

THE PRINCIPLE OF OPEN JUSTICE: A COMPARATIVE PERSPECTIVE*

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I INTRODUCTION

In Anglo-Australian discourse the principle of open justice is most frequently expressed in the form of an aphorism attributed to Lord Chief Justice Hewart from his Lordship's judgment in *R v Sussex Justices; Ex parte Macarthy*:

It is not merely of some importance but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done.¹

The aphorism is not well known in the United States, although it was referred to indirectly by Justice Frankfurter and directly by Justice Kennedy.² Lord Hewart's pithy aphorism about the principle of open justice encapsulated a proposition that had been long known and often expressed in different ways. Another articulation was that of Lord Atkin who once said: 'Justice is not a cloistered virtue'.³ And Lord Bowen once said: 'Judges, like Caesar's wife, should be above suspicion'.⁴

Lord Hewart was the Solicitor General in Lloyd George's government and, when F. E. Smith became Lord Chancellor, was promoted to Attorney General. The then British practice was that an Attorney General had a right to be appointed Lord Chief Justice of England, if the office fell vacant during his term of office. When that occurred in 1921, Lloyd George refused to dispense with Hewart's services, or at least refused to risk a by-election. He promised to appoint Hewart as soon as he could. Accordingly, a High Court Judge aged 78 was appointed in his stead. Lloyd George protected his colleague by obtaining an

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1 *R v Sussex Justices; Ex parte Macarthy* [1924] 1 KB 256, 259 ('*R v Sussex Justices*').

2 See *Joint Anti-Fascist Refugee Committee v McGrath, Attorney General* (No 8), 341 US 123, 171–2 (1951) with footnote reference quotation from *R v Justices of Bodmin; Ex parte McEwan* [1947] 1 KB 321, 325. The direct quotation appears in *Liteky v United States*, 510 US 540 (1994).

3 *Ambard v Attorney General for Trinidad & Tobago* [1936] AC 322, 335.

4 *Leeson v General Medical Council* (1889) LJ 59 Ch NS 233, 241.

undated, signed letter of resignation. The very next year that new Lord Chief Justice was astonished to read of his own resignation in *The Times*. Hewart was Lord Chief Justice from 1922 to 1940.

These days Lord Hewart is probably best remembered for his publication *The New Despotism*, a series of newspaper articles published as a book in 1929. This was an attack on the rising power of the bureaucracy expressed in intemperate and politically charged language and advancing a ridiculous conspiratorial thesis. Such conduct was unprecedented by a senior English judge and has never been imitated since. However, the basic themes continue to resonate today, as Lord Bingham indicated in his lecture entitled *The Old Despotism*, whilst distancing himself from the partisan vitriol of his predecessor.⁵

Must we attribute the open justice aphorism to Lord Hewart? If we do, the proposition that 'justice must be seen to be done', could hardly have a less auspicious provenance. Even the *English Dictionary of National Biography*, which usually confines its entries to the bland list of facts customarily found in a *Who's Who*, could not contain itself in the case of Lord Hewart. It described him as: 'Brilliant advocate; less successful as judge through tendency to forget he was no longer an advocate'.⁶ Professor R M Jackson, in his book *The Machinery of Justice in England*, referred to the system by which an Attorney General had a right of appointment as Lord Chief Justice in the following way:

In 1922 this system landed the country with Lord Hewart as Lord Chief Justice, who proved to be a judge so biased and incompetent that he seems to have caused a reaction against it.⁷

In the seventh edition of his book published in 1977, Professor Jackson had referred to Hewart as 'the worst English judge within living memory'.⁸ This reference was deleted from the eighth edition of 1989. Perhaps, in the intervening decade, other contenders had emerged for the title. Lord Devlin, however, displayed no doubt when he wrote in 1985:

Hewart ... has been called the worst Chief Justice since Scroggs and Jeffries in the seventeenth century. I do not think that this is quite fair. When one considers the enormous improvement in judicial standards between the seventeenth and twentieth centuries, I should say that, comparatively speaking, he was the worst Chief Justice ever.⁹

Lord Hewart may very well have presided over the worst conducted defamation trial in legal history: one Hobbs suing the *Nottingham Journal*.¹⁰ Of the litany of misconduct found by the Court of Appeal to have been committed by Lord Hewart during the course of this trial, it is sufficient to note the following:

5 Lord Bingham, 'The Old Despotism' in Tom Bingham (ed), *The Business of Judging: Selected Essays and Speeches* Oxford University Press (2000) 195–210.

6 *The Concise Dictionary of National Biography* (1992) vol 2, 1413; see also, Alfred William Brian Simpson (ed) *Biographical Dictionary of the Common Law* (1984) 237–8.

7 Richard Meredith Jackson, *Jacksons Machinery of Justice in England* (8th ed, 1989) 375.

8 Richard Meredith Jackson, *Jacksons Machinery of Justice in England* (7th ed, 1977) 475.

9 Lord Patrick Devlin, *Easing the Passing: the Trial of Dr John Bodkin Adams* (1985) 92.

10 *Hobbs v CT Tinling & Co. Limited* [1929] 2 KB 1 ('*The Nottingham Journal Case*').

- Rulings were made against the Plaintiff without calling for submissions from Counsel for the Plaintiff.
- His Lordship accused the Plaintiff, in front of the jury, of fraudulently concealing documents and failed to withdraw the accusation when informed that the document had in fact been disclosed.
- He permitted two days of cross-examination on matters of bad reputation, including allegations of criminal conduct which had never been particularised.
- His Lordship received communications from the jury which were not disclosed to counsel.
- He failed to give the jury any summing up or any directions as to the limited use they could make of cross-examination of the plaintiffs.
- He failed to leave critical issues to the jury.
- When the jury indicated a tentative view in favour of the Defendant, his Lordship orchestrated an early end to the trial, before they changed their minds.
- He then refused to permit an adjournment of a second defamation trial against the same Defendant – suggesting the same jury should hear the second case immediately.

He thereupon entered judgment for the Defendant in the absence of counsel for the Plaintiff.

The reputed author of the aphorism ‘justice must be seen to be done’ never indicated to the jury that they were entitled to ignore his Lordship’s numerous expressions of opinion on the facts or his adverse comments about the veracity of the Plaintiff, upon which grounds of appeal the Court of Appeal found it unnecessary to rule, being content with the observation of Lord Justice Scrutton, in accordance with the demure standards of the time, that: ‘I regret that, with much better grounds available, it was thought right to insist on them’.¹¹ Many would wish that appellate courts were still so reticent.

Again I ask, must we continue to attribute the important aphorism about open justice to such a judge?

The last word from the *Nottingham Journal Case* belongs to Lord Sankey. In his judgment, his Lordship said, with reference to the false accusation of fraudulent non-disclosure of documents, that it was ‘unfortunate that the Lord Chief Justice did not appreciate’ the correctness of certain submissions made to him. Lord Sankey concluded:

The Bar is just as important as the Bench in the administration of justice, and misunderstandings between the Bar and the Bench are regrettable, for they prevent the attainment of that which all of us desire – namely, that justice should not only be done, but should appear to have been done.¹²

His Lordship cited no authority for this proposition. Perhaps he was indulging in a little whimsy. Alternatively, perhaps Lord Sankey, who six years earlier had

¹¹ *The Nottingham Journal Case* [1929] 2 KB 1, 33.

