# V. "OPEN AND PUBLIC" COURTS: OFF-SITE, OUT-OF-SIGHT, AND SECRET JUDGING

## Introduction[*]

Constitutions make express commitments that court hearings be public and open. Those commitments relate to larger questions of access to courts, the meaning of due process of law, and the scope of free speech rights. Our focus here is on the theory, content, parameters of and exceptions to rights of "open and public" courts.

Open courts stem in part from historical practices. A first question is why, as a theoretical matter, the public dimension of courts is to be valued. Hence, we begin with Jeremy Bentham's nineteenth-century explanation of the importance of "publicity" for and to adjudication. We then provide a brief overview of the kinds of textual obligations imposed by constitutions to provide open courts, with details set forth in an appendix.

The next step is to turn to contested applications of that norm. The relevant case law is vast, as closures are sometimes advocated because of the subject matter of a proceeding (such as crime, terrorism, or family life), sometimes because of the categorization of a proceeding (as "civil," "criminal," "administrative," "arbitration," or as a process such as plea bargaining or civil settlement), and sometimes because of the stage of the proceeding (e.g., whether rights of audience exist for proceedings other than trials or the announcement of judgments and whether documents filed with courts, such as pleadings, must be accessible to the public).

Yet other issues revolve around the obligations and rights of spectators (the problem of Foucault's "unruly crowd"), as well as the modes of dissemination of court judgments in light of new technologies of which the television is now an old version, surpassed by the internet. One can thus trace two competing trajectories: of ever more ready access and of ever more privatized court-based decisions to which access is increasingly restricted.

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The overarching questions include whether Bentham captured all the utilities of "publicity" and all its appropriate limits; the nature of the relationship between court-based proceedings and what Habermas and others call "the public sphere," argued as requisite to thriving democracies; and the degree to which the character of being "open and public" is constitutive of what we call a "court," so that shifts to forms of decision-making without hearings or to non-public administrative settings create "constitutional" problems.

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## Theory

Jeremy Bentham
*Of Publicity and Privacy, as Applied to Judicature in General and to the Collection of Evidence in Particular*[*]

§1. *Preliminary explanations—Topics to be considered.*

[Publicity] and privacy are opposite and antagonizing, but mutually connected, qualities, differing from one another only in degree. Secrecy might be considered as exactly synonymous to privacy, were it not that, upon the face of it, it seems to exclude gradation, and to be synonymous to no other than the greatest possible degree of privacy.

For the correctness and completeness of the mass of evidence, publicity is a security in some respects: privacy—its opposite, in some other respects. Publicity and privacy have for their measure the number of the persons to whom knowledge of the matters of fact in question is considered as communicated, or capable of being communicated. . . .

[The] means or instruments of publicity may be distinguished into natural and factitious. Natural, are those which take place of themselves, without any act done by any person (at least by any person in authority) with the intention and for the purpose of producing or contributing to the production of this effect. Factitious, are such as, for this very purpose, are brought into existence or put in action by the hand of power.

Considered in itself, a room allotted to the reception of the evidence in question (the orally delivered evidence) is an instrument rather of privacy

[*] Excerpted from 6 WORKS OF JEREMY BENTHAM 351 (London, W. Tait 1843).

than of publicity; since, if performed in the open air and in a plain, the number of persons capable of taking cognizance of it would bear no fixed limits; it would, in no individual instance, have any other limits than those which were set to it by the strength of the voice on the one part, and the strength and soundness of the auditory faculty on the other.

Considered on the other hand in respect of its capacity of being so constructed as to be in any degree an instrument of privacy, the room in question, the place of audience, may (in so far as, in the magnitude and form given to it, the affording room and accommodation to auditors in a number not less than this or that number is taken for an end) be considered, in this negative sense, as an instrument of publicity. . . .

[In] the case of *viva voce* evidence, there is a demand, not only for those means and instruments which are necessary and sufficient to any given degree of divulgation in the case of evidence which is in its origin scriptitious, but also for such antecedently employed means and instruments as are necessary to the purpose of bringing about this perpetuation. Minuting or note-taking, copying, printing, publishing,—these are so many successive operations, which, according to the degree of divulgation or publicity given or proposed to be given to the matter, become necessary in the character of means of publicity: and so many as there are of these operations performed, so many are the instruments or sets of instruments, personal and real, that come to be employed about it. . . .

Admission given, extra-accommodation given, to note-takers—permission of publication or republication at length, in the way of extract or abridgment, given to the editors of newspapers, and other periodical papers,—in this way (on the occasion in question, as on other occasions), whatsoever mischief is by the hands of authority forborne or omitted to be done, is naturally and frequently placed to the account of merit, and taken for the subject of approbation and praise.

Instruments of privacy.—In this character, two sorts of apartments, both of them fit appendages to the main theatre of justice, may be brought to view, viz.—

1. The witnesses' chamber or conservatory.
2. The judge's private chamber, or little theatre of justice.

Of the nature and destination of these two apartments, explanation will come to be given under another head. As, when publicity is the object,

the magnitude of the theatre is among the instruments employed for the attainment of it; so, when privacy is the object, the smallness, if not necessarily of the apartment itself, at any rate of the company for which it is destined, qualifies it for operating in the character of an instrument of privacy.

§ 2. *Uses of publicity, as applied to the collection of the evidence, and to the other proceedings of a court of justice.*

The advantages of publicity are neither inconsiderable nor unobvious. In the character of a security, it operates in the first place upon the deponent; and, in a way not less important, though less immediately relevant to the present purpose, upon the judge.

1. In many cases, say rather in most (in all except those in which a witness bent upon mendacity can make sure of being surprised with perfect certainty of every person to whom it can by any possibility have happened to be able to give contradiction to any of his proposed statements), the publicity of the examination or deposition operates as a check upon mendacity and incorrectness. However sure he may think himself of not being contradicted by the deposition of any percipient witnesses,—yet, if the circumstances of the case have but afforded a single such witness, the prudence or imprudence, the probity or improbity, of that one original witness, may have given birth to derivative and extra-judicial testimonies in any number. "Environed, as he sees himself, by a thousand eyes, contradiction, should he hazard 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 channel, burst forth to his confusion."

2. In case of registration and recordation of the evidence, publicity serves as a security for the correctness in every respect (completeness included) of the work of the registrator. In case of material incorrectness, whether by design or inadvertence,—so many auditors present, so many individuals, any or each of whom may eventually be capable of indicating, in the diameter of a witness, the existence of the error, and the tenor (or at least the purport) of the alteration requisite for the correction of it.

3. Nor is this principle either less efficient or less indispensable, in the character of a security against misdecision considered as liable to be produced by misconduct in any shape on the part of the judge. Upon his

moral faculties it acts as a check, restraining him from active partiality and improbity in every shape: upon his intellectual faculties it acts as a spur, urging him to that habit of unremitting exertion, without which his attention can never be kept up to the pitch of his duty. Without any addition to the mass of delay, vexation, and expense, it keeps the judge himself, while trying, under trial:—under the auspices of publicity, the original 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 have been unrighteous) beholds attending in his Court, so many witnesses he sees of his unrighteousness;—so many industrious proclaimers, of his sentence.

On the other hand,—suppose the proceedings to be completely secret, and the court, on occasion, to consist of no more than a single judge,—that judge will be at once indolent and arbitrary; how corrupt, soever his inclination may be, it will find no check, at any rate no tolerably efficient check, to oppose it. Without publicity, all other checks are insufficient: in comparison with publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks—as cloaks in reality, as checks only in appearance.

4. Publicity is further useful as a security for the reputation of the judge (if blameless) against the imputation of having misconceived, or, as if on pretence of misconception, falsified, the evidence. Withhold this safeguard, the reputation of the judge remains a perpetual prey to calumny, without the possibility of defence: apply this safeguard, adding it as an accompaniment and corroborative to the security afforded (as above) by registration,—all such calumny being rendered hopeless, it will in scarce any instance be attempted—it will not in any instance be attempted with success.

5. Another advantage (collateral indeed to the present object, yet too extensively important to be passed over without notice) is, that, by publicity, the temple of justice adds to its other functions that of a school—a school of the highest order, where the most important branches of morality are enforced by the most impressive means—a theatre, in which the sports of the imagination give place to the more interesting exhibitions of real life. Sent thither by the self-regarding motive of curiosity, men imbibe, without intending it, and without being aware of it, a disposition to be influenced, more or less, by the social and tutelary motive, the love of justice. Without effort on their own parts, without effort and without merit

on the part of their respective governments, they learn the chief part of what little they are permitted to learn (for the obligation of physical impossibility is still more irresistible than that of legal prohibition) of the state of the laws on which their fate depends. . . .

Uses of leaving it free to all persons without restriction, to take notes of the evidence:

1. To give effect, in the way of permanence, to the general principle of publicity—to the general liberty of attendance, proposed to be allowed as above. From no person's attendance in the character of auditor and spectator, can any utility be derived, either to himself or to any other individual, or to the public at large, but in proportion as his conceptions of what passes continue correct: and by no other means can he make so sure of their correctness as by committing them (or at least having it in his power to commit them) to writing, with his own hand, at the very time.

But for this general liberty, there would be no effectual, no sufficient check at least, against even wilful misrepresentation on the part of an unrighteous judge. Against written testimony from such a quarter, what representation could be expected to prevail, on the part of individuals precluded by the supposition from committing to writing what they were hearing—precluded from giving to their testimony that permanence on which its trustworthiness would so effectually depend?

2. To afford a source of casual solution or correction to any casual ambiguity, obscurity, or undesigned error, in the representation given of the evidence by the judge or other official scribe:

Rule: Allow to persons in general the liberty of publishing, and that in print, minutes taken by anybody of the depositions of witnesses, as above.

Reason: Without the liberty of publishing, and in this effectual manner, the liberty of penning such minutes would be of little use. It is only in so far as they are made public, that they can minister to any of the above-mentioned uses (except that which consists in the information they afford to the judge). By a limited circulation, room is left for misrepresentation, wilful as well as undesigned: by an unlimited circulation, both are silenced: by the facility given to an unlimited circulation, both are prevented.

Look over the list of advantages by which the demand for publicity is produced in respect of the *evidence*; you will find them applying (the greater part of them, and with a force quite sufficient) to the extension of the demand to all *observations* of which the evidence is the subject, whether on the part of the judge, or of the parties or their advocates. Security to suitors (to the suitors in each individual cause)—and through them to men in general, in the character of persons liable to become suitors—against negligence and partiality on the part of the judge; security to the judge against the unmerited imputation of any such breach of duty; instruction to the people at large, in the elm-meter of occasional spectators and auditors at the theatre of justice, and occasional readers of the dramatical performances exhibited at that theatre. . . .

If, previously to the decision for the purpose of which the inquiry is performed, debate should arise, with arguments on both sides;—in such a case, under the auspices of publicity, a result altogether natural (whether obligatory or no) is, that the judge should state, in the presence of the bystanders (his inspectors), the considerations—the reasons—by the force of which the decision so pronounced by him has been made to assume its actual shape, in preference to any other that may have been contended for. In such a situation, that to any judge the good opinion of such his judges should be altogether a matter of indifference, is not to be imagined. In such a state of things, that which the judge is to the parties or their advocates, the by-standers are to the judge: that which arguments are in their mouths, reasons are in his.

Publicity therefore draws with it, on the part of the judge,—as a consequence if not altogether necessary (since in conception at least it is not inseparable), at any rate natural, and in experience customary, and at any rate altogether desirable—the habit of giving reasons from the bench.

The same considerations which prescribe the giving an obligatory force to the one arrangement, apply in like manner to the other, subject only in both instances to the exception dictated by a regard to preponderant inconvenience in the shape of delay, vexation, and expense. Whenever the reason of the arrangement made by the judge is apparent upon the face of it, entering into a detailed explanation of it would be so much time and labour lost to everybody.

So difficult to settle is the proportion between the advantage in respect of security against misdecision on the one hand, and the disadvantage in respect of delay and vexation on the other, that the practice

of giving reasons from the bench can scarcely be made the subject of any determinate rule acting with the force of legal obligation on the judge. Of courts of justice it may be said, that they shall be open, unless in such and such cases; while, in the description of these cases, a considerable degree of particularity may be employed, designative of the species of cause, or of the stage at which the cause (be it what it may) is arrived in the track of procedure. But of the judge it cannot be determined with any degree of precision, in what cases he shall, and in what cases he shall not, be bound to deliver reasons.

This, however, is but one out of the multitude of instances in which, though an obligation of the legal kind is inapplicable, an obligation of the moral kind will be neither inapplicable nor inefficacious. Specifying reasons is an operation, to the performance of which, under the auspices of publicity, the nature of his situation will (as already observed) naturally dispose him to have recourse. Consigned to the text of the law, an intimation to the same effect, in terms however general, can scarce fail of producing upon the minds of the persons concerned, the effect on this occasion to be desired: in the minds of the public, a more constant disposition to expect this sort of satisfaction from the mouth of the judge—in the mind of the judge, a more constant disposition to afford it.

In legislation, in judicature, in every line of human action in which the agent is or ought to be accountable to the public or any part of it,—giving reasons is, in relation to rectitude of conduct, a test, a standard, a security, a source of interpretation. Good *laws* are such laws for which good reasons can be given: good *decisions* are such decisions for which good reasons can be given. On the part of a legislator whose wish it is that his laws be good, who thinks they are good, and who knows why he thinks so, a natural object of anxiety will be, the communicating the like persuasion to those whom he wishes to see conforming themselves to those rules. On the part of a judge whose wish it is that his decisions be good, who thinks them so, and knows why he thinks them so (it is only in proportion as he knows why he thinks them good that they are likely so to be), an equally natural object of anxiety will be the communicating the like persuasion to all to whose cognizance it may happen to them to present themselves; and more especially to those from whom a more immediate conformity to them is expected.

In neither case, therefore, does a man exempt himself from a function so strongly recommended as well by probity as by prudence; unless it be where—power standing in the place of reason—the deficiency

of psychological power being supplied by political, of internal by external,—he exempts himself, because it is in his power to exempt himself, from that sort of qualification which, feeling himself unable to perform well, he feels it at the same time in his power to decline performing. . . .

"Appeals without publicity, are an aggravation, rather than a remedy: they serve but to lengthen the succession, the dull and useless compound, of despotism, procrastination, precipitation, caprice, and negligence."

§ 3. *Of the exceptions to the principle of universal publicity*.

The uses and advantages of publicity have already been brought to view: so far as those uses are concerned, the most complete and unbounded degree of publicity cannot be too great.

But in other ways, in particular cases, publicity, if carried to this or that degree, may on this or that score be productive of inconvenience, and the mass of that inconvenience preponderant over the mass of the advantages. To the application of the principle of publicity—of universal and absolute publicity, these cases will present so many exceptions. . . .

1. Publicity is necessary to good judicature. True: but it is not necessary that every man should be present at every cause, and at every hearing of every cause. No—nor so much as that every man should be so present, to whom, for whatever reason, it might happen to be desirous of being present.

A man, a number of men, wish to be present at the hearing of a certain cause; and in what view? To disturb the proceedings—to expel or intimidate the parties, the witnesses (or, what is worse and more natural, this or that party, this or that witness), or the judge. Because judicature ought to be public, does it follow that this ought to be suffered?

2. Publicity is necessary to good judicature. True: but even to him to whose cognizance it is fit that a cause, and such or such a hearing in the cause, should come, it is not absolutely necessary that he should be actually present at the hearing, and that during the whole of the time. Nor, again, is it necessary that any one person should be present, over and above those whose presence is necessary and sufficient to ensure the rendering, upon occasion, to the public, at a subsequent time, a correct and complete account of whatever passed at that time.

3. What is more: suppose a cause absolutely devoid of interest to all persons but the parties to the cause, and those parties agreeing in their desire that the doors shall be open to no other person, or no other than such and such persons as they can mutually agree upon: in this case, where can be the harm of the degree of privacy thus required? As to unlimited publicity, the existence of the inconvenience that would result from it is sufficiently established by the suffrage of those who by the supposition are the only competent judges.

If the guarding the parties against injustice in the individual cause before the court, were the only reason pleading in favour of unrestrained publicity,—this reason would cease in every case in which unrestrained publicity being the general rule, all the parties interested joined in an application for privacy; or in which, privacy being the general rule, no application were made by either of them for publicity. For by common consent they might put an end to the proceedings altogether; and where no proceedings existed, there would be none to make public.

But neither by any such joint application, nor by any such joint acquiescence, would more than a part (and that scarcely a principal part) of the demand for publicity, unrestrained publicity, be removed. . . . The main use of publicity being to serve as a check upon the judge, no particular application could be made for it without manifesting a suspicion to his disadvantage. Much, therefore, as a party might conceive himself to stand in need of this security, he would have no means of obtaining it without exposing himself to the displeasure of the judge.

4. The supposition is, that all parties who have any interest in this question (at any rate any special interest) join in the consent given to the privacy. But this supposition is very apt to prove erroneous: nor will it perhaps be easy to pitch upon any individual case in which there can be any very perfect assurance of its being verified. More interests, it will frequently happen, are involved in a cause, than those of the individuals who appear in the character of parties to the cause . . . .

The cases which present themselves as creating a demand for a certain degree of restriction to be put upon the principle of absolute publicity, . . . may be thus enumerated:

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.

Object 2. To prevent the receipt of mendacity-serving information. . . .

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.

Object 5. To preserve individuals and families from unnecessary vexation, producible by the unnecessary disclosure of their pecuniary circumstances.

