THE PRINCIPLE OF OPEN JUSTICE

by

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> 'Publicity is the very soul of justice. . . . . It is to publicity, more than to everything else put together, that the English system of procedure owes its being the least bad system as yet extant, instead of being the worst.'
>
> *Jeremy Bentham*

The principle of openness of judicial proceedings has achieved international recognition subject, however, to significant qualifications. Article 14 (1) of the International Covenant on Civil and Political Rights provides:

> All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

The principle also appears, in one form or another, in regional human rights conventions such as the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (Article 6) and the *American Convention on Human Rights* (Article 8 (5)). It also appears in a number of national constitutions and bills of rights, and in legislation governing the operation of particular courts and tribunals.

This principle is widely regarded today as fundamental. Yet it is only in relatively recent times that it has been formally accorded the 'constitutional' status which it enjoys today. The leading case to expound the principle in English law was decided by the House of Lords as

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recently as 1913,[1] and the issue has required very recent consideration in the United States Supreme Court.[2]

Early Exposition

The origins of the practice of judicial openness are obscure. One modern writer considers it to be, '... a traditional feature of English trials, more or less accidental'.

> I have called it accidental because it seems almost a necessary incident of jury trials, since the presence of a jury — involving a panel of thirty-six men and more — already insured the presence of a large part of the public. We need scarcely be reminded that the jury was the *patria*, the 'country' and that it was in that capacity and not as judges, that it was summoned.
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> But any feature of the common law was sure to be noted as a merit, especially in the seventeenth century. Apparently Hale is the first to make a virtue of it, but in the eighteenth century the evil reputation of *lettres de cachet* and perhaps the horrendous picture of the 'Spanish Inquisition', gave the 'open and public trial' of the common law something of an odor of sanctity. It certainly was not a deliberately planned safeguard against the dangers incident upon secrecy.[3]

It may be that the principle is historically dependent less on the practice of jury trial than on ancient notions that a 'Court' (judicial or otherwise) necessarily connotes a public occasion.[4]

Nothing was said about open justice in such major English constitutional statements as *Magna Carta*, the *Petition of Right* of 1621 or the *Bill of Rights*.[5] However, in the 17th century, Sir Edward Coke purported to find early statutory foundation for the principle in the words *In Curia Domini Regis* ('In the King's Court') in the *Statute of Marlborough* of 1267:

> These words are of great importance, for all Causes ought to be heard, ordered, and determined before the Judges of the Kings Courts openly in the Kings Courts, whither all persons may resort; and in no chambers, or other private places: for the Judges are not Judges of chambers, but of Courts, and therefore in open Court, where the parties Councell and Attorneys attend, ought orders, rules, awards, and judgements to be made and given, and not in chambers or other private places. ... Nay, that Judge that ordereth

1 *Scott* v. *Scott* [1913] A.C. 417.

2 *Gannett Co. Inc.* v. *De Pasquale,* 443 U.S. 368, 61 L Ed. 2d 608, 99 S.Ct. 2898 (1979); *Richmond Newspapers Inc.* v. *Commonwealth of Virginia* 448 U.S. 555, 65 L Ed. 2d 973, 100 S.Ct. 2814 (1980); *Globe Newspaper Co.* v. *Superior Court for the County of Norfolk* 449 U.S. 894, 66 L Ed. 2d 124, 101 S.Ct. 259 (1982).

3 N. A. Radin, 'The Right to a Public Trial', [1932] *Temple L.Q.* 381 at pp. 388-389.

4 *Gannett Co.* v. *De Pasquale* (1979) 443 U.S. 368 at pp. 419-421 *per* Blackmun J; *Richmond Newspapers Inc.* v. *Commonwealth of Virginia* (1980) 448 U.S. 555 at pp. 565-567 *per* Burger C.J.

5 Radin, *op. cit.*

> or ruleth a Cause in his chamber, though his order or rule be just, yet offendeth he the law, (as hear it appeareth) because he doth it not in Court.[6]

We begin to hear of the principle from the 16th century not in judicial decisions but in writings describing the virtues of the English judicial process. Sir Thomas Smith commented on the matter in *De Republica Anolorum* in 1583.[7] Speaking of the jury ('the xii), he said:

> Evidences of writings be shewed, witnesses be sworne, and heard before them, not after the fashion of the civill law but openly, that not only the xii, but the Judges, the parties and as many as be present may heare what ech witnesse doeth say.[8]

Later he said:

> This is to be understood although it will seeme straunge to all nations that doe use the civill lawe of the Romane Emperours, that for life and death there is nothing put in writing but the enditement onely. All the rest is done openlie in the presence of the Judges, the Justices, the enquest, the prisoner, and so manie as can come so neare as to heare it, and all depositions and witnesses given aloude, that all men may heare from the mouth of the depositors and witnesses what is saide.[9]

Sir Matthew Hale in his *History of the Common Law of England*[10] also commended the English practice of taking evidence in public and offered several reasons to support the, 'Excellency of this open Course of Evidence'. One reason is that the Judge's rulings on objections to, 'the Competence of the Evidence, or the Competence or Credit of the Witnesses' would be public, 'wherein if the Judge be partial, his Partiality and Injustice will be evident to all By-standers'. In addition, any mistake in law by the Judge in such a ruling could be made subject to Writ of Error. Thus, one virtue in the system is as a check on the performance of the Judge himself. Other advantages were also suggested by Hale:

> 1st, That it is openly; and not in private before a Commissioner or Two, and a couple of Clerks, where oftentimes Witnesses will deliver that which they will be ashamed to testify publickly.[11]

Another benefit as perceived by Hale was the directness of public testimony — what a witness has to say himself in public trial, together with his demeanour in saying it, provides a far better indication of its truth or falsity than a written deposition of his testimony inscribed by, 'a crafty Clerk, Commissioner, or Examiner' who might distort the witness' meaning. Likewise, witnesses may be questioned and also brought into confrontation with other witnesses.