¹² *Ibid* 48.

merely concurred with Lord Hewart's judgment in *R v Sussex Justices*, was giving us a hint as to the true origins of the aphorism. For myself, I am content for the future to quote Lord Sankey.

II THE SCOPE OF THE PRINCIPLE

The new found preparedness of the United States Supreme Court to draw on the jurisprudence of other nations¹³ extends the ability to look at matters such as this from a comparative perspective. Over recent decades a sense of international collegiality has emerged amongst the judiciaries of nations which observe the rule of law. This is reflected in the demise of the intellectual insularity that replaced the colonial cringe or imperial omniscience of an earlier era.

The principle of open justice is one of the most pervasive axioms of the administration of justice in common law systems. It was from such origins that it became enshrined in the United States Bill of Rights where the Sixth Amendment guarantees a criminal accused the right to a 'speedy and public trial'. More recently, it is incorporated in international human rights instruments such as Article 14 of the *International Covenant on Civil and Political Rights* ('ICCPR')¹⁴ and Article 6 of the *European Convention for the Protection of Human Rights*¹⁵ ('European Convention'), as adopted and implemented by the British *Human Rights Act 1998* (UK). In both treaties the right is expressed as an entitlement to 'a fair and public hearing by an independent and impartial tribunal established by law'.¹⁶

As Jeremy Bentham, no friend of the common law, who suffered from the naïve delusion that all law could be written down with incontestable precision in what he called a 'Pannomion', once encapsulated the argument for open justice: '[p]ublicity is the very soul of justice. It is the keenest spirit to exertion and the surest of all guards against improbity. It keeps the judge, while trying, under trial'.¹⁷ The significance of the principle of open justice is of such a high order that, even where there is no written constitution, or a written constitution does not extend to the principle, the principle should be regarded as of constitutional significance. Indeed in the fundamental House of Lords decision on the principle, *Scott v Scott* decided in 1913, Lord Shaw described the principle as 'a sound and very sacred part of the constitution of the country and the administration of justice'.¹⁸ His Lordship went on to say, when rejecting the proposition that the courts could create new categories of exclusion: 'to remit the maintenance of

13 See especially *Laurence v Texas*, 539 US 558, 573 (2003); *John Fairfax Publications Pty Ltd v District Court of New South Wales* (2004) 61 NSWLR 344 (Kennedy J).

14 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

15 *Convention for the Protection of Human Rights and Fundamental Freedoms* as amended by Protocol No 11, ETS No 155 (entered into force 1 November 1998).

16 A reference to a 'competent' tribunal in the ICCPR has been omitted in the *European Convention* article. No doubt someone found it unnecessary or offensive.

17 John Bowling (ed), *Works of Jeremy Bentham* (1843) vol 4, 316–17.

18 *Scott v Scott* [1913] AC 417, 473.

constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand'.¹⁹

British lawyers are becoming more accustomed to the terminology of 'constitutional rights'. This is a reversion to an earlier tradition of rights talks, reflected most clearly in Blackstone.²⁰

The fundamental rule is that judicial proceedings must be conducted in an open court to which the public and the press have access. A court cannot agree to sit in camera, even if that is by the consent of the parties. The exceptions to the fundamental rule are few and are strictly defined. For over a century it has been the law in England and in Australia that the inherent power of a court of justice to develop new circumstances in which the public may be excluded is spent. Sitting in public is part of the essential nature of a court of law and any new exception to the principle can only be created by statute.²¹

I recently had occasion to apply the principle in full force when holding that a statutory court in New South Wales with a major criminal jurisdiction had no power to make a non-publication order.²² The test of necessary implication had to be applied with strictness because of the principle of open justice. Furthermore, we followed a recent Privy Council decision,²³ on appeal from Trinidad and Tobago, that a non-publication order could not be addressed in terms to bind persons not present in court, specifically the media.

In 1936 the Privy Council applied the principle in an appeal from the Supreme Court of Alberta, which had set aside orders dissolving a marriage on the basis that the trial of the divorce action had not been in open court. The case had been conducted in what was described as the Judge's law library to which entry was gained through a double swing door off a public corridor. One wing of that door was always fixed, the other was usually unfastened. On the fixed wing was a brass plate with the word 'Private' in black letters. It was that sign which determined the issue. The word 'Private' was enough to deny the proceedings the essential qualities of a judicial trial.

The Privy Council stated with force and conviction:

Publicity is the authentic hallmark of judicial as distinct from administrative procedure ... The court must be open to any who may present themselves for admission. The remoteness of the possibility of any public attendance must never by judicial action be reduced to the certainty that there will be none.²⁴

Their Lordships felt constrained to accept the original trial judge's assertion that the somewhat unusual location of these divorce proceedings was not influenced by the status of the husband, who was then Minister for Public Works for the province of Alberta. He had instituted proceedings for divorce alleging adultery by the appellant with one Leroy Mattern. The proceedings were undefended.

19 Ibid 477.

20 See JJ Spigelman AC, 'Blackstone, Burke, Bentham and the Human Rights Act 2004' (2005) 26 *Australian Bar Review* 1, 1-4; see, eg, *R v Shipley* (1784) 4 Doug. KB 73, 171; 99 ER 774, 824 (Willis J).

21 See *Scott v Scott* [1913] AC 417; *Dickason v Dickason* (1913) 17 CLR 50; *McPherson v McPherson* [1936] AC 177; *Russell v Russell* (1976) 134 CLR 495.

22 See *John Fairfax Publications Pty Ltd v District Court of New South Wales* (2004) 61 NSWLR 344, [51].

23 *Independent Publishing Co Ltd v Attorney General of Trinidad and Tobago* [2005] 1 AC 190.

24 See *McPherson v McPherson* [1936] AC 177, 200.

Subsequently, Leroy Mattern's wife divorced him and Mr McPherson, after his own apparently successful divorce proceedings, had married her. The Privy Council found itself in a dilemma. Could the secret nature of the proceedings, so inconsistent with judicial process, stand in the way of Mrs McPherson's claim to have the divorce proceedings declared void and the consequential order for restitution of what was then touchingly referred to as 'conjugal rights'?

Their Lordships were not prepared, at least in the absence of Mr McPherson's second wife as a party, to actually make a declaration that the divorce was void. They found it merely voidable. However, the order absolute had become unassailable by the time the appellant's claim was made. It was for that reason only that the court refused to intervene.

The landmark United States decision is *Richmond Newspapers Inc v Virginia*²⁵. Prior to this case the Sixth Amendment, with its guarantee of a 'public trial', was applied only to a criminal accused and did not give any form of positive right of access to the public and the media.²⁶ In *Richmond Newspapers* the First Amendment was used to fill the gaps in the Sixth Amendment. On the basis of the traditional significance of openness as a critical attribute of the Anglo-American trial, the principle of open justice was constitutionalised. Chief Justice Burger's judgment contained a lengthy historical analysis of open trials, from their pre-Norman origins through to the adoption of the Constitution of the United States.

