PRESS AND MEDIA ACCESS TO THE CRIMINAL COURTROOM

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Families have been the vehicle for success over the centuries, and their cooperation and understanding are responsible for this writing: my loving wife Esther Freedman, a psychiatric social worker; my son Dr. Douglas Freedman, an orthodontist; my daughter Debbie Stiebel, mother of three grandchildren and elementary school teacher in Avon, Connecticut; and my youngest daughter, Miriam, a successful art director in a well-known New York City advertising agency.

Preface

A quarter century ago I authored an important article titled "News Media Coverage of Criminal Cases and the Right to a Fair Trial," which appeared in volume 40 of the Nebraska Law Review (1961). The title is somewhat anachronistic because in today's economy the press and media are not necessarily concerned with "news" but with "entertainment." The accused's right to a speedy and fair criminal trial, for example, is therefore less of a shibboleth of the press and media today; it is only incidental to the "entertainment" that is being sold under the guise of presenting the "news" to the American public. Whether the changing concept of press and media merits the same protection as is generally afforded the "news" is an open question. Yet the unanswered question persists, unless we create a new concept of "news-entertainment" which is more consonant with reality.

Nevertheless, it is important that the accused's rights to a speedy and fair trial be guaranteed; and the press and media are indeed the bulwarks against those forces that would preclude such guarantees. The speedy trial usually means a fair trial, and a fair trial presumes a speedy trial. Giving the press and media access to the criminal courtroom, whether for news or for entertainment or for both—means that someone may be sufficiently concerned about protecting these basic constitutional rights alongside the protection afforded the press and media under the First Amendment.

Barring radio, television, and newspaper coverages from the crimi-

nal courtroom is primarily rationalized on the grounds of maintaining the dignity and decorum of the courtroom, which is then more conducive to protecting the constitutional rights of the criminal defendant to a speedy and fair trial. But these modern-day electronic coverages, including still photography, do not interfere with the conduct of the criminal trial, especially where the trial judge has the instrument of control and supervision, and when the press and media abide by their own codes of conduct. A criminal courtroom need not be forced open all the time if the press and media have rights of access that are respected by the judiciary. In short, press and media should make application for permission to broadcast, televise, report, or photograph the criminal proceedings. There should be little or no restraint whether the proceedings are pre-trial (like evidence suppression hearings) or even post-trial (like appeal motions). Good faith is necessary on both sides of the curtain, and only then is the public's right to know (or to be entertained) assured.

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The First Amendment and the Public's Right of Access

The First Amendment to the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom of speech or of the press." These noble words have served as the basis for recognition of the axiom that both the public and the press and media have a fundamental right of access to courtroom proceedings and a right to attend criminal trials.[1] The public's right of access is grounded on the Anglo-American tradition of open criminal proceedings and the need for public scrutiny of the judicial process.[2] However, this historical basis for open criminal proceedings is subject to the Sixth Amendment's protection of the criminal defendant's right to receive a fair trial.[3] A defendant apparently has no right to a secret or closed criminal trial, as more particularly manifest in state court proceedings like Phoenix Newspapers Incorporated v. Jennings,[4] where the Arizona Supreme Court emphasized that the criminal defendant was not entitled to have the public (and the press) excluded from a preliminary criminal hearing despite the claim that harmful and prejudicial publicity would endanger the defendant's right to a fair trial by an impartial jury.

On the other hand, the New York decision of United Press Association v. Valente[5] held that the First Amendment right of access to the criminal courtroom was not abridged by an exclusionary order of the New York court denying to the public opportunity to see and hear what transpired at trial. A criminal defendant, however, cannot waive

the right of the public to have a trial open to the public view because a crime is a public wrong in which the community is deeply interested, and therefore the public has a right to observe the administration of criminal justice.[6] The Oregon Supreme Court in State ex rel Oregonian Publishing Co. v. Deiz[7] apparently ruled that the public could be excluded from the juvenile criminal courtroom when the juvenile court was of the opinion that privacy would promote the goal of juvenile justice; here a thirteen-year-old girl was in custody in connection with the drowning of a younger child.[8] Yet the highest Oregon court could not overcome the express language of the Oregon Constitution[9] that "no court shall be secret, but justice shall be administered . . . openly," and so the trial court order barring the public and the press was declared to be invalid, subject, however, to the trial court's discretion "to control access by members of the press or public who would overcrowd the courtroom, attempt to interfere in the proceedings, or otherwise obstruct the proceedings." The dissenting opinion of Justice Howell cited numerous examples such as bastardy-filiation proceedings, guardianship proceedings, and rape trials where "in the interests of justice, the legislature had determined that the press and the public may or should be excluded," without violating the Oregon Constitution.