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6 E. Coke, 2 *Institutes of the Laws of England* (1642) at pp. 103-104.

7 Thomas Smith *De Republica Anglorum* (1970).

8 Ibid, Book 2, ch. 15 at pp. 61-62.

9 Ibid, Book 2, ch. 23 at pp. 81-82.

10 Sir Matthew Hale, *The History of the Common Law of England* (ed. Gray, 1970).

11 Ibid at p. 163.

Sir William Blackstone used almost identical language to that of Hale in describing the advantages of public testimony by witnesses, which contrasted with the procedure, 'in the ecclesiastical courts, and all others that have borrowed their practice from the civil law', though he notes that Roman law had also provided for examination of witnesses in public.[12]

The most influential of the writers on English law to expound the virtues of publicity was Jeremy Bentham. In his *Draught for the Organization of Judicial Establishments Compared with that of the National Assembly, with a Commentary on the same* he emphasised the effect of openness on the judge, as well as on the witness.

> Publicity is the very soul of justice. It is the keenest spur to exertion, and the surest of all guards against improbity. It keeps the judge himself, while trying, under trial. Under the auspices of publicity, the cause in the court of law, and the appeal to the court of public opinion, are going on at the same time. So many bystanders as an unrighteous judge, or rather a judge who would otherwise be unrighteous, beholds attending in his court, so many witnesses he sees of his unrighteousness, so many condemning judges, so many ready executioners, and so many industrious proclaimers of his sentence. By publicity, the court of law, to which his judgement is appealed from, is secured against any want of evidence of his guilt. It is through publicity alone that justice becomes the mother of security. By publicity, the temple of justice is converted into a school of the first order, where the most important branches of morality are enforced, by the most impressive means: — into a theatre, where the sports of the imagination give place to the more interesting exhibitions of real life.
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> Nor is publicity less auspicious to the veracity of the witness, than to the probity of the judge. Environed as he sees himself by a thousand eyes, contradiction, should he hazard a false tale, will seem ready to rise up in opposition to it from a thousand mouths. Many a known face, and every unknown countenance, presents to him a possible source of detection, from whence the truth he is struggling to suppress may through some unsuspected connexion burst forth to his confusion.
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> Without publicity, all other checks are fruitless: in comparison of publicity, all other checks are of small account. It is to publicity, more than to everything else put together, that the English system of procedure owes its being the least bad system as yet extant, instead of being the worst.[13]

But Bentham also saw the necessity for some exceptions to the general rule requiring publicity.

> But essential as it is that nothing should ever pass in justice which it should be in the power of the judge, or of any one, ultimately to conceal, it is not by any means so that every incident should be made known at the very instant of its taking place. If, then, in

12 Sir William Blackstone, *Commentaries on the Laws of England*, Book III, ch. 23, II (Dawson reprint, 1966) at pp. 373-374. Interestingly, of the various charges laid in the 17th century against the procedure of the Star Chamber, secrecy was not one. Radin. *op. cit.* at pp. 386-388.

13 *Works of Jeremy Bentham* Vol. 4, (Bowring, ed., 1843) at pp. 305, 316-317.

> any case, things should be so circumstanced, that the unrestrained publication of one truth might give facilities for the suppression of another, a temporary veil might be thrown over that part of the proceedings of without any infraction of the general principle. On this consideration is grounded one division of the class of secret cases as laid down in Tit. XIII: — preliminary examinations in criminal causes and others, in which there appears ground for suspecting a plan of concerted falsehood.
>
> Necessary again as it is that nothing should ever pass in justice which it should not be in the power of every one who had an interest in bringing it to light, to bring to light if he thought proper, it is not so that anything should be brought to light, the disclosure of which would be prejudicial to some and beneficial to nobody. It is on this consideration that I ground the three other divisions of the class of secret cases: causes to be kept secret for the sake of peace and honour of families; causes to be kept secret for the sake of decency; and incidental inquiries to be kept secret out of tenderness to pecuniary reputation.[14]

Bentham's exceptional cases were expounded in more detail elsewhere.[15] His support for the principle of publicity was also developed in other writings, notably his *Rationale of Judicial Evidence*[16] in which he developed a number of additional themes including the notion that reports of judicial proceedings should be freely published. He also developed the list of exceptions.

> The cases which present themselves as creating a demand for a certain degree of restriction to be put upon the principle of absolute publicity, each for an appropriate mode and degree, — these cases, as expressed by the several grounds of the demand, may be thus enumerated.
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> *Object 1.* To preserve the peace and good order of the proceedings: to protect the judge, the parties, and all other persons present, against annoyance.
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> *Object 2.* To prevent the receipt of mendacity-serving information.
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> *Object 3.* To prevent the receipt of information subservient to the evasion of justiciability in respect of person or property.
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> *Object 4.* To preserve the tranquility and reputation of individuals and families from unnecessary vexation by disclosure of facts prejudicial to their honour, or liable to be productive of uneasiness or disagreements among themselves.
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> *Object 5.* To preserve individuals and families from unnecessary vexation, produceable by the unnecessary disclosure of their pecuniary circumstances.
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> *Object 6.* To preserve public decency from violation.
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> *Object 7.* To preserve the secrets of state from disclosure.

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14 Ibid, p. 317.