The High Court of Australia, unlike the Supreme Court of the United States, but like final courts of appeal in other common law nations, can determine what the common law requires for the whole of the nation. There is no need to constitutionalise common law doctrines. The significant difference, of course, is that once a right is found to exist in a constitution it is incapable of amendment by the legislature. That is a topic for another day.

The invocation in *Richmond Newspapers* of the First Amendment to reinforce and expand the principle of open justice, specified in the Sixth Amendment with respect only to criminal trials, has seen the principle applied in many different areas:

- Civil trials;²⁷
- Preliminary hearings;²⁸
- University disciplinary hearings;²⁹

25 448 US 555 (1980) ('*Richmond Newspapers*').

26 *Gannett Co Inc v De Pasquale*, 443 US 368 (1979).

27 *Publicker Industries Inc v Cohen*, 733 F 2d 1059 (3rd Cir, 1984); *Westmoreland v Columbia Broadcast System, Inc*, 752 F 2d 16 (2nd Cir, 1984); *Newman v Graddick*, 696 F 2d 796 (11th Cir, 1983).

28 *Press-Enterprise Co v Superior Court*, 478 US 1 (1986).

29 *United States v Miami University*, 294 F 3d 797 (6th Cir, 2002).

- Juror selection and *voir dire* examinations;³⁰
- Post-trial examination of jurors for misconduct;³¹ and
- Immigration deportation hearings.³²

Since September 11, the application of the principle to immigration deportation hearings has become controversial, leading to law journal articles with titles such as ‘Is *Richmond Newspapers* in Peril After 9/11?’³³

Ten days after the attacks of 9/11, on the instructions of the then Attorney General, John Ashcroft, Chief Immigration Judge, Michael Creppy, issued what has come to be called the *Creppy Directive*, which ordered additional security measures for ‘special interest’ deportation hearings.³⁴ The features of this new system include:

- Closure to press and public, including family and friends;
- The record of proceedings remains secret from all persons except the deportee’s attorney;
- Suppression of information confirming or denying whether a special interest case was on the docket or scheduled for hearing.

The criteria for determining whether a case ought to be classified as ‘special interest’ were broad. The restrictions apply to all cases chosen by the Attorney-General, without any need for a case-by-case analysis.

Two federal appeals courts have ruled on the constitutionality of the *Creppy Directive*: the Sixth Circuit found the restrictions unconstitutional,³⁵ while the Third Circuit found them permissible.³⁶ The Supreme Court denied *certiorari* for an appeal from the Third Circuit decision,³⁷ and the Government did not seek to appeal the decision of the Sixth Circuit.

In this, as in so many respects, the fundamental principles of our legal procedures have to face new challenges associated with the threat of terrorism.

III APPLICATION OF THE PRINCIPLE

The principle of open justice informs and energises fundamental aspects of common law procedure and is the origin, in whole or in part, of numerous substantive rules.

For example, the requirement of due process or natural justice or procedural fairness – both the obligation to give a fair hearing and the importance of the absence of bias in a decision-maker – is in part based on the importance of

30 *Press-Enterprise Co v Superior Court*, 464 US 501 (1984).

31 *United States v Simone*, 14 F 3d 833 (3rd Cir, 1994).

32 *Detroit Free Press v Ashcroft*, 303 F 3d 681 (6th Cir, 2002) but cf *North Jersey Media Group v Ashcroft*, 308 F 3d 198 (3rd Cir, 2002) *cert denied* 123 S Ct 225 (2003).

33 See, Howard W Chu, ‘Is *Richmond Newspapers* in Peril After 9/11?’ (2003) 64 *Ohio State Law Journal* 1655.

34 See, eg, *Detroit Free Press v Ashcroft*, 303 F 3d 681, 683 (6th Cir, 2002).

35 *Ibid*.

36 *North Jersey Media Group Inc v Ashcroft*, 308 F 3d 198 (3rd Cir, 2002).

37 *North Jersey Media Group Inc v Ashcroft*, 123 S Ct 2215 (2003).

appearances.³⁸ In Anglo-Australian law the test of reasonable apprehension of bias is an objective one. It is a question of what fair minded people – not just the parties, but the public at large – might reasonably apprehend or suspect.

How significant the appearance of proper conduct of the administration of justice must be is a matter that can vary over time. It is inconceivable that today, in any common law jurisdiction, let alone in England and Wales after the passage of the *Human Rights Act 1998* (UK), a court of appeal would decide two cases in the same way as the English Court of Appeal did in about 1970.

In one case the Court of Appeal held that a trial did not miscarry despite the fact that during the accused's counsel's address to the jury the chairman of Quarter Sessions kept sighing and groaning and was heard to say 'Oh God' a number of times.³⁹

In the other case the Court of Appeal rejected an allegation that a murder trial miscarried when the judge appeared to be asleep for 15 minutes. The Court was satisfied, by perusal of his summing-up, that he must have been awake. The mere appearance of being asleep was not enough. The Court referred to the principle that 'justice must be seen to be done' as a 'hallowed phrase' and dismissed the appearance of the judge as being asleep as a 'facile' application of the principle.⁴⁰

One important manifestation of the principle is also the foundation of judicial accountability. I refer to the obligation to publish reasons for decision. This obligation requires publication to the public, not merely the provision of reasons to the parties.⁴¹ Judges can no longer rely on the advice which Lord Mansfield gave to a general who, as Governor of an island in the West Indies, would also sit as a judge. Lord Mansfield said:

Be of good cheer – take my advice, and you will be reckoned a great judge as well as a great commander-in-chief. Nothing is more easy; only hear both sides patiently – then consider what you think justice requires and decide accordingly. But never give your reasons – for your judgment will probably be right, but your reasons will certainly be wrong.⁴²

Numerous other specific rules are influenced by the principle of open justice. For example, the prohibition of undue interference by a judge in proceedings; the prohibition of improper conduct by a court officer with respect to the trial;⁴³ the determination of the weight to be given to the public interest when ruling on a

38 See *Webb & Hay v The Queen* (1994) 181 CLR 41, 47 and particularly the list of cases set out in fn 36; *Murray v Legal Services Commission* (1999) 46 NSWLR 224, 242; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; Paul Jackson, *Natural Justice* (2nd ed, 1979); *R v Bow Street Magistrate; Ex parte Pinochet Ugarte (No. 2)* [2000] 1 AC 119; *Pullar v United Kingdom* (1996) 22 EHRR 391, [30].

39 See *R v Hircock* [1970] 1 QB 67.

40 See *R v Langham* [1972] Crim LR 457.

41 See, eg, *Public Service Board v Osmond* (1986) 159 CLR 656, 666–7; *Pettit v Dunkley* (1971) 1 NSWLR 377, 382; *Housing Commission of NSW v Tatmar Pastoral Co Limited* (1983) 3 NSWLR 378, 385–6; *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247, 273, 277, 281.

