We must see them in court

Article (Accepted Version)

Townend, Judith (2019) We must see them in court. *British Journalism Review*, 30 (4). pp. 35-39. ISSN 0956-4748

This version is available from Sussex Research Online: <http://sro.sussex.ac.uk/id/eprint/91807/>

This document is made available in accordance with publisher policies and may differ from the published version or from the version of record. If you wish to cite this item you are advised to consult the publisher's version. Please see the URL above for details on accessing the published version.

Copyright and reuse:

Sussex Research Online is a digital repository of the research output of the University.

Copyright and all moral rights to the version of the paper presented here belong to the individual author(s) and/or other copyright owners. To the extent reasonable and practicable, the material made available in SRO has been checked for eligibility before being made available.

Copies of full text items generally can be reproduced, displayed or performed and given to third parties in any format or medium for personal research or study, educational, or not-for-profit purposes without prior permission or charge, provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

Unobserved justice

In fixing open justice, we can't rely on the news media alone

One week. One Magistrates' court. More than fifty "newsworthy" stories. One journalist present for one case, concerning a series of violent attacks in a town centre, who wrote one story. Two further stories were reported, presumably based on press releases from the CPS or police. This was the finding of a pilot study in Bristol in 2018, by media and legal academics, who dutifully recorded the details of each case and assessed its potential "newsworthiness".ⁱ

The implication of the findings are that the public is being under-informed about potentially "newsworthy" stories, and, critically, the functioning of the judicial system. Although further research is needed to establish regional and temporal variance, the pilot study indicates that, as the authors put it, "local level justice was being conducted invisibly" without journalistic oversight.

That regular court reporting, especially in lower courts, is absent in the overwhelming majority of cases is an unsurprising finding. The hypothesised decline, typically anecdotally evidenced, is part of a broader trend in contracted coverage of public institutions, such as local councils. The latter has led to policy interventions such as the founding of the BBC's Local Democracy Reporters (LDR) scheme, through which news organisations are subsidised to employ reporters to cover local authorities and public sector organisations. Courts are not currently part of the scheme's formal remit, though this has been suggested by Mark Hanna, a journalist and media law specialist.ⁱⁱ

I don't doubt that lack of media presence is damaging the delivery of open justice; it is very concerning that the process of justice is often entirely unobserved by any third party not directly involved in proceedings. It is important that the participants of proceedings, not least the judges, know that there is the possibility of media and public scrutiny of what occurs in the court process. Observers are not there merely to report the detail of cases but also the functioning of the justice system, what the Bristol study authors characterise as "Justice Reporting". It can help expose instances of judicial incompetence, unfair treatment of participants, and inadequate resources: system failures that might otherwise go unchecked.

Clearly the media plays a vital role. But we cannot assume that media presence or media reports will - in isolation - deliver such open and fair justice, for the following reasons. First, the media's interest in "newsworthy" content may not align with a broader public interest. In the Bristol study, the authors assess the "newsworthiness" of each case, based on "news

values” that are the common criteria for deciding if an event is worthy of reporting, defined in numerous academic studies since the 1960s. These include, for example, the negativity of a story, its unexpectedness, or involvement of an “elite” or well-known person. Such “news values”, however, may not be desirable; in fact, as Johan Galtung - the sociologist who co-formulated the first and most influential set of “news values” - recently explained, his work was supposed serve as a “a warning of the consequences for the way news media filtered the world”, not provide a gold standard.ⁱⁱⁱ In this light, we can see that important information about the justice process and events in the courtroom may be overlooked, if we prioritise a limited range of news values.

Second, the nature of the media reports may, in fact, omit important parts of the justice process. Leslie Moran’s work, cited by the Bristol study authors, showed that newspaper coverage tends to cover the beginnings and ends of cases.^{iv} Similarly, past complaints to the press regulator have included those of partial coverage - for example, that an acquittal has not been reported. Furthermore, reports based on CPS and police reports – such as those identified in the Bristol study – will only provide a very partial picture of what has occurred in court, providing inadequate oversight.

Third, prioritising the media and journalists may lead to the exclusion of other well-informed observers - including academics, NGOs and lawyers. Worryingly, in 2014 and 2015, two terrorism-related trials were largely private or restricted to ten or so approved journalists.^v This type of selective accreditation frustrates the purpose of the open justice principle, enshrined in centuries of common law and ensuring that justice is “seen to be done”.

Another exclusive approach can be found in the family courts, which have until recently restricted public access to “accredited” members of the media. As a result, family proceedings have only been reported very selectively, leaving the public and litigants inadequately informed about the family justice system. A new pilot scheme allows qualified lawyers, under certain conditions, to access the family court, as well as card-carrying members of the media.^{vi} If successful, the relevant procedural bodies may be persuaded to increase access to other types of observers, as is now permitted in the Court of Protection. Though some contend that the media are better equipped and trained for such a role, there is merit in allowing the participation of other observers who help deliver open justice, beyond the delivery of newsworthy stories conforming to a narrow set of criteria.

A fourth, if distinct, concern, is that the nature of media reports causes collateral damage to court participants that is overlooked if open justice is only appraised against the needs and demands of the media (especially the commercial media).