15 Ibid, p. 301-303.

16 Jeremy Bentham, *Rationale of Judicial Evidence* Vol. 1, ch. X (1827, Garland Facsimile ed., 1978) at pp. 511-606.

> *Object 8.* So far as concerns the taking of active measures for publication, — the avoidance of the expense necessary to the purchase of that security, where the inconvenience of the expense is preponderant (as in all but here and there a particular case it will be) over the advantage referable to the direct ends of justice.[17]

In the eyes of the constitutional historian, Henry Hallam, openness of judicial proceedings had a constitutional dimension:

> Civil liberty, in this kingdom, has two direct guarantees; the open administration of justice, according to known laws truly interpreted, and fair constructions of evidence; and the right of parliament, without let or interruption, to inquire into, and obtain the redress of, public grievances. Of these, the first is by far the most indispensible; . . .[18]

Indeed, it has been written into the Constitutions of most of the American States and into the Sixth Amendment to the United States' Constitution.

English Decisions

Judicial exposition of the principle of open justice began to appear early in the 19th century. While recognizing the general principle, judges were called on to consider whether it was applicable to particular sorts of proceedings.

In *Daubney* v. *Cooper*[19] the question arose as to whether the principle applied to summary criminal trials before justices. The accused did not attend in person, but Daubney attended as his attorney. The magistrates decided that they would not allow an attorney to appear, and required him to leave. When he refused to go he was forcibly removed, and he brought an action in assault and battery. Argument before the King's Bench appears to have turned initially on the question whether a party to summary proceedings was entitled to appear by attorney; it was the Court itself that raised the broader question whether any person, attorney or not, had a right simply to be present. Having reserved judgment (and conferred with Lord Tenterden) the Court held that because the magistrate was exercising judicial authority, he was a Court of Justice. Justice Bayley continued:

> . . . and we are all of opinion, that it is one of the essential qualities of a Court of Justice that its proceedings should be public, and that all parties who may be desirous of hearing what is going on, if there is room in the place for that purpose, — provided there is no specific reason why they should be removed, — have a right to to be present for the purpose of hearing what is going on.[20]

Interestingly, the reason given particularly to support the principle was that persons present might observe the testimony of witnesses.

17 Ibid at pp. 541-542.
18 Henry Hallam, *Constitutional History of England* Vol. 1 (8 ed., 1867), at pp. 230-231.
19 (1829) 10 B. & C. 237, 109 E.R. 438.
20 Ibid at p. 240 (440). A verdict of one shilling damages was sustained against the justice who procured the plaintiff's removal.

The status of the principle (*i.e.* the consequences of non-observance) remained unclear. In *Kenyon* v. *Eastwood*[21] there was no doubt that the principle should be applied because the *Debtors Act,* 1869, s. 5, specifically stated that any order to commit a debtor to prison should be 'made in open Court'. The only question was whether there was non-compliance with this requirement arising from the Bolton County Court judge's practice of hearing all but jury matters not in the formal court room but in his adjoining chambers with the door left open and the public and press invariably admitted. (The judge's reason for adopting this practice was, apparently, 'the greater difficulty of hearing in the large room'.)

The Queen's Bench Division took the view that the objection to the judge's practice was 'technical' but that prohibition should lie to restrain enforcement of an order so made. The decision appears to have turned on the presence of the specific statutory requirement. The Chief Justice, Lord Coleridge, said:

> *I do not doubt that the Judge may exercise many of his duties in his library, and it is not for us to interfere; but this is a jurisdiction conferred by Act of Parliament,* and he cannot exercise it but in compliance with the Act of Parliament, which requires him to exercise it in open Court. I have already said what I think is open Court, and I do not think this order was made in open Court.[22]

It seems implicit in the reasoning that, in the absence of a statutory requirement, the judge would have had a large measure of discretion in the matter.

A number of other judicial decisions suggested various exceptions to the principle of open justice. These, and the principle itself, came up for consideration in *Scott* v. *Scott.*[23]

A woman successfully petitioned for a decree of nullity on grounds of her husband's impotence. The case was heard *in camera* in accordance with what the report describes as the usual practice. Trouble arose afterwards when the wife sent copies of the transcript to certain persons, in order to vindicate her reputation. On the husband's motion, both she and her solicitor were held guilty of contempt, but the judge accepted their apology and ordered only that they should pay the costs of the motion. They appealed from this order to the Court of Appeal.

In the Court of Appeal, the majority of judges[24] held that the contempt ruling involved a 'criminal cause or matter' within s. 47 of the *Judicature Act* 1873, so that the Court of Appeal lacked jurisdiction.

21 (1888) 57 L.J. Rep. (N.S.) Q.B. 455. *McPherson* v. *McPherson* [1936] A.C. 177 raised similar issues.

22 Ibid at pp. 456-457. (Emphasis supplied.)

23 [1912] P. 241 (C.A.) [1913] A.C. 417 (H.L.).

24 Cozens-Hardy M.R., Farwell, Buckley and Kennedy L.JJ.; Vaughan-Williams and Fletcher Moulton L.JJ. dissenting.

The majority also took the view that the order that the nullity proceedings should be *in camera* extended to prevent publication of the proceedings.

The judgments proceeded to a consideration of the scope and status of the principle of open justice. Reference was made to the Chancery practice of secrecy in cases concerning wards of court and lunatics. The majority judges also considered that the practice of secrecy in divorce and nullity suits derived from the practice of the old Ecclesiastical Courts. Lord Justice Buckley saw the rationale for this practice as resting, '... upon grounds of morality and public decency',[25] though Farwell L.J. put it in different terms:

> It is not so much the scandal to the public as the practical impossibility of eliciting evidence in many cases of nullity or divorce from modest women, under the eyes and in the hearing of a crowded Court of prurient sensation seekers, and with the knowledge that some of the baser newspapers may publish her evidence.[26]

The Master of the Rolls Cozens Hardy, cited with approval *Andrews* v. *Raeburn*[27] in which, '... both Lord Cairns and Lord Justice James treated the matter as in the discretion of the Court, a discretion which, no doubt, should be jealously guarded in view of the extreme importance in general of publicity'.[28] Farwell L.J. considered that the court had

> ... inherent jurisdiction to hear and decide in camera if it be necessary for the due attainment of justice.
>
> It is a jurisdiction to be exercised with the greatest caution and only in special cases, and orders made in exercise of it are subject to appeal, for the open and public hearing and determination of suitors' rights and complaints is the salt of the Constitution; but on principle and on authority I think it clear that the jurisdiction exists ... and is enforceable by attachment for contempt ...[29]

The notion of a broad judicial discretion in the matter was unacceptable to Vaughan-Williams and Fletcher Moulton L.JJ. Fletcher Moulton L.J. described it as, '... against the weight of authority' and, 'most dangerous'.[30] Apart from special jurisdictions, secrecy should apply only where a public trial would defeat the object of the action.