42 John Campbell, *Lives of the Chief Justices* (1894) vol 2, 572 quoted in Jackson, above n 38, 97.

43 See, eg, *Cleaver* (1953) 37 Cr App R 37, 39–40; *R v Racz* [1961] NZLR 227, 232; *Yuill v Yuill* [1945] 1 All ER 183, 185; *R v Burney* [1989] 1 NZLR 732; *Re JRL; Ex parte CJL* (1986) 161 CLR 342, 349–50.

claim of privilege;⁴⁴ the proposition that a permanent stay of criminal proceedings will be extremely rare.⁴⁵

The maintenance of public confidence in the judiciary has been described by one Australian High Court Judge to be the current meaning of the traditional phrase ‘the majesty of the law’.⁴⁶ In this respect a critical function of open justice is to ensure that victims of crime and the community generally understand the reasons for criminal sentences.⁴⁷

The significance of this function was well expressed by Chief Justice Burger, in the landmark decision of *Richmond Newspapers*:

Civilized societies withdraw both from the victim and the vigilante the enforcement of criminal laws, but they cannot erase from people’s consciousness the fundamental, natural yearning to see justice done – or even the urge for retribution. The crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is ‘done in a corner [or] in any covert manner’. It is not enough to say that results alone will satiate the natural community desire for ‘satisfaction’. A result considered untoward may undermine public confidence, and where the trial has been concealed from public view an unexpected outcome can cause a reaction that the system at best has failed and at worst has been corrupted. To work effectively, it is important that society’s criminal process ‘satisfy the appearance of justice’, and the appearance of justice can best be provided by allowing people to observe it.⁴⁸

IV THE PRINCIPLE AND THE MEDIA

The principle of open justice raises many issues about the administration of justice relevant to the media. It is appropriate to recall the observations of Justice Felix Frankfurter:

A free press is not to be preferred to an independent judiciary, nor an independent judiciary to a free press. Neither has primacy over the other, both are indispensable to a free society. The freedom of the press in itself presupposes an independent judiciary through which that freedom may, if necessary, be vindicated. And one of the potent means for assuring judges their independence is a free press.⁴⁹

In the landmark case of *Attorney General v Leveller Magazine*, Lord Diplock said the principle of open justice requires that the Court should do nothing to discourage fair and accurate reports of proceedings.⁵⁰ This has been described as

44 See *Australian National Airlines Commission v Commonwealth* (1975) 132 CLR 582, 593–4; *Alister v The Queen* (1984) 154 CLR 404, 415; *Ellis v Home Office* [1953] 2 QB 135, 147.

45 See *Jago v District Court (NSW)* (1989) 168 CLR 23, 50; *Subramaniam v The Queen* (2004) 79 ALJR 116.

46 *Mann v O’Neill* (1997) 191 CLR 204, 245 (Gummow J).

47 See *Jago v District Court (NSW)* (1989) 168 CLR 23, 49–50; *Pearce v The Queen* (1998) 194 CLR 610, 622 [39]; *R v Jurisic* (1998) 45 NSWLR 209, 221.

48 *Richmond Newspapers*, 448 US 555, 571–2 (1980).

49 *Pennekamp v State of Florida*, 328 US 331 (1946) 335.

50 *Attorney General v Leveller Magazine* [1979] AC 440, 450; see also *John Fairfax & Sons v Police Tribunal of NSW* (1986) 5 NSWLR 465, 476–9; *Hodgson v Imperial Tobacco Limited* [1998] 1 WLR 1056, 1068–73; *Amber v Attorney General for Trinidad & Tobago* [1936] AC 322, 345.

a 'strong' but not a 'mechanical' rule.⁵¹ Indeed, it is appropriate to speak of a right to publish a report of court proceedings.⁵² As Lord Steyn put it:

A criminal trial is a public event. The principle of open justice puts, as has often been said, the judge and all who participate in the trial under intense scrutiny. The glare of contemporaneous publicity ensures that trials are properly conducted. It is a valuable check on the criminal process. Moreover, the public interest may be as much involved in the circumstances of a remarkable acquittal as in a surprising conviction. Informed public debate is necessary about all such matters. Full contemporaneous reporting of criminal trials in progress promotes public confidence in the administration of justice. It promotes the value of the rule of law.⁵³

In Anglo-Australian law the principle of open justice does not create some kind of freedom of information legislation entitling the media access to court documents, at least when those documents have not yet been deployed in any manner in the course of litigation.⁵⁴ Except insofar as freedom of speech considerations may be involved, the principle of open justice serves purposes related to the operation of the legal system. This limits accessibility in circumstances where proceedings are only filed.⁵⁵

There is a range of legitimate judicial opinion on the application of the principle. It has always been so. It always will be so. The search for the middle ground, an instinctive judicial response to the dilemma of choice, was well described, perhaps satirised, by Lord Hoffmann. It is a noble passage worth quoting at length:

There are in the law reports many impressive and emphatic statements about the importance of the freedom of speech and the press. But they are often followed by a paragraph which begins with the word 'nevertheless'. The judge then goes on to explain that there are other interests which have to be balanced against press freedom. And in deciding upon the importance of press freedom in the particular case, he is likely to distinguish between what he thinks deserves publication in the public interest and things in which the public are merely interested. He may even advert to the commercial motives of the newspaper or television company compared with the damage to the public or individual interest which would be caused by publication. The motives which impel judges to assume a power to balance freedom of speech against other interests are almost always understandable and humane on the facts of the particular case before them. Newspapers are sometimes irresponsible and their motives in a market economy cannot be expected to be unalloyed by considerations of commercial advantage. And publication may cause needless pain, distress and damage to individuals or harm to other aspects of the public interest. But a freedom which is restricted to what judges think to be responsible or in the public interest is not freedom. Freedom means the right to publish things which government and judges, however well motivated, think should not be published. It means the right to say things which 'right-thinking people'

51 *Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, 603.

52 For an Australian authority see *Esso Australian Resources Ltd v Plowman* (1995) 183 CLR 10, 43.

53 *Re S (A Child) (Identification: Restrictions on Publication)* [2005] 1 AC 593, 607. See also *R v Legal Aid Board Ex parte Kaim Todner (A Firm)* [1999] QB 966, 977.

54 See, eg, *R Lucas & Son (Nelson Mail) Ltd v O'Brien* [1978] 2 NZLR 289, 305–7; *Dobson v Hastings* [1992] Ch 30 394, 401–2; *Smith v Harris* [1996] 2 VR 335, 347–50; *Titellius v Public Service Appeal Board* (1991) 21 WAR 201, [74]–[88]; *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512, [27]–[32]; William Ollie Key, 'The Common Law Right to Inspect and Copy Judicial Records: In Camera or On Camera' (1982) 16 *Georgia Law Review* 659.

55 See *John Fairfax Publications v Ryde Local Court* (2005) 62 NSWLR 512, [60]–[69] (Spigelman CJ).

regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions laid down by common law or statute.⁵⁶

This judgment was delivered before the United Kingdom adopted the *European Convention*. However, Lord Hoffmann referred to Article 10 of the *Convention* and noted the limited list of exceptions to its guarantee of freedom of speech. His Lordship concluded:

It cannot be too strongly emphasised that outside the established exceptions or any new ones which Parliament may enact in accordance with its obligations under the *Convention*, there is no question of balancing freedom of speech against other interests. It is a trump card which always wins.⁵⁷

I must point out that his Lordship's 'trump card' metaphor was not adopted by the other judges, who used the terminology of balancing without any suggestion of a tilt, let alone a predetermined priority. Further, in his Goodman Lecture of 1996, Lord Hoffmann modified his position by denying that freedom of speech always trumps other rights.