Object 6. To preserve public decency from violation.

Object 7. To preserve the secrets of state from disclosure.

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.

Object 9. (A false object.) To prevent the receipt of information tending to produce undue additions to the aggregate mass of evidence.

Purpose 1. Securing the persons of the judge and the other dramatis personae against violence and annoyance.

The importance of this object, the necessity of making due provision for it, is too obvious to be susceptible either of contestation or proof. Being thus incontestable, the necessity is the more apt to be converted into a plea for abusive application for undue extension. . . .

On such occasion, to warrant the assumption of this power, it should be necessary for the judge to declare his opinion of the needfulness of such a precaution; the declaration to this purpose being notified by a placard signed by the judge, and hung out in a conspicuous situation on the outside of the court. . . .

Purpose 4. Preservation of pecuniary reputation. . . .

In addition to the knowledge of the aggregate amount of his debts, knowledge of the circumstances of the creditors to whom they are respectively due may be necessary to the judge, to enable him to preserve from unequal and unreasonable loss, third persons, not parties to the suit by which the demand for the inquiry has been produced. . . .

Purpose 7. Preservation of state secrets from disclosure.

To give the question a body, and that the discussion may be somewhat more useful than a mutual beating of the air in the dark, let us frame a feigned case out of a real one. On the occasion of the peace that ensued in 1806 between France and Austria after the battle of Austerlitz, and the change that took place soon afterwards in the British administration, parliament received from the departing ministry a communication of the negotiations that had preceded the rupture terminated by that peace. The communication thus made, was charged with imprudence: the military weakness of your late unfortunate allies, the weakness of their councils, the intellectual weakness of the persons by whom those councils were conducted, the designs entertained in your favour by other powers who were in a way to become your allies; all these (it was said) you have betrayed: such is the imprudence; and what is the probable consequence? That on future contingent occasions, powers who otherwise might have become your allies, will shrink from your alliance, deterred by the apprehension of the like imprudence.

Such was the imputation: as to the justice or injustice of it, it is altogether foreign to the present purpose. To adapt the case to the present purpose:—suppose that the conduct of the British administration, antecedently to that disaster, had been made the subject of a charge of corruption; and suppose that, for the pronouncing a judicial decision upon that charge, it would have been necessary that the communication spontaneously made as above should have been produced in the character of evidence; and, for the argument's sake, suppose it sufficiently established, that, from the unrestricted publicity of that evidence, the inconveniences above spoken of would have ensued; and that the weight of those circumstances would have been preponderant, over any advantage that could have been produced by the punishment of the persons participating in that crime.

Here, then, would have been two great evils, one of which, under the system of inflexible publicity, must necessarily have been submitted to: on the one hand, impunity and consequent encouragement to a public crime of

the most dangerous description; on the other hand, offence given to foreign powers, and the country eventually deprived of assistance which might be necessary to its preservation.

By a considerate relaxation of a system, which, inestimably beneficial as it has been in its general tendency, was introduced without consideration, and has been pursued in the same manner, both these evils might in the supposed case in question be avoided.

To give a detailed plan for this ideal purpose would occupy more space than could be spared. But, as to leading principles, precedents not inadequate to the purpose might be found without straying out of the field of English practice. The privacy of secret committees, though as yet confined to preparatory inquiry, might on an emergency of this sort be extended to definitive judicature: the mode in which, in equity procedure, the examining judges are appointed by the parties—appointed but of a body of men to a certain degree select,—and (to come nearer the mark) the mode in which two of the fifteen judges are chosen in the House of Commons for the trial of election causes,—would afford a more promising security for impartiality than could be afforded by any committee chosen (though it were in the way of ballot) in either House.

§ 4. *Precautions to be observed in the application of the principle of privacy.*

Whatever be the restriction applied to the principle of absolute publicity, care must be taken that the mischief resulting from the restriction be not preponderant over the advantage; that the advantage, consisting in the avoidance of vexation (the inconvenience opposite to the collateral ends of justice), be not outweighed by any considerable abatement of the security necessary with reference to the direct ends, or rather to all the ends, of justice.

The following are a few precautions, by the observance of which, whatever advantage depending on the relaxation of the principle of publicity be pursued, the more important security afforded by the general observance of that principle may (it should seem) be maintained, either altogether undiminished, or without any diminution worth regarding:

1. In no case should the concealment be foreknown to be perpetual and indefinite. For to admit of any such case, would be to confer on the judge under whose direction the evidence were to be collected, and the

inquiry in other respects carried on, a power completely arbitrary; since, in relation to the business in question, let his conduct be ever so flagitious and indefensible, by the supposition he is, by means of the concealment in question, completely protected from every unpleasant consequence; protected not against legal punishment, but against shame.

At all events, in the hands of every party interested must be lodged (to be exercised on some terms or other), in the first place, the power of establishing each act, each word, by proper memorials; in the next place, the power of eventually bringing those memorials to light. If, in the case of a secret scrutiny, the examination be performed *viva voce*, questions and answers both should be minuted *ipsissimis verbis*, and the authenticity of the minutes established in the strictest and most satisfactory mode.

2. In no case let the privacy extend beyond the purpose: let no degree of privacy be produced (if one may so say) in waste. For every restriction put upon publicity, in tendency at least (whether in actual effect or not) infringes upon the habit, and weakens the sense of responsibility on the part of the judge.

3. Care in particular should be taken not to have two different sets of tribunals; one of them reserved for secret causes. The tribunals reserved for secret causes will be so many seats of despotism; more especially if composed of judges who never judge but in secret. Under a judge trained up (as it were) from infancy to act under the controul of the public eye, secrecy in this or that particular cause will be comparatively exempt from danger: the sense of responsibility, the habit of salutary self-restraint, formed under the discipline of the public school, will not be suddenly thrown off in the closet.

4. Instead of secret courts, of which there should not anywhere be a single one, let there be to every court a private chamber or withdrawing room: behind the bench, a door opening into a small apartment, into which the judge, calling to him the persons requisite, may withdraw one minute, and return the next, the audience in the court remaining undisplaced.

In this way, just so much of the inquiry is kept secret as the purpose requires to be kept secret, and no more. In one and the same cause, the interrogation of one deponent may be performed in secret, that of another in public: even of the same deponent, one part of the examination may be performed in the one mode, another in the other mode.

§ 5. *Cases particularly unmeet for privacy.*

[It] would not be eligible that the judge, at the instance of the prosecutor alone, should, for any cause, withdraw the procedure from the cognizance of the public at large.

Whatsoever be the form of government—monarchical, aristocratical, democratical, or mixed—the sort of dependence or connexion which can scarcely fail of subsisting as between the judge and the members of the administration, is such, that, to a person in the situation of defendant in any cause in which any member of that body (as such) has any personal interest, the eventual protection of the public eye is a security too important to be foregone: the vexation—the greatest vexation—that could befall the public functionary for want of that privacy which, in a case between individual and individual, might without preponderant danger be allowed, would be confined to the individual: but, in case of misdecision to the prejudice of the defendant, and undue punishment in consequence (besides that to the individual the affliction of the punishment in this case would be so much greater than that of the vexation on the other), the alarm which a bare suspicion of such unjust punishment is calculated to excite, would, in respect of its extent, be an additional and more serious evil: and although there were no other cause, the simple fact of a desire on the part of the prosecutor, and a consent on the part of the judge, to withdraw the procedure from the cognizance of the public eye would of itself be a ground of alarm, neither unnatural nor unreasonable . . . .

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## Constitutional Commitments

Our participating jurists come from countries in which constitutions or human rights laws oblige courts to be open and public. The appendix compiles excerpts of such provisions. As you will see, the oldest constitution in the group (that of the United States) provides an affirmative commitment that criminal defendants enjoy "the right to a speedy and public trial," as well as a guarantee of free speech and due process. These provisions are sometimes read as entailing rights of public access to civil as well as criminal proceedings and to documents filed. Many state constitutions of the same vintage go further, guaranteeing that their courts be "open" and public.

Moving to the twentieth century, the concept of rights to public courts became enshrined in transnational documents. For example, Article 10 of the 1948 Universal Declaration of Human Rights says, "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." Article 6(1) of the 1950 European Convention on Human Rights says, "everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice." Article 14 of the 1966 International Covenant on Civil and Political Rights guarantees similar rights.

Many of these transnational documents predate national constitutions that have taken up phrases like "fair and public hearing" (Canada, Colombia, New Zealand, South Africa). Some countries, such as China, make the commitment to public hearings for particular kinds of courts ("All cases handled by the people's courts, except for those involving special circumstances as specified by law, shall be heard in public"). Israel has a general requirement that "the Court shall sit in public." The more recently constituted international tribunals focused on war crimes specify rights to public proceedings but also detail the right to closed proceedings based on the need to "protect confidential or sensitive information to be given in evidence."

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**Applications: Inaccessibility, Closure, and Depublication**

**Riepan v. Austria**
App. No. 35115/97, 2000-XII
European Court of Human Rights

THE CIRCUMSTANCES OF THE CASE

[9] The applicant is serving an eighteen-year prison term following his conviction for murder and burglary in 1987. . . . In September 1994 he was transferred to Stein Prison and on 8 May 1995 to Garsten Prison, as the

prison administration feared that he and a number of other inmates were devising an escape plan.

[10] On [9] May 1995 . . . in the course of an interview with a senior prison officer, he again insisted on being returned to Stein Prison and threatened the prison officer that otherwise someone would pay the officer "a private visit." A few days later he threatened a prison warder saying "that he should not turn his back on him." On account of these incidents, criminal proceedings . . . were instituted against the applicant.

[11] The Steyr Regional Court decided to hold the hearing at Garsten Prison, which is situated about 5 km from Steyr. It set down 29 January 1996 as the date for the trial. The summons indicating the date and place of the hearing was served on the applicant as well as on his official defence counsel a month before the hearing. . . .

[13] On 29 January 1996 the Steyr Regional Court, sitting with a single judge, held a hearing in the closed area of Garsten Prison. The hearing room measured about 25 sq. m. It was furnished with a table and seats for the judge, the secretary, the public prosecutor, the applicant and his defence counsel. There is disagreement between the parties as to whether there were further seats available for witnesses and potential spectators.

[14] The hearing, which according to the minutes was public, was opened at 8.30 a.m. . . . Neither the applicant nor his counsel complained about a lack of publicity at that time. Following the hearing, the Regional Court convicted the applicant of threatening behaviour, finding that he had on three occasions threatened prison personnel with arson or assault, and sentenced him to ten months' imprisonment.

[15] Thereupon, the applicant filed an appeal on points of law and fact, as well as against sentence. He complained . . . that the hearing on 29 January 1996 had not been public since it took place in the closed area of Garsten Prison, to which only people with special permits, other than prison personnel, had access. . . .

[16] On 5 July 1996 the Linz Court of Appeal held a public hearing in the court building in the presence of the applicant and his counsel. . . .

[17] The Court of Appeal dismissed the case. . . . [T]he court noted that, according to information submitted by the Steyr Regional Court, the

hearing was public in the sense that any interested person would have been allowed to attend . . . .

THE LAW

[24] The Government submitted as their principal argument that the hearing at Garsten Prison complied with the requirement of publicity. In the alternative they asserted that, in any case, there were sufficient reasons to justify an exclusion of the public. Furthermore, they contended that any possible lack of publicity at the trial stage was remedied by the public appeal hearing. . . .

A. Whether the hearing at Garsten Prison was public.

[27] The Court reiterates that the holding of court hearings in public constitutes a fundamental principle enshrined in paragraph 1 of Article 6. This public character protects litigants against the secret administration of justice with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society. The public character of the proceedings assumes a particular importance in a case such as the present, where the defendant in the criminal proceedings is a prisoner, where the charges relate to the making of threats against prison officers and where the witnesses are officers of the prison in which the defendant is detained.

[28] It was undisputed in the present case that the publicity of the hearing was not formally excluded. However, hindrance in fact can contravene the Convention just like a legal impediment (see the *Airey v. Ireland* judgment of 9 October 1979, Series A no. 32, p. 14, § 25). The Court considers that the mere fact that the trial took place in the precincts of Garsten Prison does not necessarily lead to the conclusion that it lacked publicity. Nor did the fact that any potential spectators would have had to undergo certain identity and possibly security checks in itself deprive the hearing of its public nature. . . .

[29] Nevertheless, it must be borne in mind that the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. . . . The Court considers that a trial complies with the requirement of publicity only if the public is able to obtain

information about its date and place and if this place is easily accessible to the public. In many cases these conditions will be fulfilled by the simple fact that a hearing is held in a regular courtroom large enough to accommodate spectators. However, the Court observes that the holding of a trial outside a regular courtroom, in particular in a place like a prison, to which the general public in principle has no access, presents a serious obstacle to its public character. In such a case, the State is under an obligation to take compensatory measures in order to ensure that the public and the media are duly informed about the place of the hearing and are granted effective access.

[30] The Court will therefore examine whether such measures were taken in the present case. As to the question whether the public could obtain information about the date and place of the hearing, the Court notes that the hearing was included in a weekly hearing list held by the Steyr Regional Court, which apparently contained an indication that the hearing would be held at Garsten Prison. . . . This list was distributed to the media and was available to the general public at the Regional Court's registry and information desk. However, apart from this routine announcement, no particular measures were taken, such as a separate announcement on the Regional Court's notice-board accompanied, if need be, by information about how to reach Garsten Prison, with a clear indication of the access conditions.

Moreover, the other circumstances in which the hearing was held were hardly designed to encourage public attendance: it was held early in the morning in a room which, although not too small to accommodate an audience, does not appear to have been equipped as a regular courtroom.

[31] In sum, the Court finds that the Steyr Regional Court failed to adopt adequate compensatory measures to counterbalance the detrimental effect which the holding of the applicant's trial in the closed area of Garsten Prison had on its public character. Consequently, the hearing of 29 January 1996 did not comply with the requirement of publicity laid down in Article 6 § 1 of the Convention.

B. Whether the lack of publicity was justified for any of the reasons set out in the second sentence of Article 6 § 1. . . .

[34] The Court considers that the present case concerning ordinary criminal proceedings cannot be compared to that of *Campbell and Fell v. the United Kingdom*, where it held that a requirement that disciplinary

proceedings against convicted prisoners should be held in public would impose a disproportionate burden on the authorities of the State. . . . The Court would add that security problems are a common feature of many criminal proceedings, but cases in which security concerns justify excluding the public from a trial are nevertheless rare. In the present case, although there were apparently some security concerns, the Steyr Regional Court did not consider them serious enough to necessitate a formal decision under Article 229 § 1 of the Code of Criminal Procedure excluding the public. Nor did the Linz Court of Appeal take such a view.

In these circumstances, the Court finds no justification for the lack of a public hearing at first instance in the present case.

C. Whether the lack of publicity at first instance was remedied by the public appeal hearing. . . .

[37] The Court recalls that it has already dealt with the question whether the lack of a public hearing before the lower instance may be remedied by a public hearing at the appeal stage. In a number of cases it has found that the fact that proceedings before an appellate court are held in public cannot remedy the lack of a public hearing at the lower instances where the scope of the appeal proceedings is limited, in particular where the appellate court cannot review the merits of the case, including a review of the facts and an assessment of the proportionality between the fault and the sanction. . . .

[38] The Court doubts whether, in the present case, a conclusion *a contrario* can be drawn from this case law which was developed in the context of proceedings to which Article 6 § 1 would not have been applicable had it not been for the "autonomy" of the concepts of "civil rights and obligations" and "criminal charge."

[39] The Court recalls that in the area of proceedings which are classified neither as "civil" nor as "criminal" under domestic law, but as disciplinary or administrative, it is well established that the duty of adjudicating disciplinary or minor offences may be conferred on professional or administrative bodies which do not themselves comply with the requirements of Article 6 § 1 of the Convention as long as they are subject to review by a judicial body that has full jurisdiction. . . . Thereby it has accepted that in such proceedings the lower instances may not qualify as independent and impartial tribunals and that the hearings before them may not be public.

[40] The present case, however, concerns proceedings before courts of a classic kind which are classified as "criminal" both under domestic and Convention law. In this field, the Court has, in the context of the requirement of a tribunal's independence and impartiality, rejected the possibility that a defect at first instance could be remedied at a later stage, finding that the accused was entitled to a first-instance tribunal that fully met the requirements of Article 6 § 1. . . .

The Court considers that a normal criminal trial requires the same kind of fundamental guarantee in the form of publicity. As stated above, by rendering the administration of justice transparent, the public character of a criminal trial serves to maintain confidence in the courts and contributes to the achievement of the aim of Article 6 § 1, namely a fair trial. To this end, all the evidence should, in principle, be produced in the presence of the accused at a public hearing with a view to adversarial argument. . . . Given the possible detrimental effects that the lack of a public hearing before the trial court could have on the fairness of the proceedings, the absence of publicity could not in any event be remedied by anything other than a complete re-hearing before the appellate court.

[41] However, an examination of the facts of the present case reveals that the review carried out by the Linz Court of Appeal did not have the requisite scope. It is true that the appellate court could review the case as regards questions of law and fact and could reassess the sentence. However, apart from questioning the applicant, the court did not take any evidence, and in particular did not rehear the witnesses. It is of little importance that the applicant did not request a rehearing of the witnesses. Firstly, the appellate court would, in accordance with the relevant procedural rules . . . have acceded to such a request only if it considered that the trial court's taking of evidence had been incomplete or defective. Secondly, it is for the courts to secure the accused's right to have evidence adduced at a public hearing.