Vaughan-Williams L.J. said

> ... the hearing of trials in public is so precious a characteristic of English law that it is important that the power to hear cases in camera, even by consent, should be limited by express specific limitations and not left to the unfettered discretion of the Court or judge ...[31]

Both Judges questioned whether the old Ecclesiastical Court practice justified complete closure of hearings in divorce and nullity suits, espec-

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25 [1912] P. 241, 293.
26 Ibid at p. 288.
27 (1874) L.R. 9 Ch. 522. The judgments do not, in fact, support the interpretation placed on them by Cozens-Hardy M.R.
28 [1912] P. 241 at pp. 246-247.
29 Ibid at p. 287.
30 Ibid at p. 282.
31 Ibid at p. 260.

ially in the light of references to open Court in s. 46 of the *Divorce Act* 1857. And Fletcher Moulton L.J. went on to say that his researches had found no trace of any attempt by the Court to enforce secrecy, in regard to subsequent publication, either on the parties or on anybody else.

> The Courts are the guardians of the liberties of the public and should be the bulwark against all encroachments on those liberties from whatsoever side they may come. It is their duty therefore to be vigilant. But they must be doubly vigilant against encroachments by the Courts themselves.
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> ... nothing would be more detrimental to the adminisation of justice in any country than to entrust the judges with the power of covering the proceedings before them with the mantle of inviolable secrecy.[32]

Yet, in the House of Lords the dissenting views of Vaughan-Williams and Fletcher Moulton L.JJ. were vindicated when the case went on further appeal[33] Their Lordships held that the order against the petitioner and her solicitor was not a judgment in a 'criminal cause or matter' so as to exclude appeal to the Court of Appeal. They held that the order that the hearing be *in camera* did not prevent subsequent publication of the proceedings. And they held that the order to hear *in camera* itself was made without jurisdiction.

The Lord Chancellor, Viscount Haldane, took the view that the *Divorce Act* 1857, especially s. 46, substantially put an end to the old Ecclesiastical Court procedure and required that the new Court should, '... conduct its business on the general principles which regulated the other Courts of justice in this country'.[34]

> Whatever may have been the power of the Ecclesiastical Courts, the power of an ordinary Court of justice to hear in private cannot rest merely on the discretion of the judge or on his individual view that it is desirable for the sake of decency or morality that the hearing should take place in private. If there is an exception to the broad principle which requires the administration of justice to take place in open Court, that exception must be based on the application of some other and overriding principle which defines the field of exception and does not leave its limit to the individual discretion of the judge.[35]

Nor could proceedings generally be closed by consent of the parties.

> In cases in other Courts, where all that is at stake is the individual rights of the parties, which they are free to waive, a judge can exclude the public if he demits his capacity as a judge and sits as an arbitrator. ... In proceedings, however, which, like those in the Matrimonial Court, affect status, the public has a general interest which the parties cannot exclude...[36]

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32 Ibid at p. 274.
33 [1913] A.C. 417.
34 Ibid at p. 434.
35 Ibid at p. 435.
36 Ibid at p. 436.

However there might be an exception if justice in the particular case could not otherwise be done.

> While the broad principle is that the Courts of this country must, as between parties, administer justice in public, this principle is subject to apparent exceptions... But the exceptions are themselves the outcome of a yet more fundamental principle that the chief object of Courts of justice must be to secure that justice is done. In the two cases of wards of Court and of lunatics the Court is really sitting primarily to guard the interests of the ward or the lunatic. Its jurisdiction is in this respect parental and administrative, and the disposal of controverted questions is an incident only in the jurisdiction. It may often be necessary, in order to attain its primary object, that the Court should exclude the public. The broad principle which ordinarily governs it therefore yields to the paramount duty, which is the care of the ward or the lunatic. The other case referred to, that of litigation as to a secret process, where the effect of publicity would be to destroy the subject-matter, illustrates a class which stands on a different footing. There it may well be that justice could not be done at all if it had to be done in public. As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace its application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration. The question is by no means one which, consistently with the spirit of our jurisprudence, can be dealt with by the judge as resting in his mere discretion as to what is expedient. The latter must treat it as one of principle, and as turning, not on convenience, but on necessity.[37]

Viscount Haldane went on to say that unless it was strictly necessary for the attainment of justice, there could be no power in the Court to hear *in camera* a matrimonial cause or any other. In particular

> The mere consideration that the evidence is of an unsavoury character is not enough, any more than it would be in a criminal Court, and still less is it enough that the parties agree in being reluctant to have their case tried with open doors.[38]

Likewise a mere desire to consider feelings of delicacy or to exclude from publicity details which it would be desirable not to publish would not be sufficient. Any changes in this position would be for the legislature, not the judiciary to make.