Nevertheless, (I use the word despite Lord Hoffmann's scorn), other perspectives are available. These perspectives can lead to different weight being given to freedom of speech in a balancing process. One retired judge of my court expressed a widely held view:

It is the power of the media which alone remains, in the relevant sense, arbitrary. I do not use the term pejoratively or by way of criticism: I use it to describe the nature of the power. I mean two things. The media exercises power, because and to the extent that, by what it publishes, it can cause or influence public power to be exercised in a particular way. And it is, in the relevant sense, subject to no laws and accountable to no-one: it needs no authority to say what it wishes to say or to influence the exercise of public power by those who exercise it.

The media may, by the exercise of this power, influence what is done by others for a purpose which is good or bad. It may do so to achieve a public good or its private interest. It is, in this sense, the last significant area of arbitrary public power.⁵⁸

If I may be permitted the sin of self quotation, in a case in which a television crew trespassed on land in order to confront the owner with his iniquity, I said:

The media have considerable power in contemporary society. That power is enhanced by the capacity for intrusion afforded by contemporary technology. That power can be wielded for good or ill. To establish, for the first time, a wide ranging right to enter property to pursue the truth, let alone the quite different requirements of a "good story", would be to trust those who wield power to a degree that centuries of experience with searches and seizures establishes to be unwise.⁵⁹

And in another case I observed:

When the media come before the Court invoking high-minded principles of freedom of speech, freedom of the press or the principle of open justice, it is always salutary to bear in mind the commercial interest the media has in maximising its access to private information about individuals.⁶⁰

56 *R v Central Independent Television plc* [1994] Fam 192, 202–3.

57 *Ibid.*

58 *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680, 725 (Mahoney JA).

59 *TCN Channel Nine Pty Ltd v Anning* (2002) 45 NSWLR 333, 346–7.

60 *John Fairfax Publications Pty Ltd v Ryde Local Court* (2005) 62 NSWLR 512, 528.

The media do not need to rely on such high minded rhetoric. Too often it sounds like self-serving cant. No Bill of Rights anywhere in the world contains a freedom to entertain. The media's position can candidly be supported on the basis of Adam Smith's invisible hand. The media can serve the public interest by pursuing its own interests.

V BALANCING CONFLICTING RIGHTS

The interaction of the principles of open justice and of freedom of speech, with other doctrines of the law, is at the heart of much media law. The principle of open justice has important implications for the law of contempt, for the interpretation of legislation and for the exercise of powers by a court which impinge upon media access to proceedings in court. The principle often interacts with other rights. For example: the right to reputation, the right to privacy and the right to a fair trial. Each of these interfaces raises a major topic. I will focus on the latter.

As the full text of the Sixth Amendment makes clear, and the express conjunction of a 'fair and public hearing' in the *ICCPR* and the *European Convention* highlights, the principle of open justice is directly related to, and interacts with, the principle of a fair trial. This interaction raises difficult issues for the application of each principle with important implications for the media. The interaction requires a court to compare essentially incommensurable matters. The values served by openness cannot be measured on the same scale as the values served by a fair trial. It is like asking whether one object is longer than another object is heavy.

Many take the opposite position of those who believe freedom of speech is a trump. Lawyers are prone to refuse to accept any balancing which would diminish the right to a fair trial found, for example, in Article 6 of the *European Convention*.⁶¹ What precisely may be required – to refer to one of the exclusions from freedom of speech in Article 10(2) of that Convention – to 'maintain the authority and impartiality of the judiciary', is a matter about which reasonable minds may differ. These words have been held to encompass the requirements of a fair trial.⁶²

For persons who are advocates of particular interests, or hold a particular intellectual perspective, the terminology of balancing is not always acceptable. The reason is obvious. Balancing necessarily results in occasions when the particular interest or perspective takes second place to some other right or principle. One English commentator, who emphasised the right to a fair trial under Article 6 of the *European Convention*, dismissed the terminology of 'balancing' on the basis that it leads to 'sloppy reasoning' and allows the right to

61 See JJ Spigelman AC, 'The Truth Can Cost Too Much', above n *, 44–6.

62 *Sunday Times v United Kingdom* (1979) 2 EHRR 245, 274; *Attorney General v Associated Newspapers Ltd* (1994) 2 AC 238, 243 D–E.

a fair trial to be ‘balanced away’.⁶³ The Privy Council on a Scottish appeal had to consider whether adverse pre-trial publicity meant that a fair trial under Article 6 was impossible.⁶⁴ The leading judgment rejected the idea that the Article 6 right must be balanced against the public’s right to information. The Article 6 right was described in terms of ‘primacy’.⁶⁵ A few months later, however, in another Article 6 case, the Privy Council, deployed the terminology of ‘fair balance’.⁶⁶

These issues have been much debated in the United States. There is force in the conclusion of the author of one review of the American literature who said: ‘We all share a common intuitive grasp of, or at least are in agreement about, what the metaphor of balancing interests entails’.⁶⁷

Perhaps a better way of approaching the issue is to discard the metaphor of balancing and to focus on the scope of the right in issue. As one author has observed:

With complex rights ... reasons for constructing, limiting or qualifying the exercise of the relevant right may in many cases be thought of as constitutive or definitional. The weight given to competing rights or considerations simply goes to defining the proper scope and application of the right. When properly weighed, rights to reputation or public safety merely illustrate the proposition that freedom of communication is a qualified right that does not include in its scope shouting fire in crowded theatres or destroying reputations.⁶⁸

In *Richmond Newspapers* itself Chief Justice Burger acknowledged that the openness of a trial must on occasion give way to another ‘overriding interest’. He said:

Our holding here today does not mean that the First Amendment rights of the public and representatives of the press are absolute ... [A] trial judge, in the interests of the fair administration of justice [may] impose reasonable limitations on access to a trial.⁶⁹

First Amendment jurisprudence, however, requires an extremely strong ‘overriding interest’ to displace the presumption of openness. For example, a statute requiring the exclusion of the press and public during the testimony of underage victims of sexual assault was found unconstitutional.⁷⁰ Similarly a decision to close a six week *voir dire* examination of jurors was overturned⁷¹ and the test of ‘reasonable likelihood of substantial prejudice’ was found not sufficient to warrant closure to the public.⁷²

United States First Amendment jurisprudence gives free speech dominant and usually determinative effect in a broad range of circumstances in which that right

63 See Andrew Ashworth, ‘Crime Community and Creeping Consequentialism’ (1996) *Criminal Law Review* 220, 229; Andrew Ashworth, ‘Criminal Proceedings After the *Human Rights Act*: The First Year, (2001) *Criminal Law Review* 855, 864–7. See, also, *R v Burns (Travis)* [2002] NZLR 387, 403 [11].

64 *Montgomery and Coulter v HM Advocate* [2003] 1 AC 641

65 *Ibid* 670.

66 *Brown v Stott* [2003] 1 AC 681 at 704F, 712H, 720E–F.