Accordingly, the Court finds that the lack of a public hearing before the Steyr Regional Court was not remedied by the public hearing before the Linz Court of Appeal. . . .

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Justice Lech Garlicki, who provided us with the excerpts from *Riepan*, also notes:

In the *Riepan* case, the Court was confronted with "public order" arguments. It is not impossible that the argument of "national security" might be regarded as a more convincing one. *Perote Pellon v. Spain* (decision of February 10, 2000) dealt with the conviction, by a Spanish military tribunal, of a colonel accused of illegal appropriation of some top secret military documents. The public was excluded from the trial due to the necessity "to protect identity and life of the witnesses, to avoid possible divulgation of classified information and because of the national security grounds." The Strasbourg Court dismissed, as manifestly ill-founded, the claim that exclusion of publicity had violated the Convention. However, the Court preferred not to address the problem in any larger perspective and it only observed that "since the domestic courts are better placed to assess the necessity to hold hearings in camera," it accepts—as reasonable—arguments adopted by the Central Military Court and confirmed by the Supreme Court.

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**Håkansson and Sturesson v. Sweden**
171 Eur. Ct. H.R. (Ser. A) (1990)
European Court of Human Rights

[8] On 4 December 1979 the applicants bought for 240,000 Swedish crowns (SEK) at a compulsory sale by auction (. . . "the 1979 auction") an agricultural estate called Risböke 1:3 in the municipality of Markaryd. . . . According to a valuation made public before the auction, the market value (saluvärde) of the property was estimated at 140,000 SEK.

[9] At the auction the public was, according to the minutes drafted by the representative of the County Administrative Board (länsstyrelsen) of the County of Kronoberg, informed of the regulations contained in section 2, sub-section 10, and section 16 of the Land Acquisition Act 1979 (jordförvärvslagen 1979:230; "the 1979 Act"), whereby a purchaser would have to resell the property within two years unless he had obtained in the meantime from the County Agricultural Board (lantbruksnämnden) of the same County a permit to retain it or fell under one of the listed exceptions from the permit requirement. . . .

III. Alleged Violations of Article 6 ¶ 1 (art. 6-1) of the Convention

[66] The public character of court hearings constitutes a fundamental principle enshrined in paragraph 1 of Article 6 (art. 6-1). Admittedly neither the letter nor the spirit of this provision prevents a

person from waiving of his own free will, either expressly or tacitly, the entitlement to have his case heard in public. (See, inter alia, the *Le Compte, Van Leuven and De Meyere* and the *H. v. Belgium*.) However, a waiver must be made in an unequivocal manner and must not run counter to any important public interest.

[67] No express waiver was made in the present case. The question is whether there was a tacit one. While in some earlier cases dealt with by the Court the confidentiality of the proceedings at issue stemmed from legislation . . . or practice . . . , in the present case the Swedish law expressly provided for the possibility of holding public hearings: the Code of Judicial Procedure gave the Göta Court of Appeal power to hold public hearings "where [this was] necessary for the purposes of the investigation."

[Since] the applicants' appeal mainly challenged the lawfulness of the 1985 auction and since in Sweden such proceedings usually take place without a public hearing, the applicants could have been expected to ask for such a hearing if they had found it important that one be held. However, they did not do so. They must thereby be considered to have unequivocally waived their right to a public hearing before the Göta Court of Appeal. Their misgivings as to their treatment before that court only seem to have emerged in the course of the proceedings before the Convention organs; in their application to the Supreme Court for leave to appeal, no complaint was raised in this respect. Furthermore, it does not appear that the litigation involved any questions of public interest which could have made a public hearing necessary. . . .

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**Shinga v. State**
(CC) Case No. CCT 56/06, 8 March 2007
Constitutional Court of South Africa

YACOOB, J:

(a) The interaction between this Court and Parliament concerning the constitutional validity of the criminal appeal procedure in respect of judgments of the Magistrates' Courts has spanned more than ten years. This is the third occasion on which this Court has been called upon to consider the procedure for criminal appeals from the Magistrates' Courts. This Court has twice previously declared aspects of these prescriptions to be inconsistent with the Constitution. Parliament responded each time by

putting in place a procedure and requirements different from those that had been declared unconstitutional in an effort to remedy the defect. . . .

[The Court summarized the prior law, amendments, and decisions.]

(b) Finally section 309(3A), which was introduced by the first amendment and which sought to permit appeals in chambers subject to agreement between the accused and the prosecution and to directions by the Judge President, was amended to encroach upon the right to appeal even further. It now provides that all appeals (which by definition are considered only after leave to appeal has been granted either by the magistrate or the High Court) must be disposed of in chambers on the written argument of the parties or their legal representatives, unless the court is of the opinion that the interests of justice require that the parties or their legal representatives submit oral argument to the court regarding the appeal. In other words, absent exceptional circumstances and a direction by the Judge President, an appeal will not be heard in open court and no oral argument may be permitted.

BACKGROUND: *The* Shinga *judgment*

[1] During June 2004 Mr Mandlakhe Khehla Shinga was convicted of robbery in the Regional Court sitting on circuit in Scottburgh and sentenced to ten years' imprisonment. He was represented at the trial. His defence was that he was elsewhere at the time the crime was committed. The issues in the trial were therefore whether he had been identified beyond a reasonable doubt and whether there was a reasonable possibility that his alibi was true.

[2] The magistrate convicted him and granted him leave to appeal . . . . Section 309(3A) was in issue . . . .

Section 309(3A)

[3] Section 309(3A) (declared invalid in the *Shinga* judgment) reads as follows:

> (a) An appeal under this section must be disposed of by a High Court in chambers on the written argument of the parties or their legal representatives, unless the Court is of the opinion that the interests of justice require that the parties or

> their legal representatives submit oral argument to the Court regarding the appeal.
>
> (b) If the Court is of the opinion that oral argument must be submitted regarding the appeal as contemplated in paragraph (a), the appeal may nevertheless be disposed of by that Court in chambers on the written argument of the parties or their legal representatives, if the parties or their legal representatives so request and the Judge President so agrees and directs in an appropriate case. . . .

[5] Counsel for the amicus in the *Shinga* case submitted that, insofar as the object of section 309(3A) is to save judicial time and resources and to streamline the processing of criminal appeals, the potential administrative and practical difficulties that would arise from the implementation of the section and from the publication of the decisions in criminal appeals is likely to have quite the opposite effect. So, for example, if the judges who read the record and the written argument in chambers agree that the interests of justice require oral argument, the arrangements necessary to arrange a date upon which all the relevant parties—the same judges, defence counsel and/or the appellant and counsel for the State—are available will cause long delays and burden court resources. This is particularly so in those divisions where the judges change duty roster on a regular basis. The alternative of enrolling the matter for an appeal hearing before two different judges would mean that at least four, instead of two, judges would be required to read and engage with the record and the written arguments.

[6] As was pointed out by counsel for the amicus, section 309(3A) also gives no indication of how the decisions in criminal appeals dealt with in chambers are to be published. Either the preparation and handing down in open court of a written judgment in every case, or the subsequent delivery of an oral judgment in the presence of all the relevant parties, would result in a waste of judicial time and resources. The alternative of publishing the orders in criminal appeals dealt with in chambers without giving reasons for the orders would dramatically undermine the important requirements of judicial transparency and accountability.

[7] Counsel for the Minister also had no answer to these submissions. As is apparent from what follows, however, the provisions are so objectionable in principle that even practical merit would not easily render them acceptable.

[8] It is important that the significance of this deviation from the rule of law, fairness and justice be fully understood. The section makes dangerous inroads into our system of justice which ordinarily requires court proceedings that affect the rights of parties to be heard in public. It provides that an appeal can be determined by a judge behind closed doors. No member of the public will know what transpired; nobody can be present at the hearing. Far from having any merit, the provision is inimical to the rule of law, to the constitutional mandate of transparency and to justice itself. And the danger must not be underestimated. Closed court proceedings carry within them the seeds for serious potential damage to every pillar on which every constitutional democracy is based.

[9] The importance of criminal appeals being argued and heard in open court cannot thus be gainsaid. The survivors of crime, those accused of it and the broader community have a right to see that justice is done in criminal matters. Seeing justice done in court enhances public confidence in the criminal justice process and assists victims, the accused and the broader community to accept the legitimacy of that process. Open courtrooms foster judicial excellence, thus rendering courts accountable and legitimate. Were criminal appeals to be dealt with behind closed doors, faith in the criminal justice system may be lost. No democratic society can risk losing that faith. It is for this reason that the principle of open justice is an important principle in a democracy. As was recently reasoned in this Court:

> Courts should in principle welcome public exposure of their work in the courtroom, subject of course to their obligation to ensure that proceedings are fair. The foundational constitutional values of accountability, responsiveness and openness apply to the functioning of the judiciary as much as to other branches of government. These values underpin both the right to a fair trial and the right to a public hearing (i.e. the principle of open courtrooms). The public is entitled to know exactly how the judiciary works and to be reassured that it always functions within the terms of the law and according to time-honoured standards of independence, integrity, impartiality and fairness.

[10] It is true, of course, that the principle of open justice is not without exception. This Court has held that leave-to-appeal procedures may be heard in chambers, but this is an exception to the general rule of open justice permitted only to ensure that judicial resources are preserved for

deserving cases. This narrow exception may not be extended to the very appeals a court has held to be potentially of merit.

[11] Our approach to the matter is that there can be no doubt that section 35(3)(o) contemplates that the review or appeal it guarantees is as fair as the trial itself must be. In determining the requirements for fairness of an appeal, it must be borne in mind that the accused person in prosecuting an appeal exercises a right which inures consequent upon leave to appeal having been granted either by the Magistrates' Court or two judges of the High Court. In exercising this right to appeal, the accused person exercises the right to review or appeal conferred by the Constitution. A fair appeal must require that every accused and the prosecution be given an opportunity to advance their case in every reasonable way they can. To deny the accused or the prosecution the right to present oral argument in open court is fundamentally unfair bearing in mind the importance of oral argument as a significant tool in the hands of both an accused and the prosecution in the appeal process.

[12] The requirement of fairness must also take into account that all victims and their families have an abiding interest in the outcome of the appeal and have a right to attend the proceedings so that if the appeal should succeed, they have at least been given the opportunity to witness the process that gave rise to this result. It is a fundamental tenet of the administration of justice and the rule of law that appeals, particularly criminal appeals, are not held behind closed doors. In the circumstances, I would support the general reasoning of the High Court in relation to the provision with which we are now concerned.

[13] Counsel for the Minister tried to justify this provision. She said that consideration in chambers with written argument and the denial of the right to present oral argument in open court on appeal was somehow acceptable because the accused would have had the trial in open court and would have been able to present oral argument to the magistrate. This amounts to saying that a fair trial justifies an unfair appeal. The submission has no substance. . . . In the circumstances the provisions of section 309(3A) must be held to be inconsistent with the Constitution. . . .

Langa CJ, Moseneke DCJ, Kondile AJ, Madala J, Mokgoro J, Nkabinde J, O'Regan J, Sachs J, van der Westhuizen J, van Heerden AJ concur in the judgment of Yacoob J.

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## Plea Bargaining and Settlement

In 2004, for the first time in France, a statute adapting the administration of justice to the changing face of crime introduced plea-bargaining for minor criminal offenses, punishable by a term of one year or less in prison. As is excerpted below, the Constitutional Council ruled that, according to the Declaration of Human and Civic Rights of 1789, in particular the equal protection clause (Article 6) and the guarantee of rights (Article 16), the trial of a criminal case which may entail a custodial sentence should be heard in an open court. The Council therefore struck down the provisions of the statute that permitted the President of the tribunal to approve in chambers a punishment proposed by the prosecution and accepted by the offender that could involve a custodial sentence.

Conseil Constitutionnel Decision no. 2004-492DC, Mar. 2, 2004, Rec. 66

*The Act adapting the Administration of Justice to the changing face of crime*

On February 11, 2004, the Constitutional Council received a referral, pursuant to paragraph 2 of Article 61 of the Constitution, for review of the constitutionality of the Act adapting the Administration of Justice to the changing face of crime . . . .

[99] [The proposed legislation] inserts in Chapter I of Title II of the Code of Criminal Procedure a section 8 entitled: "Pleading guilty to charges before trial." This section comprises ten new Articles numbered 495-7 to 495-16.

[100] Article 495-7 makes this new procedure applicable to persons who, sent before the Public Prosecutor or summoned to appear, plead guilty to having committed one or more offences punishable by a term of imprisonment of five years or less. It specifies that the Public Prosecutor may automatically apply this procedure, or do so at the request of the offender or his lawyer. However under Article 495-16, the provisions cannot apply "to minors aged eighteen [or younger], nor to offences under the law of the press, involuntary homicide, political offences or offences for which a special statute has provided a prosecution procedure." Neither are they applicable, under Article 495-11, to persons committed for trial before the Correctional Tribunal by the Investigating Magistrate.

[101] Article 495-8 poses the limits and the conditions in which the Public Prosecutor may offer the offender the choice of one or more alternative punishments. In particular in cases involving a prison sentence, the length of said punishment must not exceed one year nor exceed one half of the sentence liable to be passed on the offender. If the punishment would consist of paying a fine, the alternative punishment shall not exceed the amount of the fine itself. The same Article specifies that both the plea of guilty and the proposal of an alternative punishment must be made in the presence of the offender's lawyer. The offender, informed that he may request a further ten days in which to consider his response, may consult with his lawyer, out of the Public Prosecutor's presence, before finally making his decision known.

[102] Article 495-9 provides for the official approval by the President of the Tribunal of First Instance [*Tribunal de grande instance*] of the proposal made by the Public Prosecutor's Office and accepted by the offender in the presence of his lawyer. It specifies that the President of the Tribunal of First Instance must hear the offender and his lawyer in chambers before deciding whether or not to approve the proposed measures. In the event approval is granted, the decision of the court shall be read out in open court. New Article 495-11 specifies the conditions of said approval, which must be set out in the reasons given in the decision. In particular, the latter must note that firstly the offender, in the presence of his lawyer, admits to having committed the incriminated acts and agrees to the alternative punishment(s) proposed by the Public Prosecutor, and secondly, this punishment or these punishments are justified in view of the circumstances of the offence and the personality of the offender. . . .

[105] The parties making the referral argue that these provisions disregard the right to a fair trial and infringe the principles of the presumption of innocence, equality before courts of law and trial in open court. . . .

*As regards the argument based on the absence of a hearing in open court*

[117] It follows from the combination of Articles 6, 8, 9 and 16 of the Declaration of 1789 that the trial of a criminal case which may entail a custodial sentence should, except in particular circumstances requiring a case to be heard in camera, take place at a hearing held in open court.

[118] The grant or refusal by the President of the Tribunal of First Instance of official approval of the alternative punishment proposed by the

prosecution and accepted by the offender is a decision handed down by a court of law. This approval of the proposed arrangement may lead to a one-year custodial sentence. The fact that this hearing, where the President of the Tribunal of First Instance rules on the proposal put forward by the prosecution, does not take place in open court, even when there are no particular circumstances warranting the holding of proceedings in camera, disregards the constitutional requirements recalled hereinabove. Hence the words "in chambers" found at the end of the second sentence of indent two of new Article 495-9 of the Code of Criminal Procedure must be ruled unconstitutional. . . .

Deliberated by the Constitutional Council sitting on March 4th 2004 composed of Messrs Yves GUENA, President, Michel AMELLER, Jean-Claude COLLIARD, Olivier DUTHEILLET de LAMOTHE, Pierre JOXE, Pierre MAZEAUD, and Mesdames Monique PELLETIER, Dominique SCHNAPPER and Simone VEIL.

[Editors' note: After the Conseil Constitutionnel struck the provision, the statute became operative with a requirement that the proceeding occur in open court. Thereafter, the Cour de Cassation ruled that the Public Prosecutor had to be present at that proceeding, which undermined the efficiency rationale that had produced the statute—aimed at minor offenses. In response, the statute was amended to provide that the prosecutor did not have to attend although the proceeding had to be in public.]

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The civil equivalent of plea-bargaining is settlement, often augmented by efforts to encourage alternative dispute resolution and arbitration. Most of those activities are similarly not available for public view, and therefore raise questions about rights of access to public hearings and the authority of the parties to waive and the courts to encourage these proceedings.

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**Refusing to Publish or to Permit Citation to Judgments**

In the United States, appellate courts do not publish all of their judgments. Indeed, in the 2006-2007 term, six of the cases decided by the United States Supreme Court were in cases "not published" at the circuit

level. Explanations of the various techniques of non-publication come from an essay by Penelope Pether, excerpted below.

Penelope Pether
*Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*[*]

"Unpublication" is what happens to the vast majority of opinions issued by U.S. state and federal courts. In the federal appellate courts, for example, the rate of unpublication presently hovers just under eighty percent. Unpublication means that an opinion is not designated for publication in the jurisdiction's official reporter, if it has one; to a greater or lesser extent it makes the opinion difficult to find; it limits or destroys the precedential value of the opinion; and in most jurisdictions, citation to an unpublished opinion in documents filed in court or in argument is either banned or severely limited.

"Depublication" involves a jurisdiction's highest appellate court stripping an opinion of an intermediate appellate court of precedential value without an appeal to or hearing by the depublishing court, resulting in the opinion's removal from the jurisdiction's official reporter (if it has one), and its becoming more difficult to find than had it not been depublished.