The Earl of Halsbury agreed that matrimonial causes provided no exception to the general proposition that, '... every Court of justice is open to every subject of the King'. He agreed generally with the Lord Chancellor, but questioned whether his formulation of a power to close courts when necessary for the attainment of justice was tight enough:

> I wish to guard myself against the proposition that a judge may bring a case within the category of enforced secrecy because he thinks that justice cannot be done unless it is heard in secret. I do

37 Ibid at pp. 437-438.
38 Ibid at p. 438.

> not deny it, because it is impossible to prove what cases might or might not be brought within that category, but I should require to have brought before me the concrete case before I could express an opinion on it.[39]

Earl Loreburn considered what exceptions could be supported to the 'inveterate rule' that justice shall be administered in open Court:

> I do not speak of the parental jurisdiction regarding lunatics or wards of court, or of what may be done in chambers, which is a distinct and by no means short subject, or of special statutory restrictions. I speak of the trial of actions including petitions for divorce or nullity in the High Court. To this rule of publicity there are exceptions, and we must see whether any principle can be deduced from the cases in which the exception has been allowed.[40]

Earl Loreburn considered cases establishing that the court may be closed when the subject matter of the action would be destroyed by an open hearing (for example, secret processes), or to prevent disorder in the court room. Those and other instances all illustrated an underlying principle that openness may be departed from when the administration of justice would be rendered impracticable by the presence of the public, and this principle provided the only basis for a power to close proceedings in the Divorce Court. But when proceedings were properly closed, in matrimonial cases as in secret process cases, he considered that principle required that some subsequent publication be treated as contempt, at least in regard to 'wilful and malicious publications going beyond the necessity', for the reason that otherwise persons might be deterred from bringing proceedings at all. On this point Lord Atkinson disagreed, but added that publication of anything which took place *in camera* would not be protected by privilege from liability for defamation.

Lord Shaw of Dunfermline examined the old Ecclesiastical Court procedure and found that it fell far short of the total secrecy which had been attributed to it. The principle of openness had been departed from with increasing frequcney in the 1840s and 1850s:

> ... but it was, I incline to believe, never departed from under challenge, and this undermining of what was, in my view, a sound and very sacred part of the constitution of the country and the administration of justice did not take place under legislative sanction, nor di dit do so by the authority of the judges, on any occasion where the point of power to exclude the public was argued pro and con.[41]

Lord Shaw continued to speak in constitutional terms:

> ... the tests of whether we are in the region of constitutional right or of judicial discretion — of openness or of optional secrecy in justice — are general tests.[42]

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39 Ibid at p. 442.

40 Ibid at p. 445.

41 Ibid at p. 473.

42 Ibid at p. 475.

The case before him disclosed

> . . . a violation of that publicity in the administration of justice which is one of the surest guarantees of our liberties, and an attack upon the very foundations of public and private security.[43]

As to the precedents cited in support of a power to depart from the principle of openness, these were mostly *obiter*, and

> . . . have signified not alone an encroachment upon and suppression of private right, but the gradual invasion and undermining of constitutional security. This result, which is declared by the Courts below to have been legitimately reached under a free Constitution, is exactly the same result which would have been achieved under, and have accorded with, the genius and practice of a despotism.
>
> What has happened is a usurpation — a usurpation which could not have been allowed even as a prerogative of the Crown, and most certainly must be denied to the judges of the land. To remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand.[44]

After quoting from Bentham and Hallam, he continued:

> There is no greater danger of usurpation than that which proceeds little by little, under cover of rules of procedure, and at the instance of judges themselves. I must say frankly that I think these encroachments have taken place by way of judicial procedure in such a way as, insensibly at first, but now culminating in this decision most sensibly, to impair the rights, safety, and freedom of the citizen and the open administration of the law.[45]

The exceptional cases concerning wards of court and lunatics, anl secret processes were acknowledged, but Lord Shaw believed that a concern that persons should not be deterred from bringing actions unless openness were departed from ought not to prevail:

> . . . the concession to these feelings would, in my opinion, tend to bring about those very dangers to liberty in general, and to society at large, against which publicity tends to keep us secure; and it must further be remembered that, in questions of status, society as such — of which marriage is one of the primary institutions — has also a real and grave interest as well as have the parties to the individual cause.[46]

But the majority reasoning left it open to a court to conduct proceedings *in camera* where it is proved to be necessary for the attainment of justice.

One contemporary commentator remarked that the report of *Scott* v. *Scott*, '. . . seems to exhaust the law regarding the necessity of a public hearing where there is a final adjudication upon a matter within the

43 Ibid at p. 476.

44 Ibid at pp. 476-477.

45 Ibid at pp. 477-478.

46 Ibid at p. 485.

jurisdiction of the Court. We say final adjudication, because a preliminary inquiry, not conclusive in its result, stands upon a different footing'.[47]

The later House of Lords decision in *Attorney-General* v. *Leveller Magazine*[48] concerned restrictions on publicity, but Lord Diplock endorsed the *Scott* v. *Scott* principle in the following terms:

> ... since the purpose of the general rule is to serve the ends of justice it may be necessary to depart from it where the nature or circumstances of the particular proceeding are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest for whose protection Parliament has made some derogation from the rule. Apart from statutory exceptions, however, where a court in the exercise of its inherent power to control the conduct of proceedings before it departs in any way from the general rule, the departure is justified to the extent and to no more than the extent that the court reasonably believes it to be necessary in order to serve the ends of justice.[49]

Commonwealth Decisions

The Privy Council affirmed the principle of open justice in *McPherson* v. *McPherson.*[50] The appellant, who had been the respondent to a divorce in Alberta, brought an action (after time for appeal had expired) seeking to have the decrees rescinded and set aside as void on the ground that the trial had taken place in the Judge's law library and not in open court. On the facts, the Supreme Court of Alberta had held that the hearing had taken place in open court, but the Privy Council reached a contrary conclusion and perceived a need to check an apparent practice in Alberta to hear undefended divorce suits in the judge's private rooms. But the case ultimately failed. Not only had time for appeal expired, but the respondent had remarried in the meantime. Accordingly the Privy Council held that the effect of the irregularity was to make the decree not void but voidable and it had, with the lapse of time, become unassailable.