67 See Vincent Luizzi, ‘Balancing of Interests in Courts’ (1980) 20 *Jurimetrics Journal* 373, 373.

68 Geoffrey Marshall, ‘Things We Can Say About Rights’ (2001) *Public Law* 207, 209.

69 *Richmond Newspapers*, 448 US 555, 581, fn 18 (1980).

70 See, *Globe Newspaper Co v Superior Court*, 457 US 596 (1982).

71 *Press Enterprise Co v Superior Court*, 464 US 501 (1984).

72 *Press Enterprise Co v Superior Court*, 478 US 1 (1986).

comes into conflict with other rights and principles. Other common law nations also recognise the significance of freedom of speech and of freedom of the press. In comparative terms, however, the First Amendment ensures that the outcome of virtually every conflict between freedom of speech and other rights and principles is quite different in the United States than in all other common law nations.⁷³ In effect, the balance has been predetermined as a matter of law.

The position in Australia is exemplified by one case in which I sat, when the NSW Court of Appeal had to determine whether in the Australian law of contempt the conflict between freedom of speech and a fair trial was such that the balance had been predetermined by giving the right to a fair trial predominance.⁷⁴ The case involved a publication about a person alleged to be Australia's largest heroin distributor. At the time of publication that person had been committed for trial on charges of supplying heroin.

The Court decided by majority that there was no predetermined balance and that the public interest defence to a prosecution for contempt had been made out. My judgment proceeded by balancing the public interest in freedom of speech against the public interest in the administration of justice. I am pleased to say that I have not identified a single 'nevertheless' in the judgment.⁷⁵ However, (to use a word of transition not satirised by Lord Hoffmann), in Australian practice there is a discernable tilting of the balance in favour of the right to a fair trial by means of a 'thumb on the scale', rather than by a predetermined balance. It appears to me that the same mild form of tilting existed in the courts of England and Wales, at least before the *Human Rights Act 1998* (UK).⁷⁶ The position in England and Wales under the *Human Rights Act* appears to me to remain in doubt.⁷⁷ The position in Canada under its Charter involves an equal balance.⁷⁸ The New

73 See Joanne Armstrong Brandwood, 'You Say "Fair Trial" and I Say "Free Press": British and American Approaches to Protecting Defendants' Rights in High Profile Trials' (2000) 75 *New York University Law Review* 1412; John E Nowak, 'Jury Trials and First Amendment Values in Cyber World' (2001) 34 *University of Richmond Law Review* 1213; Michael Chesterman, 'OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury is Dealt With in Australia and America' (1997) 45 *American Journal of Comparative Law* 109; Newton Minow and Fred Cate, 'Who is an Impartial Juror in an Age of Mass Media?' (1990–1991) 40 *American University Law Review* 631; Eileen A Minnefor, 'Looking for Fair Trials in the Information Age: the Need for More Stringent Gag Orders Against Trial Participants' (1995–1996) 30 *University of San Francisco Law Review* 95; Erika Patrick, 'Protecting the Defendant's Right to a Fair Trial in the Information Age' (2002) 15 *Capital Defence Journal* 71; Ann Riehle, 'Canada's "Barbie and Ken" Murder Case: The Death Knell of Publication Bans?' (1996–1997) 7 *Indiana International & Comparative Law Review* 193; Jonathan Redgrave, 'Unplugging Jurors from the Internet' (2001) 48 *Federal Law* 19; Clive Walker, 'Fundamental Rights, Fair Trials and the New Audio Visual Sector' (1996) 59 *Modern Law Review* 517; Clive Walker, 'Cyber-contempt: Fair Trials and the Internet' (1997–98) 3 *Oxford Yearbook of Media and Entertainment Law* 3.

74 See *Attorney General (NSW) v X* (2000) 49 NSWLR 653.

75 The Australian public interest defence is stated in *Ex parte Bread Manufacturers Limited v Truth & Sportsman Limited* (1937) 37 SR (NSW) 242, and approved in *Hinch v Attorney General (Vic)* (1987) 164 CLR 15.

76 See, eg, *R v Taylor & Taylor* (1994) 98 Crim App R 361; David Corker and Michael Levi 'Pre-trial Publicity and its Treatment in the English Courts' (1996) *Criminal Law Review* 622.

77 See Terry M Honess et al, 'Empirical and Legal Perspectives on the Impact of Pre-Trial Publicity' (2002) *Criminal Law Review* 719; Ben Emmerson and Andrew Ashworth, *Human Rights and Criminal Justice* London (2001) [14-51]–[14.66a].

78 See *Re Dagenais and Canadian Broadcasting Corporation* (1994) 96 CCC (3d) 289.

Zealand position appears to continue the traditional approach, which tilts the balance in favour of a fair trial and against open justice.⁷⁹

VI PRE-TRIAL PUBLICITY

The conflict between the principle of open justice and the principle of a fair trial is most acute in the context of jury criminal trials. In many jurisdictions, such as Australia and in England and Wales, the civil jury has all but disappeared. That is not the case in the United States. In all common law jurisdictions, however, despite the steady expansion of the significance of matters heard in the summary jurisdiction, the more important criminal trials continue to be conducted before juries. As far as I am aware, save with respect to complex corporate or fraud cases, there are no serious proposals that this situation should change.

Over many centuries the common law developed a series of elaborate procedures and rules for channelling, and in some respect restricting, the flow of information that is made available to jurors. Indeed, most of the law of evidence is concerned to exclude evidence so as to ensure a fair trial where the tribunal of fact is a jury. One of the most important manifestations of the principle of a fair trial is the withholding of evidence from the jury. Another aspect is that judges and juries should not be subject to external pressure to decide in a particular manner.

It is an essential characteristic of a fair trial that the jurors decide the case upon the evidence that is allowed to be adduced in the trial and which has been tested in accordance with the common law mechanism of trial, particularly by the legal representatives of the accused. Whether this is called due process or natural justice, there is no more fundamental rule in our procedure, especially in our criminal procedure. I do not think any common lawyer would believe that a fair trial could be said to have occurred unless this rule was observed.

How the courts should handle the actuality or prospect of publicity before or during a trial is something that arises frequently. After all, the courts are one of the great forums of public theatricality. It is probably no accident that reality television only took off after the OJ Simpson trial. We were there first.

The differences between Australian and United States approaches to media publicity relating to criminal cases has been the subject of an exhaustive academic analysis.⁸⁰ In this, as in so many other relevant respects, the difference between the United States and other nations is derived from the strength of United States First Amendment jurisprudence.

In order to ensure a fair trial, courts in the United Kingdom, Canada and Australia rely upon restraint of pre-trial publicity, whether by formal orders or informal restraint by the media itself, determined in large measure by the uncertainties of the law of contempt. The First Amendment virtually rules out

79 See *Solicitor General v Wellington Newspapers Limited* [1995] 1 NZLR 45, 48, 57; *Gisborne Herald Co Limited v Solicitor General* [1995] 3 NZLR 563, 574; *R v Burns (Travis)* [2002] 1 NZLR 387, 404 [11].