"Stipulated withdrawal" of judicial opinions occurs when parties settle litigation while an appeal is pending; the opinion from which the appeal has been taken is vacated and thus stripped of precedential value; the withdrawal of the opinion is a condition of settlement. Sometimes it is also reversed by the appellate court at the request of the parties. Once again, stipulated withdrawal makes an opinion difficult to find. . . . The courts of Australia, Canada, and New Zealand . . . have not (at least officially or yet) done anything like the U.S. courts have done. While only some of the opinions ("judgments") of the Australian, New Zealand, and Canadian courts are included in official or unofficial reporters, this does not affect their precedential status, either de jure or, since the development of the widespread practice of courts routinely putting judgments online, de facto. . . . [T]he Australians are now considering adopting . . . "unpublishing."

[Historical] justifications for the practice of "unpublishing" opinions turned on competing discourses of crises that were said to beset the federal judiciary in the 1960s and '70s. Judges represented the volume of book-

[*] Excerpted from 56 STAN. L. REV. 1435 (2004). Citations have been omitted.

bound precedent as overwhelming. . . . Later, efficiency became the dominant justificatory discourse [that] . . . unpublication could save judicial time, because "the judges no longer sense the same need to polish the prose and to monitor each phrase as they do with opinions which are intended for general distribution," [and] . . . that only certain classes of cases merit or produce opinions that are "precedential."

Procedures to provide access to unpublished opinions also vary widely . . . . Unpublished opinions may be posted on websites or made available to West or LEXIS . . . . At the federal district court level, "[e]ach judge decides what to submit for publication and posts it on the court's web site. . . . According to Judge Wald:

> [A] double-track system [of publication and unpublication] allows for deviousness and abuse. I have seen judges purposely compromise on an unpublished decision incorporating an agreed-upon result in order to avoid a time-consuming public debate about what law controls. I have even seen wily would-be dissenters go along with a result they do not like so long as it is not elevated to a precedent. . . .

Judge Arnold goes further, suggesting "the temptation exists" that, "If . . . a precedent is cited, and the other side then offers a distinction, and the judges on the panel cannot think of a good answer to the distinction, but nevertheless, for some extraneous reason, wish to reject it, they can easily do so through the device of an abbreviated, unpublished opinion, and no one will ever be the wiser."

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Below are excerpts from one appellate court's rule (the United States Court of Appeals for the First Circuit, encompassing the states of Massachusetts, Rhode Island, Maine, and New Hampshire, as well as Puerto Rico and the Virgin Islands) that offer justifications for nonpublication/noncitation and that detail how judges make that decision.

1st Cir. R. 36. Opinions

(a) Opinions Generally. The volume of filings is such that the court cannot dispose of each case by opinion. Rather it makes a choice, reasonably accommodated to the particular case, whether to use an order,

memorandum and order, or opinion. An opinion is used when the decision calls for more than summary explanation. However, in the interests both of expedition in the particular case, and of saving time and effort in research on the part of future litigants, some opinions are rendered in unpublished form; that is, the opinions are directed to the parties but are not otherwise published in the official West reporter, and may not be cited in unrelated cases. . . .

(1) Statement of Policy. In general, the court thinks it desirable that opinions be published and thus be available for citation. The policy may be overcome in some situations where an opinion does not articulate a new rule of law, modify an established rule, apply an established rule to novel facts or serve otherwise as a significant guide to future litigants. (Most opinions dealing with claims for benefits under the Social Security Act, 42 U.S.C. § 205(g), will clearly fall within the exception.)

(2) Manner of Implementation.

(A) As members of a panel prepare for argument, they shall give thought to the appropriate mode of disposition (order, memorandum and order, unpublished opinion, published opinion). At conference the mode of disposition shall be discussed and, if feasible, agreed upon. Any agreement reached may be altered in the light of further research and reflection.

(B) With respect to cases decided by a unanimous panel with a single opinion, if the writer recommends that the opinion not be published, the writer shall so state in the cover letter or memorandum accompanying the draft. After an exchange of views, should any judge remain of the view that the opinion should be published, it must be.

(C) When a panel decides a case with a dissent, or with more than one opinion, the opinion or opinions shall be published unless all the participating judges decide against publication. In any case decided by the court en banc the opinion or opinions shall be published.

(D) Any party or other interested person may apply for good cause shown to the court for publication of an unpublished opinion.

(E) If a district court opinion in a case has been published, the order of court upon review shall be published even when the court does not publish an opinion.

(F) Unpublished opinions of this court may be cited in filings with or arguments to this court only in related cases. Otherwise only published opinions may be cited.

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These practices engendered controversy, as one well-respected federal appellate jurist also held them to be an unconstitutional exercise of power by judges. Thereafter, the national rules relating to appellate practice were changed, effective January of 2007, to read:

Fed. Rule Appellate Procedure 32.1. Citing Judicial Dispositions

(a) Citation Permitted. A court may not prohibit or restrict the citation of federal judicial opinions, orders, judgments, or other written dispositions that have been:

(i) designated as "unpublished," "not for publication," "non-precedential," "not precedent," or the like; and

(ii) issued on or after January 1, 2007. . . .

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Some appellate courts responded by seeking to protect their practices. For example, in June 2007, the Second Circuit (a federal appellate court encompassing Vermont, New York and Connecticut) issued the following rule:

2d Cir. R. 32.1. Dispositions by Summary Order.

(a) Use of Summary Orders

The demands of contemporary case loads require the court to be conscious of the need to utilize judicial time effectively. Accordingly, in those cases in which decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by an opinion (i.e., a ruling having precedential effect), the ruling may be by summary order instead of by opinion.

(b) Precedential Effect of Summary Orders

Rulings by summary order do not have precedential effect.

(c) Citation of Summary Orders

(1) Citation to summary orders filed after January 1, 2007, is permitted.

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**Rights to Documentary Materials and the Technologies of Dissemination**

**Hartford Courant v. Pellegrino**
380 F.3d 83 (2d Cir. 2004)

Before: Meskill, Katzmann, and Wesley, Circuit Judges.

Katzmann, Circuit Judge.

This case calls upon us to decide whether the public and press have a qualified First Amendment right to inspect docket sheets and, if so, the appropriate remedy for its violation by state courts. . . .

Between 2002 and 2003, the newspaper plaintiffs learned that, over the prior 38 years, the Connecticut state court system had adjudicated what appeared to be thousands of cases where sealing procedures prohibited court personnel from allowing the public to access the files in those proceedings and, in certain comparatively rare instances, from acknowledging the existence of these cases altogether. Although some of these cases may have been sealed pursuant to a variety of statutory authorizations, including those directed at protecting juvenile offenders, or those involving bar grievance procedures, The Hartford Courant published an account that insinuated that many other cases may have been sealed simply at the behest of prominent individuals who were parties. *See* Eric Rich & Dave Altimari, *Elite Enjoy "Secret File" Lawsuits*, The Hartford Courant, Feb. 9, 2003, at A1 ("[J]udges have selectively sealed divorce, paternity and other cases involving fellow judges, celebrities and wealthy CEOs that, for most people, would play out in full view of the public . . . .").

In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), and its progeny, the Supreme Court recognized that the First Amendment grants both the public and the press a qualified right of access to criminal trials . . .

to the examination of jurors during voir dire, *see Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ("*Press-Enterprise I*"), and to preliminary hearings, *see Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press-Enterprise II*"). The circuits, including ours, have concurred in holding that this right applies to civil as well as criminal proceedings . . . .

> As the [Supreme] Court explained [in *Press Enterprise II*]:
>
> > In cases dealing with the claim of a First Amendment right of access to criminal proceedings, our decisions have emphasized two complementary considerations. First, because a tradition of accessibility implies the favorable judgment of experience, we have considered whether the place and process have historically been open to the press and general public. . . . Second, in this setting the Court has traditionally considered whether public access plays a significant positive role in the functioning of the particular process in question.

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**Press-Enterprise Co. v. Superior Court ("Press-Enterprise II")**[*]
478 U.S. 1 (1986)
Supreme Court of the United States

[The] ability of the public and press to attend civil and criminal cases would be merely theoretical if the information provided by docket sheets were inaccessible. In this respect, docket sheets provide a kind of index to judicial proceedings and documents, and endow the public and press with the capacity to exercise their rights guaranteed by the First Amendment. . . . Sealed docket sheets would also frustrate the ability of the press and the public to inspect those documents, such as transcripts, that we have held presumptively open. . . . Finally, the inaccessibility of docket sheets may thwart appellate or collateral review of the underlying sealing decisions. Without open docket sheets, a reviewing court cannot ascertain whether judicial sealing orders exist . . . .

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[*] Citations and internal quotation marks omitted.

The issue of access to pre-trial filings becomes all the more relevant when those filings are electronic and on accessible data bases. The federal courts have just adopted such a system, in part described as enhancing "transparency." Questions of the constitutional implications will likely be litigated soon.

**PACER**[*]

What is PACER?

Public Access to Court Electronic Records (PACER) is an electronic public access service that allows users to obtain case and docket information from Federal Appellate, District and Bankruptcy courts, and the U.S. Party/Case Index via the Internet. Links to all courts are provided from this web site. Electronic access is available by registering with the PACER Service Center, the judiciary's centralized registration, billing, and technical support center. Each court maintains its own databases with case information. Because PACER database systems are maintained within each court, each jurisdiction will have a different URL. Accessing and querying information from each service is comparable; however, the format and content of information provided may differ slightly. PACER is a service of United States Judiciary. . . .

Available Information

The PACER System offers electronic access to case dockets to retrieve information such as:

- A listing of all parties and participants including judges, attorneys, and trustees
- A compilation of case related information such as cause of action, nature of suit, and dollar demand
- A chronology of dates of case events entered in the case record
- A claims registry
- A listing of new cases each day
- Appellate court opinions
- Judgments or case status
- Types of documents filed for certain cases
- Many courts offer imaged copies of documents . . .

[*] A*vailable at* http://pacer.psc.uscourts.gov/pacerdesc.html.

Cost

The United States Congress has given the Judicial Conference of the United States, the judicial governing body of the U.S. Federal Courts, authority to impose user fees for electronic access to case information. . . . All registered agencies or individuals will be charged a user fee. Access to web based PACER systems will generate a $.08 per page charge. . . . A measure was approved by the Judicial Conference of the United States in March 2001 stating that no fee is owed until a user accrues more than $10 worth of charges in a calendar year.

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**Derogations: Crime, Terror, and Secrets of State**

**Botmeh and Alami v. United Kingdom**
App. No. 15187/03, Eur. Ct. H.R. (June 7, 2007)
European Court of Human Rights

[6] On 26 July 1994 a car-bomb exploded outside the Israeli Embassy in London and the following morning a second bomb went off outside the headquarters of a Jewish organisation, also in London.

[7] The applicants and two others (subsequently acquitted) were arrested and charged with having participated in the conspiracy to make, place, and detonate these bombs. . . . The Crown's case was that both were members of, or sympathizers with, the Popular Front for the Liberation of Palestine (PFLP) but, being dissatisfied with official policy, had become part of a breakaway English group. . . .

[8] Although the trial judge, following *ex parte* proceedings, ruled that certain documents should not be disclosed to the defence on grounds of public interest immunity, some intelligence information was disclosed before the trial, including material indicating that the bombs had been planted by an Iranian-backed terrorist organisation. This possibility was mentioned by the judge in his summing-up to the jury, as follows:

> Unless the bombs were the work of Iranian backed Hezbollah, who were named at one time by the media, although there was no evidence that they ever claimed responsibility or were, in fact, involved, we have to look elsewhere and ask whether these defendants were part of

> some breakaway group or faction and whether what they have said about their views and attitudes is, in fact, true. . . .
>
> The question is, for you, did these three defendants, and almost certainly one or more people unknown to us, form their own English group rejecting the PLO, Fatta, PFLP non-violent policy and decide to paint the name of Palestine on the mountain again? Or was it an Islamic fundamentalist group with which these applicants have no connection seeking to damage Israel and, at the same time, to discredit the PLO? These are the things that we have to think about. . . .

[9] On 11 December 1996 both applicants were convicted and on 16 December 1996 they were sentenced to twenty years' imprisonment and recommended for deportation. They lodged appeals against conviction and sentence.

[10] On 4 November 1997, eleven months after the conclusion of the trial, the applicant's solicitors drew the attention of the Crown Prosecution Service to a press article quoting a former intelligence officer, David Shayler, who declared that the United Kingdom's intelligence agency, MI5, had been warned by a reliable source prior to the embassy bombing that such an attack was imminent, but that the information had not been passed to the police. They requested the details of the warning and an interview with the "reliable source."

[11] On 6 April 1998 the Crown Prosecution Service replied, indicating that an *ex parte* application was to be made to the Court of Appeal, on notice, in relation to the information relevant to the disclosure request which had been made.

[12] On 8 May 1998 the Home Secretary signed a public interest immunity certificate in respect of a bundle of documents, confirming that these documents "concerned the part played by the Security Service in events prior to the prosecution of the defendants" and that they "pass the threshold test for disclosure in the criminal proceedings against the applicants" (in other words, that they were relevant to the issues raised on appeal).

[13] In March 1999, before granting leave to appeal, a division of the Court of Appeal (which did not include any of the judges who were later

to preside over the substantive appeal) held an *ex parte* hearing to consider the material which the Crown sought to withhold pursuant to the Secretary of State's certificate, and which the Crown conceded had not been placed before the trial judge prior to, or during, the trial.

[14] The same division of the Court of Appeal subsequently considered the applicants' oral application for leave to appeal, where it was submitted that the *ex parte* hearing which had already taken place was incompatible with Article 6 of the Convention. On 3 May 1999, the Court of Appeal granted leave to appeal against conviction on grounds relating to the lack of full disclosure.

[15] On 23 September 1999 the defence served a further formal request for disclosure. In a letter dated 31 March 2000 the prosecution replied to the defence request, setting out the approach it had adopted to the disclosure of unused material and confirming its intention to make a further *ex parte* application to the Court of Appeal following *inter partes* submissions on the procedure to be followed. The letter indicated that the category into which the material appended to the Secretary of State's certificate was said to fall was "agent material."

[16] The substantive appeal was first listed for hearing on 24 October 2000. It began with *inter partes* submissions on the procedure to be followed. On behalf of the applicants it was submitted that it would be inconsistent with Article 6 of the Convention for the Court of Appeal to sit *ex parte* to consider material which had not been placed before the trial judge and then uphold a claim for public interest immunity and dismiss the appeal. The Court of Appeal invited the applicants' counsel to examine the material in question, subject to an undertaking not to disclose its contents to the applicants. After taking the advice of his professional association, counsel informed that court that no such undertaking could be given.

[17] The Court of Appeal then concluded that it should view the material *ex parte* and rule on the claim for public interest immunity. Having done so, on 26 October 2000 it ordered the following summary of the undisclosed evidence to be released to the applicants and their representatives, but declined to order any further disclosure of the material in question. . . .

[18] In its judgment of 1 November 2001, the Court of Appeal rejected the argument that it could never be appropriate for it to conduct an *ex parte* hearing to determine a claim for public interest immunity in respect

of material which had not been placed before the trial judge. . . . The Court of Appeal therefore concluded that there had been no breach of the applicants' Article 6 rights and no reason to regard their convictions as unsafe.

[19] The applicants petitioned the House of Lords for leave to appeal against the judgment of the Court of Appeal, but were refused leave on 14 November 2002. . . .

[29] The applicants complained that the Court of Appeal's approach to the issues of public interest immunity and disclosure of evidence was inconsistent with Article 6 of the Convention. . . .

[37] The principles relevant to the duty to disclose relevant evidence in criminal proceedings were set out by the Grand Chamber in *Rowe and Davis v. the United Kingdom* as follows:

> It is a fundamental aspect of the right to a fair trial that criminal proceedings, including the elements of such proceedings which relate to procedure, should be adversarial and that there should be equality of arms between the prosecution and defence. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party . . . In addition Article 6 § 1 requires, as indeed does English law . . . , that the prosecution authorities disclose to the defence all material evidence in their possession for or against the accused . . . .
>
> However, the entitlement to disclosure of relevant evidence is not an absolute right. In any criminal proceedings there may be competing interests, such as national security or the need to protect witnesses at risk of reprisals or keep secret police methods of investigation of crime, which must be weighed against the rights of the accused. . . . In some cases it may be necessary to withhold certain evidence from the defence so as to preserve the fundamental rights of another individual or to safeguard an important public interest. However, only such measures restricting the rights of the defence which are strictly necessary are permissible under Article 6 § 1. . . . Moreover, in order to ensure that the accused receives a fair

> trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities. . . .
>
> In cases where evidence has been withheld from the defence on public interest grounds, it is not the role of this Court to decide whether or not such non-disclosure was strictly necessary since, as a general rule, it is for the national courts to assess the evidence before them . . . . Instead, the European Court's task is to ascertain whether the decision-making procedure applied in each case complied, as far as possible, with the requirements of adversarial proceedings and equality of arms and incorporated adequate safeguards to protect the interests of the accused.