In a later Canadian case, *Snell* v. *Haywood (No. 2),*[51] the Alberta Appellate Division asserted the stringent *necessity* standard at common law for closing courts, notwithstanding a provision in the Criminal Code permitting a judge to exclude persons when 'necessary or expedient'.

The High Court of Australia in *Dickason* v. *Dickason,* immediately followed *Scott* v. *Scott* in rejecting an application that an appeal in a nullity suit should be heard *in camera*; the Court also relied on ss. 15 and 16 of the *Judiciary Act* as showing an intention that the jurisdiction of the Court should be publicly exercised.[52]

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47 (1914) 118 L.Q.R. 6.
48 [1979] A.C. 440.
49 Ibid at p. 450.
50 [1936] A.C. 177.
51 (1947) 88 C.C.C. 213.
52 *Dickason* v. *Dickason* (1913) 17 C.L.R. 50.

The later case of *Russell* v. *Russell*[53] turned mainly on questions as to the validity, under the Commonwealth Constitution, of certain provisions of the *Family Law Act*, 1975 (Ch.). One of those provisions, s. 97 (1) as originally enacted provided, *inter alia*, that proceedings in State courts exercising Federal jurisdiction under the Act should be heard in closed court. Provisions vesting jurisdiction in State courts depend on s. 77 (iii) of the Constitution. The High Court of Australia by a 3 to 2 majority,[54] held that s. 97 (1) was invalid. The majority judges took the view that the provision that State courts exercising such invested jurisdiction should always be closed went beyond mere matter of practice and procedure and purported to change the essential nature of the State courts which was not permissible under s. 77 (iii) of the Constitution. Thus, Stephen J., after citing *Scott* v. *Scott*, said:

> To require that a Supreme Court, possessing all the attributes of an English court of justice, should sit as of course in closed court is, I think, in the words of Lord Shaw, to turn that Court into a different kind of tribunal and involves that very intrusion into its constitution and organization which s. 77 (iii) does not authorise.[55]

The minority judges on the issue were prepared to accept the provision as being of lesser significance, particularly in view of the fact that policy reasons could readily be envisaged as supporting the Federal Parliament's policy. The majority view does accord high status to the principle of openness as going to the essential nature of a Court. In addition, Barwick C.J. suggested that if a judge improperly conducted proceedings in closed court those proceedings might be reviewable — on appeal or by way of certiorari or prohibition — as voidable.

One recent case in the Federal Court of Australia, turning on specific legislative provisions, divided members of the Court in producing different assessments of the strength of the principle of open justice. The case *A.B.C.* v. *Parish*[56] arose from Kerry Packer's 'cricket takeover'. The Australian Broadcasting Commission brought proceedings against the Australian Cricket Board and three Packer corporations alleging that the agreement between them was in breach of the Commonwealth *Trade Practices Act*, 1974. Justice Brennan refused an application under s. 50 of the *Federal Court of Australia Act*, 1976[57] for an order to forbid or restrict publication of confidential parts of the agreement. On appeal to the full Federal Court, Bowen C.J. and Franki J. held that an order under s. 50 should have been made; Deane J. dissented. They held that the question whether to make an order was one for the discretion of the trial judge, so that he could be reversed on appeal only

53 (1976) 134 C.L.R. 495.

54 Ibid at pp. 505-507 (Barwick C.J.), at pp. 515-521 (Gibbs J.), at pp. 529-533 (Stephen J.); *contra* at pp. 535-537 (Mason J.), at pp. 553-555 (Jacobs J.)

55 Ibid at p. 532.

56 (1980) 29 A.L.R. 228.

57 S. 50 provides: 'The Court may . . . make such order forbidding or restricting the publication of particular evidence, or the name of a party or witness, as appears to the court to be necessary in order to prevent prejudice to the administration of justice or the security of the Commonwealth'.

if he had applied wrong principles. The Chief Judge perceived the task for the Court to be one of weighing in the scales the competing public interests in open justice, on the one hand, and on the other the projudice to the administration of justice represented by the damage to the agreement that public disclosure of the confidential terms would produce. He considered that Brennan J. had erred in treating the latter interest as a private interest of the litigants rather than a public interest, and also in not giving sufficient acknowledgement to the fact that an order restricting public disclosure of certain terms of an agreement is a relatively minor encroachment on the open justice principle. Franki J. substantially agreed with the Chief Judge in holding that Brennan J. had given insufficient weight to the importance of doing justice between the parties.

By contrast, Deane J., while conceding the need to balance a variety of factors, found himself unable to identify any relevant error by Brennan J.:

> It is apparent that Brennan J. treated the prima facie rule that judicial proceedings should be fully open to public scrutiny as being of fundamental importance to the administration of justice under the common law. This view enjoys the support of a great body of judicial opinion and is not excluded by the provisions of s. 50 which proceeds on the basis that the prima facie rule shall operate unless the avoidance of prejudice to the administration of justice makes departure from it necessary. I am unpersuaded that in adopting and applying that view his Honour fell into any error which would warrant the interference of an appellate court.[58]

Insofar as the difference among the judges may suggest that Brennan and Deane JJ. were inclined to accord greater primacy to the open justice principle, it is of interest to note that both have since been appointed to the High Court of Australia.

American Decisions

The Sixth Amendment to the United States' Constitution provides:

> a speedy and public trial . . .
> In all criminal prosecutions, the accused shall enjoy the right to

The First Amendment guarantees freedom of the press, and the Fourteenth Amendment extends constitutional guarantees to the States.

