655, 1995 WL 482066 (N.D. Cal 1995); see also M. Strauss, "From Witness to Riches: The Constitutionality of Restricting Witness Speech" (1996) 38 *Arizona Law Review* 291; J. R. Cady, "Bouncing 'Checkbook Journalism': A Balance Between the First and Sixth Amendments in High-Profile Criminal Cases" (1995) 4 *William & Mary Bill of Rights Journal* 671; I. Cubell, Note, "Banning the Sale of Witness Testimony: A First Amendment Challenge to California Penal Code Section 132.5" (1995) 75 *Boston University Law Review* 1135.

⁵² In England, the Court of Appeal has spoken critically about media payments to witnesses, indicating that in some cases they may put justice at risk, and suggesting that the question of whether they should be prohibited or controlled by legislation should be examined, see *R v. West* (1996) 2 Cr.App.R. 374, 389.

CONCLUSION

In the United States, it seems to us that in the United Kingdom too little weight is put on free speech. I think that to most people in the United Kingdom, it seems that we in the United States are too willing to tolerate free speech at the cost of creating more complexity, delay, cost, and a circus atmosphere. Neither side seems disposed to move in the direction of the other; this is a context in which path dependence is very important. And I am reasonably confident that *in the short term* neither side will move very far in the direction I have advocated – that rather than infringe free speech, courts should be more willing to close some aspects of proceedings. But in the long run, the sacrifice of some openness in order to ease the tension between fairness and free expression may prove to be a very worthwhile bargain.