In England and Wales, there is a strong and well-entrenched tradition of naming the direct participants - witnesses including victims, defendants, other individuals mentioned in evidence - unless automatic or discretionary restrictions apply, in a limited set of circumstances. The media often makes successful challenges to such restrictions - for example, in applying to lift a ban on naming a juvenile defendant in a high profile criminal case. Why, though, should open justice necessarily require a name in such circumstances? For example, why should a claimant in a civil case that concerns private health matters, forfeit their privacy in order to seek damages?

News media organisations contend that a name is essential to drawing readers to a story, and it is widely accepted (if not empirically evidenced) that real names lead to a higher number of click-throughs, or newspaper sales. This should not be the deciding factor in whether an individual should be named; the moral and legal case should rather consider the impact on the individual and society and whether there is a public interest in naming a particular individual. Even if it were proved that court reports reached a wider number of people when participants are named, the mechanics of open justice should not be solely shaped by the commercial demands of the mass media.

My case is that a broader discussion about the future of open justice is needed, one that involves a whole range of observers, including other experts from the third sector, law and academia. Now is the time for the Government and Judiciary to open that discussion, through initiatives such as the Open Government Partnership and the ongoing process of digital court reform.^{vii} Advances in digital technology have radically transformed the public process of justice, and it's time that the implications of these developments are fully considered against the backdrop of law and ethics.

To provide an example of the way in which digital technology has transformed the nature of courtroom publicity, a court participant (whether defendant, witness or other affected party) no longer lives with the media interest for a short period; search engine results can publicise proceedings long after events have concluded. A name search that yields an archive of historical coverage means that an individual's name is attached to detailed and often deeply personal accounts, perhaps indefinitely. That might be justified in many cases, but not in all circumstances. In theory, individuals have certain rights over the processing of their personal data through laws concerning rehabilitation and data protection; in practice, the process of redress can be cumbersome and difficult for them to navigate.

Another conundrum is the facilitation of public observation when proceedings are largely online: in the new Single Justice Procedure in the Magistrates' Court in which parties do not need to physically appear in court; or in proposed online dispute resolution mechanisms for civil litigation. How should public and media observation take place, and how should

publicity of such proceedings be managed? This is a major concern that has been shared by stakeholders in oral and written evidence to various parliamentary committees examining digital court reform, but not one that has been the direct subject of proper public consultation.

These scenarios and others illustrate the need for new systems for collecting, storing and disseminating the information that is generated through the administration of justice and courts process, beyond reliance on the media. On the one hand, technology affords us a great opportunity in terms of standardising and improving public access to the court process; on the other, it presents us with difficult legal and ethical problems, in terms of the implications of the processing of digital data generated by the justice system. To date, these tensions have not been sufficiently addressed by law and policymakers. There aren't clear answers to how justice should be delivered equitably and openly in the 21st century but that does not mean we should not ask.

In addressing these, it is essential that the government, judiciary and civil servants think more broadly than journalism and traditional media organisations. The news media is a necessary component but only one part of the open justice machine. On its own it is insufficient. While we should look for mechanisms to bolster and support court reporting serving the public interest, other types of observers are also capable of scrutiny and delivering the broader public interest objective of transparency and open justice. This is too often forgotten.

Judith Townend is senior lecturer in the School of Law, Politics and Sociology at the University of Sussex, where she specialises in research on freedom of expression and access to information.

ⁱ Chamberlain, P., Keppel-Palmer, M., Reardon, S. and Smith, T., 2019. It is criminal: The state of magistrates' court reporting in England and Wales. *Journalism*. Published online, 7 August 2019. Available at: <https://doi.org/10.1177/1464884919868049>. [Accessed 14 Oct. 2019].

ⁱⁱ Sharman, D., 2019. *McNae's editor calls for extension of BBC LDR scheme*. [online] HoldtheFrontPage. Available at: <https://www.holdthefrontpage.co.uk/2019/news/mcnaes-co-author-calls-for-local-democracy-reporting-scheme-to-cover-courts/> [Accessed 14 Oct. 2019].

ⁱⁱⁱ Haagerup, U., 2019. Academic who defined news principles says journalists are too negative. *The Guardian*. [online] 18 Jan. Available at: <https://www.theguardian.com/world/2019/jan/18/johan-galtung-news-principles-journalists-too-negative> [Accessed 13 Oct. 2019].

^{iv} Moran, L., 2014. Mass-mediated 'open justice': Court and judicial reports in the Press in England and Wales. *Legal Studies* 34(1): 143–166.

^v Casciani, D., 2015. Erol Incedal: The trial we couldn't report. *BBC News*. [online] 26 Mar. Available at: <https://www.bbc.com/news/uk-31989581> [Accessed 18 Oct. 2019].

^{vi} I am a member of the core group of the Transparency Project, a charity which made recommendations that led to this pilot exercise.

^{vii} See: Townend, J., 2019. Why we need a national commitment to open justice data. *UK Open Government Network*. Available at: <<https://www.opengovernment.org.uk/2019/10/10/why-we-need-a-national-commitment-to-open-justice-data/>> [Accessed 18 Oct. 2019].

draft