There had been a number of decisions in various U.S. courts on the nature and scope of the principle of open justice prior to the 1979 decision of the U.S. Supreme Court in *Gannett Co* v. *De Pasquale*.[59] The facts in that case were that two men had been indicted by a Grand Jury in a New York State prosecution for murder, robbery and grand larceny. At a pre-trial hearing (suppression hearing) on a motion to suppress allegedly involuntary confessions and certain physical evidence,

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58 (1980) 29 A.L.R. 228, 257.
59 443 U.S. 368, 61 L Ed. 2d 608, 99 S. Ct. 2898 (1979).

their counsel requested that the press and public be excluded from the hearing, arguing that the unabated build-up of adverse publicity had jeopardised their ability to receive a fair trial.[60] The district attorney did not oppose the motion, nor was it opposed by Gannett's newspaper reporter, and the County Court judge, De Pasquale J., granted the The next day the reporter asserted a right to cover the hearing and also requested access to the transcript, but was unsuccessful. The judge ruled that the interest of the press and the public was outweighed by the defendant's right to a fair trial. (Subsequently the reporter was given access to the transcript.)

The Gannett Co. then challenged the judge's orders on First, Sixth and Fourteenth Amendment grounds. It was successful in the New York Supreme Court, Appellate Division, but not in the State Court of Appeals.

By a 5 to 4 majority the United States Supreme Court rejected the challenge. In brief, they held that the Constitution did not give the petitioner an affirmative right of access to the pre-trial proceeding in the face of agreement by all parties that it should be closed to ensure a fair trial; that the Constitution imposes a duty on a trial judge, in order to ensure an accused's rights to due process, to minimise the effects of prejudicial pre-trial publicity even when such protective measures are not strictly and inescapably necessary; and that the Sixth Amendment's guarantee of a public trial is for the benefit of the defendant alone and does not confer rights of access on the public.

The opinion of the Court as delivered by Stewart J. did not dispute the importance of the principle of open justice.

> There can be no blinking the fact that there is a strong societal interest in public trials. Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously, and generally give the public an opportunity to observe the judicial system.[61]

But recognition of the existence of such a public interest was not the same as recognition that it amounted to a matter of constitutional right in the public. The history of the Sixth Amendment was said to demonstrate, '... no more than the existence of a common-law rule of open civil and criminal proceedings',[62] one which was not incorporated in the structure or text of the Sixth Amendment.

> There is no question that the Sixth Amendment permits and even presumes open trials as a norm. But the issue here is whether the Constitution *requires* that a pre-trial proceeding such as this one be opened to the public, even though the participants in the litigation agree that it should be closed to protect the defendant's right

60 The prior publicity as summarised in the Court's opinion may not have been possible under the English or Australian laws relating to contempt of court.

61 443 U.S. 383 (1979).

62 Ibid at p. 384.

> to fair trial. The history... totally fails to demonstrate that the Framers of the Sixth Amendment intended to create a constitutional right in strangers to attend a pre-trial proceeding, when all that they actually did was to confer upon the accused an explicit right to demand a public trial.[63]

Stewart J. noted that, unlike some of the early state constitutions that provided for a public right to open civil and criminal trials, the Sixth Amendment confers the right to a public trial only upon a defendant and only in criminal cases. Even if the Amendment did embody the common law right of the public to attend trials, it would not necessarily extend to pre-trial proceedings.

Burger C.J., concurring, particularly emphasised this latter point, distinguishing pre-trial proceedings from trials. Powell, Rehnquist and Stevens JJ. concurred.

Blackmun J. (joined by Brennan, White and Marshall JJ.) dissented on the substantial issues. He noted that the decision would leave it open to a trial judge to order closure of a suppression hearing merely on the agreement of defence and prosecution. Blackmun J. also read the history of the common law principle as showing that it was associated with the rights of the public rather than the right of the accused and that the casting of the public trial concept in constitutional documents was never intended to signal, '... a departure from the common law practice by granting the accused the power to compel a private proceeding'.

> I thus conclude that there is no basis in the Sixth Amendment for the suggested inference. I also find that, because there is a societal interest in the public trial that exists separately from, and at times in opposition to, the interests of the accused..., a court may give effect to an accused's attempt to waive his public trial right only in certain circumstances.[64]

And he concluded that the Constitution:

> ... prohibits the States from excluding the public from a proceeding within the ambit of the Sixth Amendment's guarantee without affording full and fair consideration to the public's interest in maintaining an open proceeding.[65]

Blackmun J. was also firmly of the view that the Sixth Amendment extended to a pre-trial suppression hearing, particularly as such proceedings may be decisive of the result. He was particularly disturbed by the Court's view that, in regard to a trial proper, the Sixth Amendment right was a right of the accused only and not the public. However he noted that the Sixth Amendment might need to yield to such countervailing considerations as the right to a fair trial, and argued that it should be for the accused to established that closure, '... is strictly and inescapably necessary in order to protect the fair trial guarantee',[66] and

63 Ibid at pp. 385-386.
64 Ibid at p. 428.
65 Ibid at p. 433.
66 Ibid at p. 440.

any restrictions imposed, '... should extend no further than the circumstances reasonably require'.[67] On the facts before him, he was unable to conclude

> ... that there was a sufficient showing to establish the strict and inescapable necessity that supports an exclusion order. The circumstances also would not have justified a holding by the trial court that there was substantial probability that alternatives to closure would not have sufficed to protect the rights of the accused.[68]

The Court's opinion attracted considerable criticism.[69] It left the public interest in open trials at the non-Constitutional level of common-law tradition, which might be infringed, with the consent of the accused (and, *semble*, the prosecutor) as a matter of judicial discretion. Chief Justice Burger's opinion appeared to confine his concurrence to the situation of pre-trial proceedings. Whatever the merit in the distinction, it would reduce the number of Justices supporting the narrow Sixth Amendment interpretation in regard to trials to a minority. The decision also provided less than clear guidance to trial judges.[70]

One week after the *Gannett* decision Taylor J. of the Virginia Supreme Court barred two reporters from a murder trial at the motion of defence counsel, without objection by the prosecutor. He did so on the basis of Virginia legislation which expressly conferred on a court trying criminal cases a discretion to, '... exclude from the trial any person whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated'. A newspaper's challenge to the closure order was upheld by the Supreme Court in the case of *Richmond Newspapers Inc.* v. *Commonwealth of Virginia.*[71]

Burger C.J., in delivering the judgment of the Court (in which White and Stevens JJ. joined) distinguished *Gannett* v. *De Pasquale* as confined to pre-trial proceedings.