The English common law rule of open proceedings was embodied in colonial charters and state constitutions. The New Jersey Constitution of 1676, for example, provided for the right of the public to attend trials.[10] Later, the language was shortened to command that "all courts shall be open," coupled with the mandate that every person shall obtain remedy by due course of law, or that justice shall be impartially administered, or both.[11] The thrust soon took the form of an independent right on the part of the public to attend civil and criminal trials and not simply a right in favor of the litigants to demand a public proceeding.[12] The Ohio court in E. W. Scripps Co. v. Fulton[13] observed in 1955:

> It can never be claimed that in a democratic society the public has no interest in or does not have the right to observe the administration of justice. The open courtroom is as necessary and important in the interest of supporting the administration of justice as is the protection of the rights of a member of the public when on trial for a criminal offense. . . . The defendents cannot waive the right of the people to insist that the proceedings of the courts, insofar as

practicable and in the interest of the public health and public morals, be open to public view. . . . [14]

The U.S. Supreme Court in its 1986 opinion in Press-Enterprise Co. v. Superior Court of California[15] opined that "the right to an open public (criminal) trial is a shared right of the accused and the public, the common concern being the assurance of fairness . . . the explicit Sixth Amendment right of the accused is no less protective of a public trial than the implicit First Amendment right of the press and the public." [16] Chief Justice Warren Burger, citing the earlier 1984 case of Press-Enterprise Co. v. Superior Court,[17] observed that "since the development of trial by jury, the process of selection of jurors has presumptively been a public process." In Richmond Newspapers Inc. v. Virginia,[18] the Court reviewed the early history of England's open trials from the day when a trial was much like a town meeting. In the days before the Norman Conquest, criminal cases were brought before "moots," a collection of freemen in the community. Indeed,

the public trial, one of the essential qualities of a court of justice in England, was recognized early in the colonies. There were risks, of course, inherent in such a "town meeting" trial. . . . The modern trial with jurors open to interrogation for possible bias is a far cry from the "town meeting trial" of ancient English practice. Yet even our modern procedural protections have their origin in the ancient common law principle, which provided, not for closed proceedings, but rather for rules of conduct for those who attend trials. . . . Openness in criminal trials, including the selection of jurors, "enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." [19]

But the Court warned that "there are some limited circumstances" in which the rights of the criminal accused might override the qualified First Amendment right of access.[20]

The public right of access to criminal trial proceedings is not limited to the courtroom but also encompasses preliminary hearings. Indeed, the vast majority of states have concluded that the same tradition of accessibility that applies to criminal trials applies to preliminary hearings.[21] In Press-Enterprise Co. v. Superior Court of California,[22] the U.S. Supreme Court also concluded that the right of access applies to preliminary hearings as conducted in California. Preliminary hearings

"conducted before neutral and detached magistrates" have long been "open to the public":

> In the celebrated trial of Aaron Burr for treason, for example, with Chief Justice Marshall sitting as trial judge, the probable cause hearing was held in the Hall of the House of Delegates of Virginia, the courtroom being too small to accommodate the crush of interested citizens. . . . From Burr until the present day, the near uniform practice of State and federal courts has been to conduct preliminary hearings in open court. . . . Indeed, public access to criminal trials and the selection of jurors is essential to the proper functioning of the criminal justice system.[23]

The accused has the right to appear personally at the preliminary hearing, to be represented by counsel, to cross-examine hostile witnesses, to present exculpatory evidence, and to exclude illegally obtained evidence against him or her. If the magistrate or hearing officer determines that probable cause exists, the accused is bound over for trial. Denial of the transcripts of a preliminary hearing would frustrate the "community therapeutic value" of openness of criminal trials, according to the highest Court, which also cited in its 1984 opinion Reik's "The Compulsion to Confess":

> The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that anyone is free to attend gives assurance that established procedures are being followed and deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.[24]

Indeed, "Preliminary hearings shall be closed only if specific findings are made demonstrating that, first, there is substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent, and second, reasonable alternatives to closure cannot adequately protect the defendant's free trial rights." The dissenting opinion of Justice John Paul Stevens held that

> it is incontrovertible that a common law right of access did not inhere in preliminary proceedings at the time the First Amendment was adopted, and that the Framers and ratifiers of that provision could not have intended such proceedings to remain open. . . . The presence of a legitimate reason for

closure in this case requires an affirmance. The constitutionally-grounded fair trial interests of the accused if he is bound over for trial, and the reputational interests of the accused if he is not, provide a substantial reason for delaying access to the transcript for at least the short time before trial.

The First U.S. Court of Appeals in In re Globe Newspaper Co.[25] considered whether the public has a First Amendment right of access to pre-trial bail proceedings, after first observing that the historical basis for open criminal trials did not extend to pre-trial proceedings. But the federal appellate court in 1984 focused on the policy concerns that supported public access, and the court concluded that the need for public scrutiny of trial proceedings, as well as the importance of the public's understanding of the trial process, mandated access to both trial and pre-trial proceedings. The court reasoned that the problem of access was aggravated by the accused's challenge to the admissibility of evidence obtained through electronic surveillance.[26] If the evidence was admissible at trial, the public's access to the wiretap information would be seriously delayed; or if the evidence was inadmissible at trial, closure of the pre-trial bail hearing would be a crucial measure in protecting the defendant's fair trial by excluding it from potential jurors.