[38] In the above-mentioned *Rowe and Davis* case, the Court found a violation of Article 6 § 1 on the basis that evidence [that] could have been used to undermine the credibility of a key prosecution witness was withheld by the prosecution from both the defence and the trial judge at first instance, its non-disclosure on grounds of public interest immunity subsequently being ordered by the Court of Appeal following an *ex parte* hearing. The Court did not consider that this procedure before the appeal court was sufficient to remedy the unfairness caused at the trial by the absence of any scrutiny of the withheld information by the trial judge. Unlike the latter, who saw the witnesses give their testimony and was fully versed in all the evidence and issues in the case, the judges in the Court of Appeal were dependent for their understanding of the possible relevance of the undisclosed material on transcripts of the Crown Court hearings and on the account of the issues given to them by prosecuting counsel. In addition, the first-instance judge would have been in a position to monitor the need for disclosure throughout the trial, whereas the Court of Appeal judges made their determination *ex post facto*. . . .

[42] In the present case, before and during the applicants' trial, the United Kingdom Security Service had in their possession evidence from "an agent source" that a terrorist organisation, unconnected to the applicants, was seeking information about the possibility of bombing the Israeli Embassy. Related intelligence received after the bombing indicated that it had not, in fact, been the work of this terrorist organisation. The document containing this information ("the first document") was not shown to the prosecutors with conduct of the trial against the applicants, and it was not, therefore, presented by the prosecution to the trial judge for his ruling as to

whether it was necessary to disclose it. One of two other documents from the same source, which did not, however, refer to the information in the first document was placed before the trial judge during the disclosure hearing.

[43] The undisclosed material was first considered by the Court of Appeal in an *ex parte* hearing prior to the grant of leave to appeal. At the commencement of the hearing of the substantive appeal, the Court of Appeal, in a different composition, heard *inter partes* submissions on the procedure to be followed in ruling on the Crown's claim for public interest immunity, before deciding to examine the material in an *ex parte* hearing. The applicants were not represented during this hearing, either by their own counsel or by a specially appointed, security-cleared, counsel. However, following the disclosure hearing and well in advance of the resumed appeal hearing, the Court of Appeal disclosed to the applicants a summary of the information contained in the first document, as well as an account of the events which had resulted in the fact that the undisclosed material had not been placed before the trial judge. In its judgment of 1 November 2001, the Court of Appeal observed that, save for the material which was given to the applicants in summary form, there was nothing of significance before the court which had not been before the trial judge. . . . The applicants were given a full opportunity to make submissions on the material which had been disclosed in summary form and on its significance to the issues raised by the case. On the basis of the submissions made, the Court of Appeal concluded that no injustice had been done to the applicants by not having access to the undisclosed matter at trial, since the matter added nothing of significance to what was disclosed at trial and since no attempt had been made by the defence at trial to exploit, by adducing it in any form before the jury, the similar material which had been disclosed at trial.

[44] Given the extent of the disclosure to the applicants of the withheld material by the Court of Appeal, the fact that the court was able to consider the impact of the new material on the safety of the applicants' conviction in the light of detailed argument from their defence counsel and the fact that the undisclosed material was found by the court to add nothing of significance to what had already been disclosed at trial, the Court considers that the case bears a stronger similarity to the cases of *Jasper* and *Fitt, Edwards* and *I.J.L., G.M.R. and A.K.P.* . . . than to those of *Rowe and Davis, Atlan* or *Dowsett* . . . and that the failure to place the undisclosed material before the trial judge was in the particular circumstances of the case remedied by the subsequent procedure before the Court of Appeal.

[45] There has not, therefore, been a violation of Article 6 in the present case.

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As Justice Garlicki, who provided us with this excerpt, comments:

Another aspect of secrecy arises in relation to the so-called lustration proceedings in the post-Communist countries. In several of those countries, public officials are required to submit declarations as to their previous collaboration with the Communist secret services. The veracity of their declarations are examined by the courts, in so-called "lustration trials." Since most of the relevant documents had been produced by the secret services, quite often those documents were, also in the time of trial, regarded as confidential or secret. In *Matyjek v. Poland* (judgment of April 24, 2007), the Strasbourg Court found that excessive requirements of secrecy may conflict with the principle of equality of arms:

> [56] The Court had already dealt with the issue of lustration proceedings in the *Turek v. Slovakia* case [judgment of 14 February 2006]. In particular the Court held in that case that, unless the contrary is shown on the facts of a specific case, it cannot be assumed that there remains a continuing and actual public interest in imposing limitations on access to materials classified as confidential under former regimes. This is because lustration proceedings are, by their very nature, oriented towards the establishment of facts dating back to the communist era and are not directly linked to the current functions and operations of the security services. Lustration proceedings inevitably depend on the examination of documents relating to the operations of the former communist security agencies. If the party to whom the classified materials relate is denied access to all or most of the materials in question, his or her possibilities of contradicting the security agency's version of the facts will be severely curtailed.
>
> Those considerations remain relevant to the instant case despite some differences with the lustration proceedings in Poland. . . .

[58] The Court notes that . . . after the institution of the lustration proceeding, the applicant could also access his court file. However, . . . pursuant to Article 156 of the Code of Criminal Procedure and section 52 (2) of the 1999 Protection of Classified Information Act, no copies could be made of materials contained in the court file and confidential documents could be consulted only in the secret registry of the lustration court.

Furthermore, it has not been disputed by the parties that, when consulting his case file, the applicant had been authorised to make notes. However, any notes he took could be made only in special notebooks that were subsequently sealed and deposited in the secret registry. The notebooks could not be removed from this registry and could be opened only by the person who had made them. Similarly, the notes taken during the hearings, the great majority of which were held in camera, were to be made in special notebooks which were later kept in the court's secret registry. . . . The applicant could not remove the notes taken during the hearings from the courtroom and that he had to hand them to a designated person after the hearing. The Court further observes that although the applicant had been represented in the lustration proceedings, it has not been disputed that identical restrictions applied to his lawyer. . . .

[59] The Court reiterates that the accused's effective participation in his criminal trial must equally include the right to compile notes in order to facilitate the conduct of his defence, irrespective of whether or not he is represented by counsel. The fact that the applicant could not remove his own notes, taken either at the hearing or in the secret registry, in order to show them to an expert or to use them for any other purpose, effectively prevented him from using the information contained in them as he had to rely solely on his memory.

Regard being had to what was at stake for the applicant in the lustration proceedings—not only his good name but also a ban on being a Member of Parliament or holding public office for 10 years—the Court considers that it was important for him to have unrestricted access to those files and

unrestricted use of any notes he made, including, if necessary, the possibility of obtaining copies of relevant documents. . . .

[62] The Court recognises that at the end of the 1990s the State had an interest in carrying out lustration in respect of persons holding the most important public functions. However, it reiterates that if a State is to adopt lustration measures, it must ensure that the persons affected thereby enjoy all procedural guarantees under the Convention in respect of any proceedings relating to the application of such measures. The Court accepts that there may be a situation in which there is a compelling State interest in maintaining secrecy of some documents, even those produced under the former regime. Nevertheless, such a situation will only arise exceptionally given the considerable time that has elapsed since the documents were created. It is for the Government to prove the existence of such an interest in the particular case because what is accepted as an exception must not become a norm. The Court considers that a system under which the outcome of lustration trials depended to a considerable extent on the reconstruction of the actions of the former secret services, while most of the relevant materials remained classified as secret and the decision to maintain the confidentiality was left within the powers of the current secret services, created a situation in which the lustrated person's position was put at a clear disadvantage.

[63] In the light of the above, the Court considers that due to the confidentiality of the documents and the limitations on access to the case file by the lustrated person, as well as the privileged position of the Commissioner of the Public Interest in the lustration proceedings, the applicant's ability to prove that the contacts he had had with the communist-era secret services did not amount to "intentional and secret collaboration" within the meaning of the Lustration Act were severely curtailed. Regard being had to the particular context of the lustration proceedings, and to the cumulative application of those rules, the Court considers that they placed an unrealistic burden on the applicant in practice and did not respect the principle of equality of arms. . . .

> [65] In these circumstances the Court concludes that the lustration proceedings against the applicant, taken as a whole, cannot be considered as fair within the meaning of Article 6 § 1 of the Convention taken together with Article 6 § 3. There has accordingly been a breach of those provisions.

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**Evidentiary Privileges for the State**

In 1998, in France, a statute was enacted giving courts, after consultation with a specially-created Consultative Commission, access to "secret de la défense nationale" (literally a "national defense secret" and in English often termed a "state secret"). Those provisions, translated by Stella Burch (YLS 2009) and Julia Schiesel (CLS 2009), with oversight from Olivier Dutheillet, are set forth below.

Law No. 98-567 of July 8, 1998,
establishing a Consultative Commission for state secrets

Article 1

A Consultative Commission for state secrets is established. This Commission is an independent administrative authority. It is responsible for providing an opinion on the declassification and communication of information that has been classified pursuant to article 413-9 of the penal code, with the exception of information whose rules of classification are not solely the preserve of the French authorities.

The opinion of the Consultative Commission for state secrets is given following a request from a French court.

Article 2

The Consultative Commission for state secrets is composed of five members:

- a president, a vice-president who assumes his duties in case of absence or inability to complete them, and a member chosen by the President of the Republic from a list of six members of the Conseil

d'Etat, Cour de cassation, or Cour des comptes,[*] drawn up jointly by the Vice President of the Conseil d'Etat, the first president of the Cour de cassation and the first president of the Cour des comptes;

- a deputy, designated for the term of office of the legislature, by the president of the National Assembly.
- a senator, designated after each partial re-election of the Senate, by the president of the Senate.

Members of the Commission may not serve for more than one term of office.

The term of office for non-parliamentary members of the commission is six years.

Apart from resignation, a member of the Commission's tenure can only be terminated when his inability to complete his duties has been recorded before the Commission. . . .

Article 4

A French court, in the course of proceedings before it, may request the declassification and communication of information protected by the state secret security classification, from the administrative authority responsible for its classification.

This request is well-motivated.

The administrative authority will refer the request, without delay, to the Consultative Commission for state secrets.

Article 5

The president of the Commission may conduct all necessary investigations.

The members of the commission are authorized to know all classified information within the scope of their assignment.

[*] The British analogy would be the Audit office; the American would be the General Accounting Office.

They are compelled to respect state secrets protected by the enforcement of articles 413-9 and following of the penal code concerning facts, acts or information that they come to know of because of their office.

The Commission establishes its own internal regulations.

Article 6

Ministers, public authorities and public officials may not oppose the work of the Commission for any reason and must take all necessary measures to facilitate its work.

Article 7

The Commission will issue an opinion within a two-month period from the time of referral. This opinion will take into consideration the public service mission of the judiciary, respect for the presumption of innocence and the rights of the defendant, and respect for France's international commitments, as well as the necessity to preserve the nation's defensive capabilities and the security of its personnel.

When the votes are evenly split, the president will have the tie-breaking vote.

The opinion issued may favor declassification, partial declassification, or no declassification.

The Commission's opinion is sent to the administrative authority that issued the classification.

Article 8

Within fifteen clear days of receipt of the opinion of the Commission, or the expiration of the two months mentioned in Article 7, the administrative authority notifies the court that requested the declassification and the communication of classified information of its decision, accompanied by the opinion.

The opinion of the Commission is published in the *Journal officiel* of the French Republic.

[Editors' note: This procedure has been reported to operate well, in that the Commission's recommendations are always followed by the Minister of Defense and further, that the Commission often recommends declassification of documents.]

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**Israel's Statutory Provision (New Version)**
5731-1971, 2 LSI 198 (1968-72)

Section 44, Privilege for the State

a. A person is not bound to give, and the Court shall not admit, evidence regarding which the Prime Minister or the Minister of Defense, by certificate under his hand, has expressed the opinion that its giving is likely to impair the security of the State, or regarding which the Prime Minister or the Minister of Foreign Affairs, by certificate under his hand, has expressed the opinion that its giving is likely to impair the foreign relations of the State, unless a Judge of the Supreme Court, on the petition of a party who desires the disclosure of the evidence, finds that the necessity to disclose it for the purpose of doing justice outweighs the interest in its non-disclosure.

b. Where a certificate as referred to in subsection (a) has been submitted to the Court, the Court may, on the application of a party who desires the disclosure of the evidence, suspend the proceedings for a period fixed by it, in order to enable the filing of a petition for disclosure of the evidence, or if it sees fit, until the decision upon such a petition.

Section 45, Privilege for the Public Interest

A person is not bound to give, and the Court shall not admit, evidence regarding which a Minister has expressed the opinion, by certificate under his hand, that its giving is likely to impair an important public interest, unless the trial court, on the petition of a party who desires the disclosure of the evidence, finds that the necessity to disclose it for the purpose of doing justice outweighs the interest in its non-disclosure.

Section 46(a), the hearing in the petition to disclose the evidence

A petition for the disclosure of evidence under sections 44 or 45 shall be heard in camera; for the purposes of deciding upon the petition, the Judge of the Supreme Court or the Court, as the case may be, may demand

that the evidence or its contents be brought to his or its knowledge, and he or it may receive explanations from the Attorney-General or his representative and from a representative of the Ministry concerned, even in the absence of the other parties.

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Ami Kobo

*Privileged Evidence and State Security Under the Israeli Law: Are We Doomed to Fail?*[*]

In *Livny v. Israel*, the Israeli Supreme Court explained the interests that should be balanced when interpreting the Israeli privileged evidence statutes. In *Livny*, several defendants were charged with murder and of being members of a terrorist organization, among other offenses. The Minister of Defense signed a certificate of privilege that prevented the defense from accessing certain evidence on the grounds that it might undermine state security. The privileged information included evidence that revealed the methods of work of the General Security Service ("GSS"), prior evidence about the defendants, and the names and details of GSS workers. The defendants applied to the Supreme Court to challenge this certificate of privilege.

In his opinion for the Supreme Court, Justice Barak first noted the interest in revealing the truth in order to determine guilt or innocence. He asserted that, in an adversarial system, truth will be revealed only if the defense has access to all investigation material. The defendant will only then be able to prove his innocence, based on the investigation information, by presenting his version of the facts or by casting doubt on the prosecution's version. Justice Barak suggested that the relative importance of investigative material to a given defendant's case should be determined by the defense, not the prosecution. In light of this fact, he concluded that the only way to ensure a fair trial was to reveal all investigation material to the defense. Otherwise, the defense counsel would never be certain that the prosecution had revealed all helpful evidence.

On the other hand, Justice Barak also acknowledged that public interest requires, at times, that the prosecution not disclose the investigation material, due to the security interest of the state. He noted that this interest

[*] Excerpted from 5 CARDOZO PUB. L, POL'Y & ETHICS J. 113 (2007). Citations omitted.

was relevant to all nations, but was especially important to Israel, which has struggled with security dangers since its founding.

After reviewing these interests—fair trial versus state security—Justice Barak fashioned a rule: if the evidence is essential to the defense, then justice demands its disclosure, notwithstanding its importance to the public or the security interests. Justice Barak decided that no security consideration can justify the damage of convicting an innocent person in a criminal prosecution. He found that it would be preferable to acquit a defendant whose guilt could not be proven, due to the need to disclose evidence, than to convict him for his inability to access exculpatory but privileged evidence.

However, Justice Barak added that, in some cases, the evidence at issue is not clearly essential, but may still have some weight. It might be relevant to a determination of the reliability of the defendant or the witnesses. It could help support other evidence or be used for cross-examination. In these cases, the rule as stated in *Livny* is that the court has to consider the relative importance of the evidence, in comparison to security or other public interests. That is, if the evidence contributes to the defense but is not essential, the privilege shall withdraw only if the relative importance of the evidence overpowers the damage to security or public interests. . . .

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**Mr. U.**
**v.**
**The decision of the Bavarian Administrative Court of 12 Feb. 1990**
**The decision of the Bavarian State Ministry of the Interior of 7 Sept. 1988**

Decision No. 1 BvR 385/90 (1999)
German Federal Constitutional Court

The complainant, a public procurement officer, underwent a security check in the late 1980s to which he had given his consent. As a result, the Bavarian Office for the Protection of the Constitution arrived at the conclusion that there were objections to the complainant's autorisation to deal with classified matters.

The officer, who was informed that he could not be further employed in the position he had held so far, terminated his contract of

service himself in order to minimise disadvantages in later applications for a position.

His request failed to be informed about the data on which the negative result of the security check was based. Substantiating its negative reply, the Office explained to him that, because of the public interest in effective protection of secrets, no further information could be given on the kind of communication, the circumstances and the persons who had expressed their views on the complainant. The latter had been assured of confidentiality.

Within the framework of the action filed against this decision, the Administrative Court requested the defendant Office to present the complete records in compliance with § 99.1.1 of the Rules of the Administrative Courts. The Bavarian State Ministry of the Interior, in its function as highest supervising authority in accordance with § 99.1.2 of the Rules of the Administrative Courts, refused to present the records which had been the basis of the security check. Upon the complainant's application in compliance with § 99.2.1 of the Rules of the Administrative Courts, the Higher Administrative Court of Bavaria decided as the court of last instance that the refusal to present the files was legally justified. There had been satisfactory proof, the Court held, that the files retained had to be treated as secret.

The complainant appealed to the Federal Constitutional Court from this decision; he essentially alleged a violation of the constitutional guarantee of access to the courts (Article 19.4 of the Basic Law).

II. The First Senate of the Federal Constitutional Court regards the regulation of § 99.1.2 in conjunction with § 99.2.1 of the Rules of the Administrative Courts as to some extent incompatible with the Basic Law.

[1] It is necessary, if legal protection is to be effective, that the Court be able to examine both the factual and legal aspects of the request for legal protection in both factual and legal respects and that it have sufficient competence to avert probable future violations of the law or to remedy violations that have already happened, the First Senate explained. The court cannot therefore in principle be bound to the findings and assessments made in the administrative proceedings. The court itself must inquire into the actual situation and reach and substantiate its legal opinion independently of the administration whose decision is objected to.