80 See Chesterman, above n 73.

deterrent sanctions on the dissemination of prejudicial publicity and also the use of injunctions forbidding the publication of specific material. This leaves little room for the strategies of court closure, actual restrictions on publication or *ex post facto* prosecution.

The United States approach is to control the jury, rather than the publicity. This involves a range of remedial techniques including extensive *voir dire* examinations of prospective jurors and a greater use of sequestration of juries. Other nations do not engage in anything like that kind of exhaustive investigation and questioning of potential jurors. So far as I am aware, sequestration is now quite rare outside the United States.⁸¹

The extent to which the principle of a fair trial may conflict with the principle of open justice will be determined by a judgment as to the ability of a jury to set aside irrelevant considerations in the course of its deliberations. This is a matter on which judges will have a range of different views. I have often expressed the view that the tendency to regard jurors as exceptionally fragile and prone to prejudice is unacceptable. I base this opinion on a considerable body of experience of trial judges to the effect that jurors approach their task in accordance with the oath they take and that they listen to the directions they are given and implement them.⁸² Other Australian appellate judges take a similar approach.⁸³ I cannot say that all trial judges do.

I am not sufficiently familiar with other jurisdictions to give anything more than impressions. Canadian judges appear to trust juries more than they used.⁸⁴ The same appears to be the case with English judges who have frequently asserted their faith in juries.⁸⁵ However, the statutory jurisdiction to make orders under s 4(2) of the *Contempt of Court Act 1981* (UK) is still exercised robustly.⁸⁶

Judicial attitudes have been influenced by studies of jury behaviour. New Zealand and Australian studies conclude that juries are able to ignore pre-trial publicity or, at least, jurors said so in answer to express questioning. Allowing for a natural reluctance to admit such influence, the studies concluded that the

81 See, eg, *Re Global Communications Limited v The Attorney General for Canada* (1984) 10 CCC (3d) 97, 111–12. See, generally, for a comprehensive comparison of the United States and Australian approaches Chesterman, above n 73.

82 See, eg, *R v Bell* (unreported, NSW Court of Criminal Appeal, Spigelman CJ, Abadee and Ireland JJ, 8 October 1998) 5–6; *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344, [103]–[110].

83 See, eg, *R v Glennon* (1992) 173 CLR 592, 603; *Gilbert v The Queens* (2000) 201 CLR 414, [31]; *Murphy v The Queen* (1989) 167 CLR 94, 99; *Hinch v Attorney General (No 2)* (1987) 164 CLR 15, 74; *R v Yuill* (1993) 69 A Crim R 450, 453–4.

84 *R v Hubbert* (1979) 29 CCC (2d) 279, 291 (an authority referred to with approval in the Australian case *Murphy v The Queen* (1989) 167 CLR 94) approved on appeal in [1977] 2 SCR 267. See also *R v Sherratt* (1991) 63 CCC (3d) 193, 209; *R v Vermette* (1988) 41 CCC (3d) 523–30; *R v Parkes* (1993) 84 CCC (3d) 353, 360; *R v Corbett* (1988) 41 CCC (3d) 385, 402; Neil Vidmar, ‘Pre-trial Prejudice in Canada: A comparative Perspective on the Criminal Jury’ (1996) 79 *Judicature* 249, 252–3; Wayne Gorman ‘DPP v Charles Haughey: A Canadian Perspective on Stays of Proceedings and Pre-trial Publicity’ (2000) 44 *Criminal Law Quarterly* 149, 152–60.

85 See, eg, *R v West* [1996] 2 Cr App R 374, 386.

86 See, eg, *Ex parte The Telegraph Group plc* [2001] 1 WLR 1983.

effects were in fact minimal.⁸⁷ These studies have frequently been referred to in judgments, including in England.⁸⁸

In New Zealand the Court of Appeal, which had said in 1995 that the absence of empirical data meant that a tilt should remain in favour of a fair trial over freedom of expression,⁸⁹ has relied on the New Zealand research to adopt reasoning indicating a higher level of preparedness to trust juries.⁹⁰

In the United States there have been numerous studies about the effect of pre-trial publicity on jurors. Indeed there have been so many that it is possible to study the studies. One such meta study considers the results of 44 other studies. It concludes that negative pre-trial publicity significantly affects jury's decisions.⁹¹

It is important to recognise that the Australian and New Zealand studies, as their authors recognised⁹², were done against a background in which law of contempt operates as a constraint on media conduct to a degree unknown in the United States. Furthermore, Australian and New Zealand courts make suppression orders on a regular basis, much too regularly media lawyers frequently suggest. The contrasting results of the Australasian studies on the one hand and the United States studies on the other, may be understood to support the proposition that unrestrained media publicity does have an effect on a fair trial.

In Australia, suppression orders are issued on occasions when they cannot be justified. In the context of a trial where the judge prohibited the publication of a conviction pending a further trial, I repeat what I said, again in sin:

The third legal error that his Honour committed is found in the passage where he said:

'The wider publication of his guilt in relation to very similar conduct would serve no end other than to prejudice the likelihood of a fair trial.'

This comment discounts the principle of open justice which is a fundamental value of our legal system. It suggests a pre-occupation with the incidents of a 'fair trial' to the exclusion of other values served by the justice system and of the mechanisms for ensuring the efficacy of that system.

87 See New Zealand Law Commission, Parliament of New Zealand, *Juries in Criminal Trials Part 2: A Discussion Paper* (1999) ch 9; New Zealand Law Commission, Parliament of New Zealand, *Juries in Criminal Trials Part 2: Some Research Findings* (1999) 746–57; Michael Chesterman, Janet Chan and Shelly Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in NSW* (2001) 101–4.

88 See, eg, *Montgomery and Coulter v Home Associate Advocate* [2003] 1 AC 641, 673; *Ex parte The Telegraph Group plc* [2001] 1 WLR 1983, [24].

89 See *Gisborne Herald v Solicitor General* [1995] 3 NZLR 563, 574–5.

90 See *R v Burns (Travis) (No 2)* [2002] 1 NZLR 410, [11], [14]; cf *R v Burns (Travis)* (2002) 1 NZLR 387, [23].

91 Nancy Mehrkens Steblay et al, 'The Effects of Pre-trial Publicity on Juror Verdicts: A Meta Analytical Review' (1999) 23(2) *Law and Human Behavior* 219, 229–30.

92 See, Chesterman et al, *Managing Prejudicial Publicity*, above n 87, 503.

The principle of open justice is not simply a means of attaining a fair trial. In a free society public access to the conduct of the courts and the results of deliberations in the courts is a human right, as well as a mechanism for ensuring the integrity and efficacy of the institutions of the administration of justice. The publication of findings of guilt are of value in and of themselves. It cannot be said that such publication 'could serve no end other than to prejudice the likelihood of a fair trial'.⁹³

A divergence of views on matters of this character is to be expected. In Australia the tendency is to trust jurors more than was the case in the past. There is greater faith in the ability to ensure a fair trial by means of strong directions. Furthermore, in Australia we do not have a constitutional, or even a statutory, right to a speedy trial, as in the Sixth Amendment to the *United States Constitution*, or Article 6 of the *European Convention* and Article 11(b) in the *Canadian Charter of Rights and Freedoms 1982*. That makes an adjournment of a trial a more feasible option. There is, however, no likelihood that Australia will return to the practice of sequestering juries, let alone to adopt, for the first time, extensive *voir dire* examinations of individual jurors.