> ... here for the first the Court is asked to decide whether a criminal trial itself may be closed to the public upon the unopposed request of a defendant, without any demonstration that closure is required to protect the defendant's superior right to a fair trial, or that some other overriding consideration requires closure.[72]

The Court's opinion traced the history of the common law tradition of open justice and found support for it not only in the effect of publicity on the participants but also in the therapeutic value of providing

67 Ibid at p. 444.

68 Ibid at p. 448.

69 For example, Coffey, (1979) 11 *Texas Tech. L.R.* 159; Dollinger (1980) 44 *Albany L.R.* 455; Hof, (1979) 15 *Tulsa L.J.* 164; Borrow and Kruth, *Calif. State Bar Journal* (Jan. 1980), 18; *Time* (16 July 1979), 64.

70 'More than 200 instances occurred in which various local judges attempted to bar the press from their courts': *Time* (14 July 1980) at p. 18.

71 448 U.S. 555, 65 L Ed. 2d 973, 100 S.Ct. 2814 (1980).

72 448 U.S. 555 at p. 564 (1980).

an outlet for community concern, hostility and emotion engendered by a shocking crime. One former role of public access to trials as providing a form of community legal education had, it was said, now largely been displaced by the intermediary role of the print and electronic media.

> From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice.[73]

The Court conceded the State's argument that there was no Constitutional provision which by its terms guarantees to the public the right to attend criminal trials

> ... but there remains the question whether, absent an explicit provision, the Constitution affords protection against exclusion of the public from criminal trials.[74]

The Court found such protection to exist, not in the Sixth Amendment but in the First which, in conjunction with the Fourteenth, prohibits governments 'from abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for the redress of grievances'. (First Amendment arguments in *Gannett* v. *De Pasquale* had been considered only by Powel and Rehnquist JJ.)

> These expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the function of government. Plainly it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted.[75]

The Bill of Rights had been enacted against the backdrop of the tradition of open justice so that, in the context of trials, the First Amendment guarantees of speech and press prohibit government from summarily closing courtroom doors which had long been open to the public at the time that amendment was adopted. The right of assembly was also relevant. The Court went on to hold that the record disclosed no basis to support the trial Judge's closure order.

White J. concurred. So did Stevens J., adding the observation that

> Today ... for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgement of the freedoms of speech and of the press protected by the First Amendment.[76]

Brennan J. (with whom Marshall J. joined) also concurred, noting that the First Amendment has a structural role to play 'in securing and fostering our republican system of self-government' and this extends

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73 Ibid at p. 573.

74 Ibid at p. 575.

75 Ibid.

76 Ibid at p. 583.

some way to ensuring access to information. Open trials are important in demonstrating that due process and equality under the law are accorded, and thus in maintaining public confidence in the administration of justice. They are also important because of the broader law-making function of judicial decisions, particularly in Constitutional cases. And they are important in reference to the proper disposition of the particular cases. Brennan J. did not go on to consider what countervailing considerations might reverse the presumption of openness as the statute at stake authorised closure at the unfettered discretion of the judge and parties, and was therefore invalid.

Stewart J. concurred and, like Brennan J., did not address the limitations which might legitimately be imposed on public access to trials. Black J. also concurred, with gratification in view of his dissent in *Gannett* v. *De Pasquale*. Rehnquist J. dissented, because he failed to find any clear prohibition in the Constitution.

The effect of the decision is that the right of public and press access to criminal (and, presumably, civil) trials in the United States has, through the circuitous route of the First Amendment, achieved constitutional status. The logic of the *Richmond Newspapers* opinion would extend also to pre-trial proceedings, despite the narrow Sixth Amendment interpretation in *Gannett*, and some American courts have so held.[77]

The consequence of these decisions is that derogations from the principle of openness in these areas, legislative or otherwise, will be unconstitutional unless they satisfy one of the countervailing considerations which the Supreme Court will be prepared to acknowledge, such as the right to a fair trial which itself has constitutional dimensions.

In its 1982 decision in *Globe Newspaper Co.* v. *Superior Court for the County of Norfolk*[78] the Supreme Court even struck down a Massachusetts statute which, as interpreted, required mandatory exclusion of press and public during the testimony of minor victims of sex crimes. The Court held that the State's interest in protecting such minors from the trauma of public testimony was 'a compelling government interest' but a mandatory closure rule was not 'narrowly tailored' to serve that interest — rather, trial judges should decide on a case-by-case basis whether closure is necessary to protect the welfare of a minor victim.

Thus in England, the Commonwealth and the United States the principle of open justice has been judicially recognized as being more than a mere matter of procedure to be left to the discretion of a judge, though there are inherent exceptions to the principle, particularly if some restriction is necessary to ensure a fair trial. Legislatures remain free to impose

77 *U.S.* v. *Edwards* 449 U.S. 872, 66 L Ed. 2d 92, 101 S.Ct. 211 (1980-1); *U.S.* v. *Criden* 50 L.W. 2597 (1981-2).

78 449 U.S. 894, 66 L Ed. 2d 124, 101 S.Ct. 259 (1982).

other restrictions, either on public access to proceedings or on the reporting of them, except where precluded by Constitutional considerations. The major countervailing considerations, recognised legislatively and judicially are:

the proper administration of justice;
the protection of children;
the protection of confidential information;
privacy and reputation.

The working out of the proper balance between open justice, on the one hand, and the several countervailing interests, on the other hand, is a large topic which cannot be pursued further in this article.