In the present case, the complainant's basic right under Article 19.4 of the Basic Law was violated because, as a result of the refusal to present the files, the Administrative Court was unable to find out what the actual basis of the authority's decision was and whether it is suitable to justify the decision.

[2] The restriction of effective legal protection by § 99.1.2 in conjunction with § 99.2.1 of the Rules of the Administrative Courts does not stand up to examination in the light of the principle of proportionality.

The purpose of the regulation does not itself give reason for constitutional objections. The secrecy of files of which the disclosure would cause a disadvantage to the Federation or one of the German *Länder* is a legitimate public policy concern.

However, the First Senate held that the regulation objected to is not necessary to achieve the intended aim, because there are possibilities of complying with the legitimate needs of secrecy without curtailing the right of legal protection under Article 19.4 of the Basic Law to the extent to which it is presently curtailed by § 99 of the Rules of the Administrative Courts. The interest in secrecy of certain files on the one side and the right of legal protection of the person concerned on the other could be better reconciled by providing for the presentation of the files—under the obligation of secrecy—to the competent court.

The need of maintaining secrecy, the First Senate declared, would then be met by the fact that the files are brought to the exclusive knowledge of the Court (proceedings *in camera*). The person seeking legal protection would not come to know the individual reasons justifying the refusal to furnish information.

Article 103.1 of the Basic Law does not conflict with such a procedural arrangement, the First Senate held, as the basic right to a hearing may in principle be restricted if this is sufficiently justified by objective reasons. In the present case, an objective reason is constituted by the fact that, in administrative proceedings, the very failure to use an *in camera* arrangement weakens the legal protection of the individual, which is of much greater weight than a restriction of audience. Not only the person seeking to protect their rights, but also the Court lacks any chance of taking notice of relevant information.

As far as the procedural organisation is concerned, the legislator has a large scope of discretion. The legislator may, in particular, take precautions keeping the number of court officials in charge of secrets small and safeguarding the protection of secrets, the First Senate held. To meet the requirements of Article 19.4 of the Basic Law, the legislator is not confined to proceedings *in camera*, however. If there are other possibilities of compensating for the deficit in legal protection caused by § 99 of the Rules of the Administrative Courts without neglecting the interest in secrecy, these may be drawn upon, too.

[3] The unconstitutionality of § 99.1.2 in conjunction with § 99.2.1 of the Rules of the Administrative Courts does not mean that the regulation is invalid, but only that it is incompatible with Article 19.4 of the Basic Law. The regulation gives rise to constitutional objections only in those cases in which the granting of effective legal protection, as in requests of information in particular, depends on knowledge of the contents of classified administrative files. To this extent, the First Senate ordered the legislator to establish, by 31 December 2001, a state of affairs that is in compliance with the Constitution. As for the rest, the regulation, also in its present form, retains its scope of application.

The First Senate further ordered that until a new regulation has been implemented, in pending proceedings of the present kind, administrative files must be submitted to the court for review of the lawfulness of the refusal to present files, without allowing the court to lay files open to inspection by the parties involved or to disclose the contents of the files in any other way, such as, for example, in the grounds of the court's decision.

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**United States v. Reynolds**
345 U.S. 1 (1953)
Supreme Court of the United States

Mr. Chief Justice VINSON delivered the opinion of the Court.

These suits under the Tort Claims Act arise from the death of three civilians in the crash of a B-29 aircraft at Waycross, Georgia, on October 6, 1948. . . . The aircraft had taken flight for the purpose of testing secret electronic equipment, with four civilian observers aboard. While aloft, fire broke out in one of the bomber's engines. Six of the nine crew members, and three of the four civilian observers were killed in the crash.

The widows of the three deceased civilian observers brought consolidated suits against the United States. In the pretrial stages the plaintiffs moved, under Rule 34 of the Federal Rules of Civil Procedure, for production of the Air Force's official accident investigation report and the statements of the three surviving crew members, taken in connection with the official investigation. The Government moved to quash the motion, claiming that these matters were privileged against disclosure pursuant to Air Force regulations promulgated under R.S. § 161. The District Judge sustained plaintiffs' motion, holding that good cause for production had been shown. The claim of privilege under R.S. § 161 was rejected on the premise that the Tort Claims Act, in making the Government liable "in the same manner" as a private individual had waived any privilege based upon executive control over governmental documents.

Shortly after this decision, the District Court received a letter from the Secretary of the Air Force, stating that "it has been determined that it would not be in the public interest to furnish this report. . . ." The court allowed a rehearing on its earlier order, and at the rehearing the Secretary of the Air Force filed a formal "Claim of Privilege." This document repeated the prior claim based generally on R.S. § 161, and then stated that the Government further objected to production of the documents "for the reason that the aircraft in question, together with the personnel on board, were engaged in a highly secret mission of the Air Force." An affidavit of the Judge Advocate General, United States Air Force, was also filed with the court, which asserted that the demanded material could not be furnished "without seriously hampering national security, flying safety and the development of highly technical and secret military equipment." The same affidavit offered to produce the three surviving crew members, without cost, for examination by the plaintiffs. The witnesses would be allowed to refresh their memories from any statement made by them to the Air Force, and authorized to testify as to all matters except those of a "classified nature."

The District Court ordered the Government to produce the documents in order that the court might determine whether they contained privileged matter. The Government declined, so the court entered an order, under Rule 37(b)(2)(i), that the facts on the issue of negligence would be taken as established in plaintiffs' favor. After a hearing to determine damages, final judgment was entered for the plaintiffs. The Court of Appeals affirmed, both as to the showing of good cause for production of the documents, and as to the ultimate disposition of the case as a consequence of the Government's refusal to produce the documents.

We have had broad propositions pressed upon us for decision. On behalf of the Government it has been urged that the executive department heads have power to withhold any documents in their custody from judicial view if they deem it to be in the public interest. Respondents have asserted that the executive's power to withhold documents was waived by the Tort Claims Act. Both positions have constitutional overtones which we find it unnecessary to pass upon, there being a narrower ground for decision.

The Tort Claims Act expressly makes the Federal Rules of Civil Procedure applicable to suits against the United States. The judgment in this case imposed liability upon the Government by operation of Rule 37, for refusal to produce documents under Rule 34. Since Rule 34 compels production only of matters "not privileged," the essential question is whether there was a valid claim of privilege under the Rule. We hold that there was, and that, therefore, the judgment below subjected the United States to liability on terms to which Congress did not consent by the Tort Claims Act.

We think it should be clear that the term "not privileged" as used in Rule 34, refers to "privileges" as that term is understood in the law of evidence. When the Secretary of the Air Force lodged his formal "Claim of Privilege," he attempted therein to invoke the privilege against revealing military secrets, a privilege which is well established in the law of evidence. The existence of the privilege is conceded by the court below, and, indeed, by the most outspoken critics of governmental claims to privilege. . . .

Regardless of how it is articulated, some like formula of compromise must be applied here. Judicial control over the evidence in a case cannot be abdicated to the caprice of executive officers. Yet we will not go so far as to say that the court may automatically require a complete disclosure to the judge before the claim of privilege will be accepted in any case. It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers.

In the instant case we cannot escape judicial notice that this is a time of vigorous preparation for national defense. Experience in the past has made it common knowledge that air power is one of the most potent

weapons in our scheme of defense, and that newly developing electronic devices have greatly enhanced the effective use of air power. It is equally apparent that these electronic devices must be kept secret if their full military advantage is to be exploited in the national interests. On the record before the trial court it appeared that this accident occurred to a military plane which had gone aloft to test secret electronic equipment. Certainly there was a reasonable danger that the accident investigation report would contain references to the secret electronic equipment which was the primary concern of the mission.

Of course, even with this information before him, the trial judge was in no position to decide that the report was privileged until there had been a formal claim of privilege. Thus it was entirely proper to rule initially that petitioner had shown probable cause for discovery of the documents. Thereafter, when the formal claim of privilege was filed by the Secretary of the Air Force, under circumstances indicating a reasonable possibility that military secrets were involved, there was certainly a sufficient showing of privilege to cut off further demand for the document on the showing of necessity for its compulsion that had then been made.

In each case, the showing of necessity which is made will determine how far the court should probe in satisfying itself that the occasion for invoking the privilege is appropriate. Where there is a strong showing of necessity, the claim of privilege should not be lightly accepted, but even the most compelling necessity cannot overcome the claim of privilege if the court is ultimately satisfied that military secrets are at stake. A fortiori, where necessity is dubious, a formal claim of privilege, made under the circumstances of this case, will have to prevail. Here, necessity was greatly minimized by an available alternative, which might have given respondents the evidence to make out their case without forcing a showdown on the claim of privilege. By their failure to pursue that alternative, respondents have posed the privilege question for decision with the formal claim of privilege set against a dubious showing of necessity.

There is nothing to suggest that the electronic equipment, in this case, had any causal connection with the accident. Therefore, it should be possible for respondents to adduce the essential facts as to causation without resort to material touching upon military secrets. Respondents were given as reasonable opportunity to do just that, when petitioner formally offered to make the surviving crew members available for examination. We think that offer should have been accepted. . . .

Reversed and remanded.

Mr. Justice BLACK, Mr. Justice FRANKFURTER, and Mr. Justice JACKSON dissent substantially for the reasons set forth in the opinion of Judge Maris below.

[Editors' Note: Judge Maris's opinion, *Reynolds v. United States*, 192 F.2d 987 (3d Cir. 1951), stated:

We cannot say that in reaching his conclusion that good cause has been shown the district judge erred. The question, as we suggested in *Alltmont v. United States*, 177 F.2d 971, 978 (3d Cir. 1950), in every such case is whether special circumstances make it essential to the preparation of the party's case to see and copy the documents sought. In appraising for this purpose the circumstances of a particular case, the district court is necessarily vested with a wide discretion. Where, as here, the instrumentality involved in an accident was within the exclusive possession and control of the defendant so that it was as a practical matter virtually impossible for the plaintiffs to have made any independent investigation of the cause of the accident, considerations of justice may well demand that the plaintiffs should have had access to the facts, thus within the exclusive control of their opponent, upon which they were required to rely to establish their right of recovery. We agree with the district judge that it is not, under the circumstances of these cases, a sufficient answer to say that since the names of the witnesses whose statements were sought had been supplied in answer to the interrogatories, their depositions might have been taken by the plaintiffs. Obviously, this is no answer at all to their demand for the production of the investigation report. And under the circumstances here disclosed, as the district judge has cogently pointed out, it may well have been of vital importance to the plaintiffs to have knowledge of the contents of the statements made by the survivors immediately after the crash even though their depositions could also have been taken. . . .

Moreover we regard the recognition of such a sweeping privilege against any disclosure of the internal operations of the executive departments of the Government as contrary to a sound public policy. The present cases themselves indicate the breadth of the claim of immunity from disclosure which one government department head has already made. It is but a small step to assert a privilege against any disclosure of records merely because they might prove embarrassing to government officers. Indeed it requires no great flight of imagination to realize that if the Government's contentions in these cases were affirmed the privilege against disclosure

might gradually be enlarged by executive determinations until, as is the case in some nations today, it embraced the whole range of governmental activities. . . .

The claim of privilege thus made is of a wholly different character from the one previously discussed. It asserts in effect that the documents sought to be produced contain state secrets of a military character. State secrets of a diplomatic or military nature have always been privileged from disclosure in any proceeding and unquestionably come within the class of privileged matters referred to in Rule 34. Moreover, this privilege, as well as the privilege previously mentioned against disclosure of official information which would be harmful to the interests of the United States, was fully recognized by the district judge in these cases in his final order. For as we have seen, he directed that the documents in question be produced for his personal examination so that he might determine whether all or any part of the documents contain, to use the words of his order, "matters of a confidential nature, discovery of which would violate the Government's privilege against disclosure of matters involving the national or public interest." The Government was thus adequately protected by the district court from the disclosure of any privileged matter contained in the documents in question. . . .]

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The Foreign Intelligence Surveillance Court
50 U.S.C. § 1803
United States

(a) [The] Chief Justice of the United States shall publicly designate 11 district court judges from seven of the United States judicial circuits of whom no fewer than 3 shall reside within 20 miles of the District of Columbia who shall constitute a court which shall have jurisdiction to hear applications for and grant orders approving electronic surveillance anywhere within the United States under the procedures set forth in this chapter, except that no judge designated under this subsection shall hear the same application for electronic surveillance under this chapter which has been denied previously by another judge designated under this subsection. If any judge so designated denies an application for an order authorizing electronic surveillance under this chapter, such judge shall provide immediately for the record a written statement of each reason for his decision and, on motion of the United States, the record shall be

transmitted, under seal, to the court of review established in subsection (b) of this section.

(b) Court of review; record, transmittal to Supreme Court

The Chief Justice shall publicly designate three judges, one of whom shall be publicly designated as the presiding judge, from the United States district courts or courts of appeals who together shall comprise a court of review which shall have jurisdiction to review the denial of any application made under this chapter. If such court determines that the application was properly denied, the court shall immediately provide for the record a written statement of each reason for its decision and, on petition of the United States for a writ of certiorari, the record shall be transmitted under seal to the Supreme Court, which shall have jurisdiction to review such decision.

(c) Expeditious conduct of proceedings; security measures for maintenance of records

Proceedings under this chapter shall be conducted as expeditiously as possible. The record of proceedings under this chapter, including applications made and orders granted, shall be maintained under security measures established by the Chief Justice in consultation with the Attorney General and the Director of National Intelligence. . . .

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Professor Theodore Ruger, who has studied the surveillance court, reports:[*]

Congress enacted the Foreign Intelligence Surveillance Act of 1978 (FISA) during an earlier era of public debate over the proper balance between national security enforcement (then related to the Cold War) and civil liberties protection. The FISA contains a substantive standard for surveillance authorization that is analogous to, although dramatically less stringent than, the basic Fourth Amendment warrant standard. For an authorization warrant to issue under FISA, the government must show that "there is probable cause to believe" that "the target of the electronic surveillance is a foreign power or an agent of a foreign power" and that "each of the facilities or places at which the electronic surveillance is directed is being used, or is about to be used, by a foreign power or an agent

[*] Excerpted from Theodore W. Ruger, *Chief Justice Rehnquist's Appointments to the FISA Court: An Empirical Perspective*, 101 NW. U. L. REV. 239, 243-45 (2007).

of a foreign power." The ordinary Fourth Amendment standard, by contrast, requires that warrants issue only on a showing of probable cause to believe that an actual crime has been committed and that evidence of the crime will be found in the place to be searched. Unlike the strictures that the Fourth Amendment and the federal wiretapping statute impose on ordinary law enforcement surveillance, FISA's "probable cause" standard does not require any additional showing of likelihood of criminal activity—probability of acting on behalf of a foreign power is sufficient. FISA also requires the government to demonstrate that it is following appropriate procedures, a requirement designed to minimize any collateral threats to the civil liberties of persons in the United States.

To enforce this specialized probable cause standard, FISA created a new federal district court of limited but exclusive jurisdiction. In 2002, Congress expanded the FISA Court from seven to eleven district judges, all of whom serve staggered, non-renewable terms of no more than seven years. Service on the FISA Court is a part-time position. The judges rotate through the court periodically and maintain regular district court caseloads in their home courts. The Chief Justice is empowered to select the FISA Court judges from among all existing federal district court judges, including senior judges. In accordance with its role in sensitive national security matters, FISA Court hearings are cloaked in specialized procedure: hearings are ex parte, with only Department of Justice attorneys appearing before the judge on duty; they are housed in a special secure chamber within the Department of Justice; and the transcripts are unavailable to the public. If the FISA Court denies a warrant application, the government can appeal to a special FISA Court of Review that is comprised of three federal circuit judges. The judges on this specialized appeals court are also selected by the Chief Justice.

Although facts about individual FISA warrant authorizations are not public, the Department of Justice does issue annual reports summarizing and aggregating its FISA Court activities. What emerges from this data is a government success rate unparalleled in any other American court. In the first twenty years of the Court's existence—from 1978 to 1999—the FISA Court granted almost 12,000 surveillance warrants and denied none. Only once in recent years has the Court ruled against the government on a FISA warrant request, and even that denial was swiftly reversed on the merits by the FISA Court of Review. Because only the government can appeal an adverse decision below, this was the first time the Court of Review had ever convened. . . .

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**In the Name of the Family**

*Confidence and Confidentiality: Openness in Family Courts—A New Approach*
Ministry of Justice Press Release, June 20, 2007
United Kingdom

Plans to promote a culture of openness in family courts, while protecting the best interests of children, were today unveiled by the Lord Chancellor and Secretary of State for Justice Lord Falconer.

The package follows a consultation last year on improving both transparency and privacy in family courts. The aim was to make the culture of family courts more open, while maintaining the privacy of those involved in proceedings—especially children.

Lord Falconer said:

> Family courts make far-reaching decisions which permanently affect the lives of the people involved. Where children are involved, their welfare must be of paramount importance.
>
> I have listened to the views of children and young people. The clear message was the media should not be given an automatic right to attend family courts as this could jeopardise children's rights to privacy and anonymity.
>
> We need instead a new approach which concentrates on improving the information coming out of family courts, rather than on who can go in.
>
> So we will focus on providing better information about family proceedings to the public. In certain cases we will give more information to the people involved in proceedings, including to adults who were involved in family proceedings when they were children.