Many of the issues that arise in other jurisdictions are resolved in Australia by express statutory provision. In the absence of constitutional entrenchment or an interpretation clause, of the kind found in s 3 of the *British Human Rights Act 1998* (UK), such provisions, so long as they are expressed with sufficient force and clarity, resolve the issue in many cases. For example, we have a statutory prohibition of publication of matter which identifies the complainant in certain sexual offence proceedings or which permits the identification of a child who is a witness or is a victim in criminal proceedings.⁹⁴ Furthermore, our national *Family Law Act 1975* (Cth) prohibits the identification of any party to matrimonial proceedings. This effectively prevents the reporting of all such cases. These are broad spheres of conduct in which questions of the exercise of a discretion by judges do not arise. The Parliament has determined the rule in a manner adverse to the principle of open justice. Similar legislative provision, resolving issues of open justice in particular contexts exists in most jurisdictions.⁹⁵

One of the focal points of concern is in the doctrine of contempt by scandalising the court. This was probably long thought to have passed into desuetude but was acknowledged to still be in existence in Australian law by the High Court about 20 years ago.⁹⁶ Some jurisdictions with a Bill of Rights have found that the common law offence of scandalising the court infringes the guarantee of freedom of expression; for example, that contained in s 2(b) of the *Canadian Charter of Rights and Freedoms*.⁹⁷ The South African Constitutional Court did not extend their constitutional guarantee that far.⁹⁸ The Court expressly rejected an invitation to import United States First Amendment jurisprudence into South Africa.

93 *John Fairfax Publications Pty Ltd v District Court of New South Wales* (2004) 60 NSWLR 344, 365.

94 See *Crimes Act 1900* (NSW) s 578A and *Children (Criminal Procedure) Act 1987* (NSW) s 11.

95 See, eg, *Children Act 1989* (UK) s 97 and *Children and Young Persons Act 1933* (UK) s 39.

96 *Gallagher v Durack* (1983) 152 CLR 238.

97 See *R v Kopyto* (1987) 44 DLR (4th) 213 (Ontario Court of Appeal).

98 See *S v Mamabolo* (2001) (3) SA 409.

The position in the United States was determined in the classic case of *Bridges v California*⁹⁹ which has frequently been cited in other judgments throughout the common law world. Harry Bridges, an Australian-born leader of the longshoremen's union on the West Coast of the United States – perhaps our most successful export to the United States until Rupert Murdoch – had been convicted of contempt of court for criticising a California judge's decision in a case involving the union. It was in this case that Justice Black adopted Oliver Wendell Holmes Junior's axiom¹⁰⁰ that censorship could only be justified if there was a 'clear and present danger' to the administration of justice.¹⁰¹ Justice Black was speaking for the majority.

We now know that nine Supreme Court judges who originally heard the case had decided to uphold the contempt conviction by 6 to 3. However, before the judgment was delivered two members of the majority retired and another judge who had intended to vote to affirm the conviction, changed his mind. In the end there was a majority of 5 to 4 to overturn the conviction.¹⁰² Anyone who suggests that the answers to questions of this character are obvious does not understand history or the judicial process.

VII CONCLUSION

The principle of open justice did not emerge in our legal history by a process of deduction from an abstract ideal. Like so many important aspects of our legal system, the principle was derived from the actual practice of dispute resolution over long periods of time. Once recognised as a principle, however, it influences further development of practice.

The word 'court' in the sense of the judicial institution shares a common origin with a royal or aristocratic 'court' which, by its nature in medieval and early modern England, involved a broader range of persons than the immediate disputants. Similarly, the earliest juries sat as representatives of the community, which implied public access. Such are the pragmatic origins of fundamental principle in the common law.

The process continues with new challenges continuing to emerge. Perhaps the most significant is the availability of information on the internet. Throughout the common law world jurors have access to information about accuseds and an ability to check expert evidence in a manner which perhaps was always theoretically available, but which was clouded in practical obscurity.

Accessing the internet is a new form of jury misbehaviour which creates challenges for some of the means that have been adopted in the past to reconcile the principle of open justice and the principle of a fair trial, such as adjournment

99 *Bridges v California*, 314 US 252 (1941).

100 See *Schenk v United States*, 249 US 47, 52 (1919).

101 See *Bridges v California*, 314 US 252, 261, 273 (1941).

102 See Anthony Lewis 'Justice Black and the First Amendment' (1987) 37 *AJA LR* 289, 295–6; Margaret H Marshall 'Dangerous Talk, Dangerous Silence: Free Speech, Judicial Independence and the Rule of Law' (2002) 24 *Sydney Law Review* 455, 457.

or change of venue. Perhaps the American practice of sequestration of jurors will be reassessed in nations where the practice is no longer common.¹⁰³

Information is now so generally accessible that it cannot be effectively controlled. For almost all purposes this is a wonderful phenomenon. It does, however, pose very real challenges for the administration of justice.

There are some who will resist the revolutionary implications of recent technological developments. The same occurred during the previous such revolution – the invention of printing. Before the upstart entrepreneur and goldsmith turned printer, Johann Guttenberg, transformed publishing, it had been conducted for millennia by scribes who, in Europe, were controlled by the Church. A limited form of mass production was able to be achieved in large scriptoria contained in monasteries. Printing was a major threat to this business.

Fra Filippo di Strata,¹⁰⁴ a Dominican friar from the convent of San Cipriano on Murano, an island of Venice, proclaimed in the late 15th century that the German interlopers, who were taking work from Italian scribes, were crude and untutored. He called them “ignorant oafs” who “vulgarised intellectual life”. He attacked the printing process for many of the reasons that persons have criticised the internet and its denizens, like bloggers. Printing, Fra Filippo thought, brought an early form of information overload. He complained that it was hardly possible to walk down the streets of Venice without having armfuls of books thrust at you “like cats in a bag”, for two or three coppers. Printed versions of the Bible, sometimes distorting what Fra Filippo saw to be the subtlety of the Latin text, were now becoming available to individuals without the intermediation of a priest. The lascivious works of Ovid were poisoning the morals of youth. Fra Filippo proclaimed: ‘The world has got along perfectly well for 6,000 years without printing and has no need to change now’.¹⁰⁵ He was wrong then. We are going through the same process again.

103 I have considered a range of US, UK and Australian cases involving internet access by jurors in a speech in May 2005 ‘The Internet and the Right to a Fair Trial’ *Criminal Law Journal*, forthcoming. See also Virginia Bell ‘How to Preserve the Integrity of Jury Trials in a Mass Media Age’ (2005) 7 *The Judicial Review* 311.

104 The following description of Fra Filippo di Strata is based on Martin Lowry *The World of Aldus Manutius: Business and Scholarship in Renaissance Venice* (1979), 26–36; Vernon J Hippetts ‘Yesterday Once More: Sceptics, Scribes and the Demise of Law Reviews’ 1996 *Akron Law Review* 267, 268–271.

105 Lowry, above n 104, 27.