Courts must meet three procedural requisites before closing a pre-trial proceeding: the public and the press must have an opportunity to voice objections to closure; the court must weigh the competing interests involved and consider alternatives to closure; and the court must draw any closure order as restrictively as possible so as to preserve the concept of open trial and open pre-trial in criminal proceedings. The public's right to scrutinize and freely discuss criminal trials applies equally well to pre-trial bail hearings. Release on bail may prevent trial if the defendant flees the jurisdiction, and a denial of bail may raise profound interests as to personal liberty.

Still another important issue surrounding the public access to criminal proceedings revolves about access to information controlled by the government. In Houchins v. KQED, Inc.,[27] the U.S. Supreme Court directly confronted the issue when the communications media sought access to inspect a prison where a prisoner had committed suicide after a judicial finding that the prison conditions were "shocking and debasing." All seven participating justices agreed that the press had no constitutional right of access to the government's information superior

to that of the public and that the court has limited institutional capacity to enforce a right of access to information in the government's hands.[28] The right to inspect and copy judicial records, however, is an ancient doctrine stemming from an act of Parliament in the year 1372. As long as the person has a proprietary interest in a judicial document or needs a judicial document as evidence to enforce a right of access in court, he or she is entitled to access.[29] In the United States all citizens have the right of access to judicial records because all citizens should be free to view their government in operation.[30] As Justice Oliver Wendell Holmes expressed it, "It is desirable that the trial . . . should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed."[31]

There are, however, limitations on this right of access to criminal court records, as noted by the U.S. Supreme Court in 1978 in Nixon v. Warner Communications.[32] Here the Court would not allow the use of judicial records to satisfy "private spite or to promote public scandal"[33] or as a "source of business information that might harm a litigant's competitive standing."[34] Indeed, it would appear that it is within the sound discretion of the trial judge to allow or disallow access to judicial records. However, several U.S. circuit courts of appeals have recently upheld claims of a common law right to inspect and copy evidentiary material in criminal trials,[35] and several other federal appellate courts have denied such access, especially to the media, to inspect and copy audiotapes that the prosecution had used in a criminal trial.[36] Yet the impact of the U.S. Supreme Court's 1980 decision in Richmond Newspapers, Inc. v. Virginia,[37] holding that the public and the press have a First Amendment right to attend criminal trials, has not resolved the conflict of views.

Two years later, Globe Newspaper Co. v. Superior Court,[38] further defined the First Amendment right of access to attend criminal trials but concluded that the right was not absolute; the qualified right of access may be overcome if a closure order is "necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."[39] Here the Massachusetts statute that promoted closure in order to protect young rape victims from further trauma and embar-

rassment was held unconstitutional.[40] In 1983 in Associated Press v. District Court,[41] the Ninth U.S. Court of Appeals held that the First Amendment required that a court provide access to pre-trial documents filed in a highly publicized narcotics trial of a public figure. The trial judge, by filing a document under seal, had impermissibly undermined the First Amendment presumption of access to criminal proceedings. The Second U.S. Court of Appeals in 1987 in United States v. Biaggi[42] ruled, however, that a qualified First Amendment right to documents sealed at a pre-trial criminal hearing may exist but that it must be balanced against the individual's right of privacy and the individual's fair trial rights, as well as the rights of innocent third parties. The federal wiretap law cannot override the constitutional rights that may be harmed by the disclosure.

The Third U.S. Court of Appeals on August 14, 1987, in United States v. Raffoul, gave both the public and the press-media the right to have a hearing before a courtroom closure. Here the defendant, charged with importing heroin into the United States, was testifying about alleged threats to his family when the trial judge ordered the courtroom closed, and representatives of the press and public who were present at the criminal trial up to that point were ejected. One news reporter filed a motion to intervene and for access to the sealed transcript, and the federal appellate court agreed that the petition entitled both the press and the public to a full hearing within a reasonable time in advance of closure. Earlier in 1987 the New York Court of Appeals in Associated Press v. Bell[43] had unanimously agreed that the First Amendment protects an affirmative right of access by the public and by the press-media to criminal hearings, including pre-trial suppression hearings.

NOTES

1. See generally 39 Vand L Rev 1465 (1986).
2. See generally 29 Suffolk U L Rev 129 (1985).
3. See, for example, Estes v. Texas, 381 US 532 (1965), where the U.S. Supreme Court overturned the defendant's conviction due to extensive publicity occasioned by videotaping, and Rideau v. Louisiana, 373 US 723 (1963), where a robbery-murder conviction was reversed due to a local telecast of defendant's confession.
4. 107 Ariz 557, 490 P2d 563 (1971).
5. 308 NY 71, 123 NE2d 777 (1954).