The measures include:

1. Providing more information about how the court has reached its decision for the people involved in proceedings and for those who were subject to proceedings as children.

2. Where there is a clear public interest, either an anonymised transcript or an anonymised decision summary will be made available for public scrutiny, for example where a child is permanently removed from one or both parents.

3. Clarifying the rules on who can attend family courts, and what reporting restrictions apply.

4. Developing an online information hub to provide general information on the different tiers of family court, what happens in each, on what basis the judiciary reaches decisions, and what to expect if you are going to be involved in proceedings.

Working closely with the judiciary and court staff, a pilot scheme will be devised to gauge the full impact, implications and benefits to people involved in family proceedings.

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Emily Bazelon

*Public Access to Juvenile and Family Court: Should the Courtroom Doors Be Open or Closed?*[*]

What role, if any, does the public have to play in the delinquency and dependency proceedings that compose the dockets of juvenile and family courts? Since the establishment of the first juvenile court in Chicago in 1899, most jurisdictions have allowed only a small group of judges, lawyers, probation officers, and social workers access to court proceedings and records when children are either victims of abuse or accused of crimes. Policies of non-disclosure for minors originated because the founders of the juvenile court at the turn of the century believed confidentiality was critical to rehabilitation and treatment. Only if children escaped the stigma of public knowledge, the juvenile court founders reasoned, could they leave behind their troubled pasts.

[*] Excerpted from 18 YALE L. & POL'Y REV. 155 (1999). Citations have been omitted.

Despite a wave of doubt in the 1920s and again in the 1950s and 1960s about whether the juvenile court could meet its rehabilitative goals, lawmakers and courts continued to assume the benefits of confidentiality in delinquency cases. The landmark 1960s cases, *Kent v. United States* and *In re Gault,* gave juveniles charged with crimes many of the same procedural rights as adults but did not grant them the right to a public trial or to a jury trial. Congress also emphasized confidentiality in passing the 1974 Child Abuse Prevention and Treatment Act (CAPTA). Following CAPTA's guidelines, states enacted statutes that strictly protected the confidentiality of child protective proceedings and child welfare agency records.

More recently, disclosure restrictions have faced attack on multiple fronts. Some critics argue against the separation of juvenile court from adult court or question the enterprise of rehabilitation. Trials of delinquents should be open, some urge, because minors accused of serious felonies have forfeited protection from public scrutiny. In response, legislators have passed laws mandating public trials for juveniles charged with serious crimes. At the same time, news organizations have begun to alter long-standing policies against printing the names and photographs of juvenile offenders. In this debate, confidentiality is still viewed as a protective measure—but increasingly one that juvenile delinquents do not deserve.

Meanwhile, from a different perspective, child advocates argue that disclosure bans in dependency cases hamper efforts to improve child welfare programs. . . . [S]upport for access to involved professionals does not necessarily imply support for public access. Some advocates who think teachers, counselors, and police should know more about a child's abuse and neglect history oppose sharing the same information with the public because they believe doing so would not serve an individual child's best interests. They too view privacy as a tool for safeguarding abused children from further harm.

A third group of critics believe public attention benefits children in the child welfare system. They argue that strict disclosure rules shield judges, lawyers, and caseworkers from accountability and obscure the need for institutional reforms. This conception of access emphasizes the role of the press in exposing poor policy, and expects a properly informed general public to call for reform. There is a trade-off, however, for increased public awareness that could benefit dependent children as a group—potential risk to the individual child whose history is exposed. . . .

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## Courts and the Public Sphere

*Diminishing Rights of Audience and the Durability of the Norm*[*]

In 2002, in the U.S. federal courts, a trial started in fewer than two of one hundred civil cases filed. Despite an increase in filings, both the percentage of civil cases tried and the absolute number of civil trials have declined over the course of forty years—producing a trend that lawyers and judges label "the vanishing trial." But trials are not the only events that take place in courtrooms. Judges hear arguments on motions, take guilty pleas and pronounce sentences, and sometimes convene conferences in courtrooms. One cannot therefore equate public processes with trials alone. Yet [a federal study of] courtroom usage, defined as "any activity," reported that courts had "lights on" only about half the time.

In the United States, declining opportunities for the public to exercise their rights of audience at the trial level are mirrored at the appellate level. No longer are appellate arguments routinely held in all cases, and, if permitted, each side may be accorded only eight minutes for their presentations. In terms of the availability of judicial opinions, an increasing number appear in tabular form, with the words "affirmed" or "denied" listed by the name of a case. As of 2001, only about one-fifth of the decisions rendered in the federal appellate system were denominated "for publication"—meaning that litigants could subsequently cite to them as informative precedent.

One might conclude from these data that, as a relative matter, not much conflict exists, and hence, that there is not much in courtrooms to see. But by enlarging the context to consider alternative venues, one learns that a good deal of adjudicatory activity is underway outside of the courts. The Social Security Administration (SSA), for example, may well be "the largest system of trial-type adjudication in the world," as it serves more than ten million beneficiaries. In many respects, agencies have become "courts."

Two charts illustrate this point for the United States. Figure 4 provides a comparison between the numbers of judges inside federal courts and those working in administrative agencies. About four times as many

[*] Some of this commentary is drawn from an essay by Judith Resnik and Dennis E. Curtis entitled, *"Rites" to "Rights" of Audience: The Utilities and Contingencies of the Public's Role in Court-Based Processes*, which will appear in REPRESENTATION OF JUSTICE (Antoine Masson & Kevin O'Connor eds., forthcoming 2007).

judicial officers serve outside courts than within. Figure 5 provides a comparison of the occasions on which these two sets of judges hear evidence. By using a generous measure, one can identify under 100,000 such proceedings in 2001. Such events take place "in open court" to which the public can attend.

In contrast, by taking data from the high-volume SSA and adding information from three other major federal agencies deciding disputes about immigration, veterans' benefits, and equal employment within the federal government, one can see that about five times as many evidentiary proceedings take place annually in these four federal agencies than in all of the 94 federal trial courts. See Figure 5.

**A Comparison of Court-Based and Administrative Judiciaries in the United States Federal System (as of 2002)**

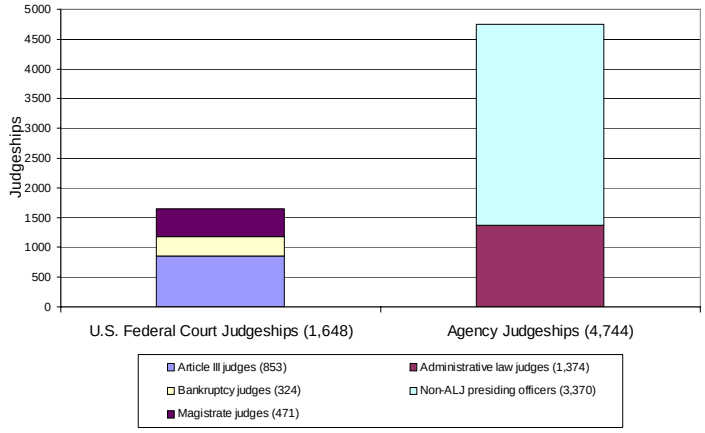




Figure 4

**A Comparison of the Numbers of Evidentiary Proceedings in U.S. Federal Courts and in Four Federal Agencies (2001)**

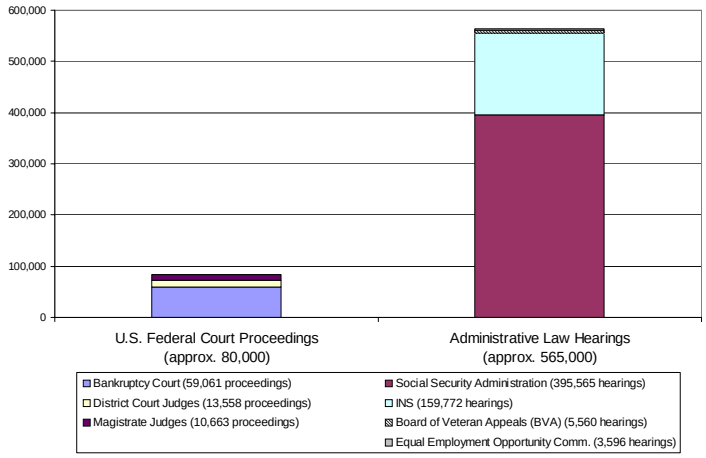




Figure 5

But these many evidentiary hearings within agencies are invisible to most members of the public, who would be hard-pressed to find the rooms inside the government buildings where the proceedings occur. And, even if able to locate *where* to go, spectators are not, by regulation, permitted to attend all such proceedings. Efforts to read—rather than to see—the output are similarly unavailing, as no reporter service (either in print or online) regularly compiles and reproduces decisions of all of the various administrative judges and hearing officers.

One question is to ponder whether certain functions performed by open courts can be provided by other institutions. Another is to question the normative premise that openness itself is a worthy aspiration. During eras when few institutions kept secure records of land transfers or of changes in personal status (such as citizenship, marriage, and adoption), courts provided social services not otherwise available. Today, archival and evidentiary systems in places such as libraries, municipal centers, and banks permit verification and provide repositories that make certain court-based record keeping unnecessary or duplicative.

Further, while courts continue through public trials to produce particularistic narratives (documented through transcripts, proceedings, and exhibits) about specific events, courts are only one of many government-

based investigatory mechanisms available to generate such records. Other institutions—from South Africa's Truth and Reconciliation Commission to blue-ribbon investigatory panels focused on particular tragedies—augment the regularly-constituted oversight hearings convened by legislatures. Generally open to the public, these institutions serve functions comparable to courts. Private sectors are also rich resources; fictions (and reality shows), written or filmed, pour stories into the marketplace. The web, bloggers, and the press also stream information. Given that multiple—and new—fora exist for revelation, courts do not need to fulfill all the functions served in prior eras.

Courts, however, distinguish themselves in one respect—their attention to the ordinary. As pre-existing institutions that do not rely on ad hoc enabling acts or national traumas to prompt their creation, on selling copies of their decisions, nor on responding only when something "interesting" is at issue, courts are a window into mundane conflicts. Courts respond to a myriad of daily disagreements as well as to rare extraordinary moments. If members of the public have the inclination and the stamina to watch, courts can enable insight into the kinds of disputes that repeatedly display the harms that befall individuals and the remedies (if any) provided.

An argument about today's need to observe court has to lay claim to the utility of observing the "ordinary" and seeing the redundancy of various claims of right and the processes, allegations, and behaviors that become the predicates to judgments. For example, in the United States, the shaping of prohibitions against sexual harassment and against domestic violence provide two contemporary illustrations of how such reiterations, through and in public courts, helped to develop public agendas that altered extant norms. And of course, a repeating pattern of alleged injuries made patent through courts can not only generate but can also limit rights. The political success of arguments that many tort injuries are overstated products of "junk science," manipulated evidence, and deceived juries is one illustration of this point, also shaping new laws in the United States limiting liability rules, policing plaintiffs' attorneys, and imposing caps on damages.

Moreover, because even a few cases can make a certain problem vivid, social policies may be forged that respond in extravagant ways to harms that are less pervasive than perceived. Criminal sanctions are exemplary here, as public disclosures of particular crimes produce anger and vengeful consequences. Publicity itself has come back into vogue as a form of punishment. In the United States, for example, press coverage of individuals found to have sexually assaulted children prompted new laws that require individuals who are convicted of a wide array of offenses to

register with government officials and to have their photos placed on the web so that, upon completion of prison sentences, potential neighbors could be forewarned about their presence. Further, public display does not necessarily trigger reasoned discourses or engender participatory parity (a concept discussed in the excerpt by Fraser, below).

Courts might also be understood as an iteration of democratic norms themselves, in that courts could be a site of democratic valorization of individual dignity, as well as institutionalizing democracy's claim that it imposes constraints on state power. In open courts, government judges have to account for their own authority by letting others know how and why power is used. Bentham's widely-quoted phrase captures this activity: "Publicity is the very soul of justice . . . . It keeps the judge himself, while trying, under trial."

Such accountability has an egalitarian aspect when government officials as disputants are, like private litigants, subjected to scrutiny, as governments not only run courts but also are subject to them, as plaintiffs or defendants, obliged to comply with court rules and therefore subjected to the discipline of such constraints. Within the United States, for example, government litigants must bear the exposure that obligations of discovery impose, thereby exposing their past deeds, their files, and their e-mails. The importance of such obligations can be seen in the efforts to avoid them. After 9/11, the Executive branch in the United States repeatedly sought to enact legislation "stripping" courts of jurisdiction over claims that the government had wrongly detained and tortured individuals. The effort to create a separate "tribunal system" is aimed at controlling access and information as well as limiting the rights of defendants and augmenting the powers of the state.

Openness limits government power in another respect, by undermining the ability of the government or the disputants to control the social meaning of conflicts and their resolutions. The lesson of the video of the hanging of Saddam Hussein is that its disclosure reduced our dependency on official reports. Without direct access, non-parties must rely on insiders to reveal events, inevitably translated through their perspectives. In contrast, public procedures themselves teach that conflicts do not belong exclusively to the disputants or to the government and give the public a place through which to interpret, own, or disown what has occurred. Courts are one of many public spheres that make possible reasoned, passionate, or irrational discourses about social norms.

In addition to undermining the state's monopoly on power, forging community ownership of norms, demonstrating inter-litigant obligations, and equalizing the field of exchange, open courts can express another of democracy's promises—that rules can change because of popular input. Courts could teach that the appropriate solutions and remedies (as well as the underlying rights) are not necessarily fixed and, moreover, that decisions on liability and remedy do not belong exclusively to the disputants. The public and the immediate participants see that law varies by contexts, decision-makers, litigants, and facts, and they gain a chance to argue that the governing rules or their applications are wrong. Through democratic iterations, norms can be reconfigured.

To appreciate the political and social utilities of the public dimensions of adjudication is not, however, to ignore the costs and burdens imposed. The immediate participants in a dispute may find the exposure to the public disquieting. Even the disclosure of accurate information can be uncomfortable. Further, the public dimensions of adjudication may inhibit parties' abilities to find common ground, thereby deepening discord. And, despite Bentham's confidence that public disclosure reveals falsehoods, many a court record is subsequently impeached as predicated on witnesses who lied. Returning to the hanging of Saddam Hussein, one can also see that the imagery fueled outrage and prompted some spectators to see valour in a person previously despised.

Moreover, one should not romanticize spectatorship. While watching state-authorized processes may prompt celebration, action, or dialectic exchanges that develop new norms, boredom can also result. Were every door to every one of the tens of thousands of administrative hearings to be open, one would not expect many (any?) to volunteer to see many of the proceedings. But it is the happenstance of observation that is at the font of what makes open courts an important facet of a functioning democracy. Extraordinary conflicts have many routes into the public sphere. The dense and tedious repetition of ordinary exchanges is where one finds the enormity of the power of both bureaucratic states and private sector actors. That is the authority that is at risk of operating unseen.

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Nancy Fraser

*Rethinking the Public Sphere: A Contribution to the Critique of Actually Existing Democracy*[*]

The idea of "the public sphere" in Habermas's sense is a conceptual resource that . . . designates a theater in modern societies in which political participation is enacted through the medium of talk. It is the space in which citizens deliberate about their common affairs, hence, an institutionalized arena of discursive interaction. This arena is conceptually distinct from the state; it a site for the production and circulation of discourses that can in principle be critical of the state. The public sphere in Habermas's sense is also conceptually distinct from the official-economy; it is not an arena of market relations but rather one of discursive relations, a theater for debating and deliberating rather than for buying and selling. Thus, this concept of the public sphere permits us to keep in view the distinctions between state apparatuses, economic markets, and democratic associations, distinctions that are essential to democratic theory. . . .

According to Habermas, the idea of a public sphere is that of a body of "private persons" assembled to discuss matters of "public concern" or "common interest." This idea acquired force and reality in early modern Europe in the constitution of "bourgeois public spheres" as counterweights to absolutist states. These publics aimed to mediate between "society" and the state by holding the state accountable to "society" via "publicity." At first this meant requiring that information about state functioning be made accessible so that state activities would be subject to critical scrutiny and the force of "public opinion." Later, it meant transmitting the considered "general interest" of "bourgeois society" to the state via forms of legally guaranteed free speech, free press, and free assembly, and eventually through the parliamentary institutions of representative government.

Thus, at one level, the idea of the public sphere designated an institutional mechanism for "rationalizing" political domination by rendering states accountable to (some of) the citizenry. At another level, it designated a specific kind of discursive interaction. Here the public sphere connoted an ideal of unrestricted rational discussion of public matters. The discussion was to be open and accessible to all; merely private interests were to be inadmissible; inequalities of status were to be bracketed; and

[*] Excerpted from HABERMAS AND THE PUBLIC SPHERE (Craig Calhoun ed. 1991).

discussants were to deliberate as peers. The result of such discussion would be "public opinion" in the strong sense of a consensus about the common good. . . .

According to Habermas, the full utopian potential of the bourgeois conception of the public sphere was never realized in practice. The claim to open access in particular was not made good. Moreover, the bourgeois conception of the public sphere was premised on a social order in which the state was sharply differentiated from the newly privatized market economy; it was this clear separation of "society" and state that was supposed to underpin a form of public discussion that excluded "private interests." But these conditions eventually eroded as nonbourgeois strata gained access to the public sphere. Then, "the social question" came to the fore; society was polarized by class struggle: and the public fragmented into a mass of competing interest groups. Street demonstrations and back room, brokered compromises among private interests replaced reasoned public debate about the common good. Finally, with the emergence of "welfare state mass democracy," society and the state became mutually intertwined; publicity in the sense of critical scrutiny of the state gave way to public relations, mass-mediated staged displays, and the manufacture and manipulation of public opinion. . . .

*Open access, participatory parity, and social equality*

Habermas's account of the bourgeois conception of the public sphere stresses its claim to be open and accessible to all. Indeed, this idea of open access is one of the central meanings of the norm of publicity. Of course, we know, both from the revisionist history and from Habermas's account, that the bourgeois public's claim to full accessibility was not in fact realized. Women of all classes and ethnicities were excluded from official political participation precisely on the basis of ascribed gender status, while plebeian men were formally excluded by property qualifications. Moreover, in many cases, women and men of racialized ethnicities of all classes were excluded on racial grounds.

Now, what are we to make of this historical fact of the non-realization in practice of the bourgeois public sphere's ideal of open access? One approach is to conclude that the ideal itself remains unaffected, since it is possible in principle to overcome these exclusions. And, in fact, it was only a matter of time before formal exclusions based on gender, property, and race were eliminated.

This is convincing enough as far as it goes, but it does not go far enough. The question of open access cannot be reduced without remainder to the presence or absence of formal exclusions. It requires us to look also at the process of discursive interaction within formally inclusive public arenas. Here we should recall that the bourgeois conception of the public sphere requires bracketing inequalities of status. This public sphere was to be an arena in which interlocutors would set aside such characteristics as differences in birth and fortune and speak to one another as if they were social and economic peers. The operative phrase here is "as if." In fact, the social inequalities among the interlocutors were not eliminated, but only bracketed.

Here we are talking about informal impediments to participatory parity that can persist even after everyone is formally and legally licensed to participate. . . . Feminist research has documented a syndrome that many of us have observed in faculty meetings and other mixed sex deliberative bodies: men tend to interrupt women more than women interrupt men; men also tend to speak more than women, taking more turns and longer turns; and women's interventions are more often ignored or not responded to than men's. In response to the sorts of experiences documented in this research, an important strand of feminist political theory has claimed that deliberation can serve as a mask for domination. . . .

Insofar as the bracketing of social inequalities in deliberation means proceeding as if they don't exist when they do, this does not foster participatory parity. On the contrary, such bracketing usually works to the advantage of dominant groups in society and to the disadvantage of subordinates. In most cases, it would be more appropriate to unbracket inequalities in the sense of explicitly thematizing them—a point that accords with the spirit of Habermas's later "communicative ethics."

The misplaced faith in the efficacy of bracketing suggests another flaw in the bourgeois conception. This conception assumes that a public sphere is or can be a space of zero degree culture, so utterly bereft of any specific ethos as to accommodate with perfect neutrality and equal ease interventions expressive of any and every cultural ethos. But this assumption is counterfactual, and not for reasons that are merely accidental. In stratified societies, unequally empowered social groups tend to develop unequally valued cultural styles. The result is the development of powerful informal pressures that marginalize the contributions of members of subordinated groups both in everyday life contexts and in official public spheres. Moreover, these pressures are amplified, rather than mitigated, by

the peculiar political economy of the bourgeois public sphere. In this public sphere, the media that constitute the material support for the circulation of views are privately owned and operated for profit. Consequently, subordinated social groups usually lack equal access to the material means of equal participation. Thus, political economy enforces structurally what culture accomplishes informally. . . .

I contend that, in stratified societies, arrangements that accommodate contestation among a plurality of competing publics better promote the ideal of participatory parity than does a single, comprehensive, overarching public. . . . [T]hese effects will be exacerbated where there is only a single, comprehensive public sphere. In that case, members of subordinated groups would have no arenas for deliberation among themselves about their needs, objectives, and strategies. They would have no venues in which to undertake communicative processes that were not, as it were, under the supervision of dominant groups. In this situation, they would be less likely than otherwise to "find the right voice or words to express their thoughts," and more likely than otherwise "to keep their wants inchoate." This would render them less able than otherwise to articulate and defend their interests in the comprehensive public sphere. They would be less able than otherwise to expose modes of deliberation that mask domination by "absorbing the less powerful into a false 'we' that reflects the more powerful."

[So] far, I have been arguing that, although in stratified societies the ideal of participatory parity is not fully realizable, it is more closely approximated by arrangements that permit contestation among a plurality of competing publics than by a single, comprehensive public sphere. Of course, contestation among competing publics supposes inter-public discursive interaction. How, then, should we understand such interaction? Geoff Eley suggests we think of the public sphere [in stratified societies] as "the structured setting where cultural and ideological contest or negotiation among a variety of publics takes place." This formulation does justice to the multiplicity of public arenas in stratified societies by expressly acknowledging the presence and activity of "a variety of publics." At the same time, it also does justice to the fact that these various publics are situated in a single "structured setting" that advantages some and disadvantages others. Finally, Eley's formulation does justice to the fact that, in stratified societies, the discursive relations among differentially empowered publics are as likely to take the form of contestation as that of deliberation. . . .

It follows that public life in egalitarian, multi-cultural societies cannot consist exclusively in a single, comprehensive public sphere. That would be tantamount to filtering diverse rhetorical and stylistic norms through a single, overarching lens. Moreover, since there can be no such lens that is genuinely culturally neutral, it would effectively privilege the expressive norms of one cultural group over others, thereby making discursive assimilation a condition for participation in public debate. The result would be the demise of multi-culturalism (and the likely demise of social equality). In general, then, we can conclude that the idea of an egalitarian, multi-cultural society only makes sense if we suppose a plurality of public arenas in which groups with diverse values and rhetorics participate. By definition, such a society must contain a multiplicity of publics.

However, this need not preclude the possibility of an additional, more comprehensive arena in which members of different, more limited publics talk across lines of cultural diversity. . . . [C]ommunication across lines of cultural difference is not in principle impossible—although it will certainly become impossible if one imagines that it requires bracketing of differences. Granted such communication requires multi-cultural literacy, but that, I believe, can be acquired through practice. In fact, the possibilities expand once we acknowledge the complexity of cultural identities. *Pace* reductive, essentialist conceptions, cultural identities are woven of many different strands, and some of these strands may be common to people whose identities otherwise diverge, even when it is the divergences that are most salient. Likewise, under conditions of social equality, the porousness, outer-directedness, and open-endedness of publics could promote inter-cultural communication. After all, the concept of a public presupposes a plurality of perspectives among those who participate within it, thereby allowing for internal differences and antagonisms, and likewise discouraging reified blocs. In addition, the unbounded character and publicist orientation of publics allow for the fact that people participate in more than one public, and that the memberships of different publics may partially overlap. This in turn makes inter-cultural communication conceivable in principle. All told, then, there do not seem to be any conceptual (as opposed to empirical) barriers to the possibility of a socially egalitarian, multi-cultural society that is also a participatory democracy. But this will necessarily be a society with many different publics, including at least one public in which participants can deliberate as peers across lines of difference about policy that concerns them all. . . .

[C]entral to Habermas's account [is] that the bourgeois public sphere was to be a discursive arena in which "private persons" deliberated about "public matters." There are several different senses of privacy and publicity in play here. "Publicity," for example, can mean 1) state-related; 2) accessible to everyone; 3) of concern to everyone; and 4) pertaining to a common good or shared interest. Each of these corresponds to a contrasting sense of "privacy." In addition, there are two other senses of "privacy" hovering just below the surface here: 5) pertaining to private property in a market economy; and 6) pertaining to intimate domestic or personal life, including sexual life . . . .

This is a view of the public sphere that we would today call civic republican, as opposed to liberal-individualist. Briefly, the civic republican model stresses a view of politics as people reasoning together to promote a common good that transcends the mere sum of individual preferences. The idea is that through deliberation the members of the public can come to discover or create such a common good. In the process of their deliberations, participants are transformed from a collection of self-seeking, private individuals into a public-spirited collectivity, capable of acting together in the common interest. On this view, private interests have no proper place in the political public sphere. At best, they are the pre-political starting point of deliberation, to be transformed and transcended in the course of debate. . . .

In general, there is no way to know in advance whether the outcome of a deliberative process will be the discovery of a common good in which conflicts of interest evaporate as merely apparent or, rather, the discovery that conflicts of interests are real and the common good is chimerical. But if the existence of a common good cannot be presumed in advance, then there is no warrant for putting any strictures on what sorts of topics, interests, and views are admissible in deliberation.

This argument holds even in the best case scenario of societies whose basic institutional frameworks do not generate systemic inequalities; even in such relatively egalitarian societies, we cannot assume in advance that there will be no real conflicts of interests. How much more pertinent, then, is the argument to stratified societies, which are traversed with pervasive relations of dominance and subordination. After all, when social arrangements operate to the systemic profit of some groups of people and to the systemic detriment of others, there are prima facie reasons for thinking that the postulation of a common good shared by exploiters and exploited may well be a mystification. Moreover, any consensus that purports to

represent the common good in this social context should be regarded with suspicion, since this consensus will have been reached through deliberative processes tainted by the effects of dominance and subordination. . . .

## APPENDIX

## CONSTITUTIONAL PROVISIONS

### Canada

Part I, Section 11 (Legal Rights) of the Canadian Charter of Acts and Freedoms reads:

> Any person charged with an offence has the right . . .
>
> (d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.

### Chile

> Chapter III, Article 19 of the Chilean Constitution provides:
>
> 3. Equal protection under the law in the exercise of their rights.
>
> All persons have the right to legal defense in the manner indicated by law and no authority nor individual may impede, restrict or perturb the due intervention of an attorney, should it have been sought. As regards the members of the Armed Forces and of Public Order and Security, this right will be governed, in connection with administrative and disciplinary matters, by the relevant norms of their respective statutes.
>
> The law shall provide for the means whereby legal counsel and defense may be rendered to those who should have been unable to obtain them on their own.
>
> No one can be judged by special commissions, but only by the court specified in the law, and provided such court has been established prior to the enactment of said law.

**China**

Article 125 of the Chinese Constitution states:

> All cases handled by the people's courts, except for those involving special circumstances as specified by law, shall be heard in public. The accused has the right of defense.

**Colombia**

Article 29 of Chapter 1, Title II of the Colombian Constitution is entitled "Due process will apply to all legal and administrative measures" and reads:

> Everyone criminally charged is entitled to a defense and the assistance of counsel chosen by the accused or assigned during the investigation and trial; to a fair and public hearing without undue delay. . . .

**Europe**

Article 6(1) of the European Convention on Human Rights states:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

Article 31 of Title III, "Procedure," of the Statute of the European Court of Justice declares:

> The hearing in court shall be public, unless the Court, of its own motion or on application by the parties, decides otherwise for serious reasons.

**France**

The French Civil Code states:

Article 22: Oral arguments are held in public hearings, save where the law requires or allows that they be held in the judge's council chamber. . . .

Article 433: The hearings are public except where the law requires them to be held in the judge's council chamber.

What is provided for in this regard at first instance must be followed on appeal, unless otherwise provided.

Article 434: In non-contentious matters, the action will be examined in the judge's council chamber.

Article 435: The judge may decide that the hearings will take place or shall continue in the judge's council chamber where their publicity might adversely affect individual privacy or, if all the parties so request, or if disturbances arise that may disrupt the atmosphere of the proceeding.

Article 436: In the judge's council chamber, the hearing will take place without the presence of the public.

Article 437: If it appears or if it is alleged, either that the hearings must have taken place in the judge's council chamber whereas it is held in open court, or in a reverse instance, the president will decide ex tempore and the incident shall be disregarded.

If the hearing is continued according to its proper manner, no nullity based on the prior progress thereof may be subsequently pronounced, even sua sponte. . . .

Article 448: The deliberations of the judges are secret. . . .

Article 451: *(Decree n°2004-826 of 20 August, Article 5, Official Journal of 22 August 204, in force on 1 January 2005)* Decisions in contentious matters are pronounced in open court and those in non-contentious matters out of the

presence of the public, subject to special provisions pertaining to certain matters.

**Germany**

The Basic Law of Germany states:

Article 3 [Equality before the law]

(1) All persons shall be equal before the law.

(2) Men and women shall have equal rights. The state shall promote the actual implementation of equal rights for women and men and take steps to eliminate disadvantages that now exist.

(3) No person shall be favored or disfavored because of sex, parentage, race, language, homeland and origin, faith, or religious or political opinions. No person shall be disfavored because of disability.

Article 19 [Restriction of basic rights]

(1) Insofar as, under this Basic Law, a basic right may be restricted by or pursuant to a law, such law must apply generally and not merely to a single case. In addition, the law must specify the basic right affected and the Article in which it appears.

(2) In no case may the essence of a basic right be affected.

(3) The basic rights shall also apply to domestic artificial persons to the extent that the nature of such rights permits.

(4) Should any person's rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts. . . .

**Hong Kong**

The Basic Law of the Hong Kong Special Administrative Region of China states:

> In criminal or civil proceedings in the Hong Kong Special Administrative Region, the principles previously applied in Hong Kong and the rights previously enjoyed by parties to proceedings shall be maintained. . . Anyone who is lawfully arrested shall have the right to a fair trial by the judicial organs without delay and shall be presumed innocent until convicted by the judicial organs.

Article 10 of the Hong Kong Bill of Rights of 1991, entitled "Equality before courts and right to fair and public hearing" previously provided:

> 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 in special circumstances where publicity would prejudice the interests of justice, but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

**Israel**

> The Basic Law of Israel states:
>
> A court shall sit in public unless otherwise provided by Law or unless the court otherwise directs under Law.

**Italy**

Italy's Constitution states:

Article 24 [Right to be Heard in Court]

(1) Everyone may bring cases before a court of law in order to protect their rights under civil and administrative law.

(2) Defense is an inviolable right at every stage and instance of legal proceedings.

(3) The poor are entitled by law to proper means for action or defense in all courts.

(4) The law defines the conditions and forms for reparation in the case of judicial errors.

Article 25 [Defendant's Rights]

(1) No case may be removed from a court, but must be heard as provided by law.

(2) No punishment is allowed except provided by a law already in force when the offence has been committed.

(3) Security measures against persons are only allowed as provided by law.

**Mexico**

The Constitution of Mexico provides:

Article 13—Nobody may be judged by private laws, or by special tribunals. No person or corporation can have privileges or enjoy more prerequisites than those that are compensation for public services and are fixed by the law. The power of court martial for crimes and actions against military discipline exists, but in no case will military tribunals extend their jurisdiction to persons who do not belong to the armed forces. When a crime or action against

> military discipline has affected a civilian, the corresponding civil authority will be notified. . . .
>
> Article 20—In all criminal processes, the accused, victim, or person offended against by a crime will have the following guarantees:
>
> A. Of the accused: . . . .
>
> III. To have a public hearing within 48 hours of being consigned to the judicial authority with the name of his or her accuser, and the nature and cause of the accusation, at the end of which it is very apparent that the punishable act is being attributed to the accused, and the accused may answer the charge, stating in this act his opening declaration.
>
> IV. Always when questioned before a judge, to be face to face with his or her accusers, except as given in section V of Part B of this article.
>
> V. To have the witnesses that have things to say about him or her, allowing for the time that the law says is necessary, and to have help in obtaining the appearance in court of those persons whose testimony he or she wants, always having them meet in the place of the process.
>
> VI. To be judged at a public hearing by a judge or jury of citizens who know how to read and write, people who reside in the place and area in which the crime was committed, for offenses punishable by more than a year in prison. In all cases, crimes committed by means of the press against the public order, or the foreign or domestic security of the nation, [to] be judged by a jury.

**New Zealand**

Article 25 of Section II of the New Zealand Bill of Rights Act, entitled "Minimum standards of criminal procedure" states:

> Everyone who is charged with an offence has, in relation to the determination of the charge, the following minimum rights:

> (a) The right to a fair and public hearing by an independent and impartial court.

**South Africa**

Section 34 of the South African Constitution, entitled "Access to courts" provides:

> Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

**United Kingdom**

In 1998 the United Kingdom implemented the European Convention on Human Rights, including Article 6's open courts provisions, in the Human Rights Act of 1998:

> 1. [The Convention Rights]
>
> (1) In this Act "the Convention rights" means the rights and fundamental freedoms set out in—
>
> (a) Articles 2 to 12 and 14 of the Convention. . . .
>
> (2) Those Articles are to have effect for the purposes of this Act subject to any designated derogation or reservation (as to which see sections 14 and 15).
>
> (3) The Articles are set out in Schedule 1. . . .
>
> Schedule 1. The Articles. Part I. The Convention. Rights and Freedoms. . . .
>
> ARTICLE 6: RIGHT TO A FAIR TRIAL
>
> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and

> public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

**United States**

Three Amendments to the U.S. Constitution address issues of due process and the right to a fair and public trial.

> The Fifth Amendment states:
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.
>
> The Sixth Amendment states:
>
> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.
>
> The Fourteenth Amendment states:
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall

> make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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The more recently constituted international tribunals, such as the ICC, make similar commitments.

**ICC**

> Article 64 (7) of the Rome Statute provides that:
>
> The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence.

**ICTR**

> Article 19(4) of the Rwanda Statute states:
>
> The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.

**ICTY**

> Article 20(4) of the Yugoslavia Statute states:
>
> The hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence.

**SCSL**

Article 17(2) of the Statute of the Special Court for Sierra Leone reads:

> The accused shall be entitled to a fair and public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses.