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OBSERVERS AS PARTICIPANTS: LETTING THE PUBLIC MONITOR THE CRIMINAL JUSTICE BUREAUCRACY

*Stephanos Bibas**

Of late, many criminal justice scholars have bemoaned the substitution of plea bargains for jury trials. Where citizens once sat in judgment as part of a public morality play, now professionals and bureaucrats hurry cases along a swift, hidden assembly line from charge through plea to sentence. These bargains efficiently process huge dockets, but at tremendous cost to the system's legitimacy, morality, and monitoring of its agents' performance. In response, scholars often wish either to dynamite the entire edifice or to recreate mini-juries within stages of the criminal justice machine.

Professor Jocelyn Simonson's Article sees this problem but identifies an important solution that is already hiding in plain sight: the audience. The First and Sixth Amendments seek to make the criminal justice transparent and participatory, and not only through professional media. The right is not simply one of the organized press or of defendants, but of the public as a whole. Sunlight is the best disinfectant — but our system tries to black out the passive solar energy that already shines into the gloomy corridors of justice as friends, relatives, and kibitzers come to watch routine proceedings.¹

This Response argues that Simonson's argument can and should be taken further to buttress the public's right to see justice done. First, I explain the point of the right: to enable the public not merely to observe, but also to participate in doing justice. After articulating this right as one of both defendants and the public, and exploring its outer boundaries and waivability, I identify the broader principal-agent dynamic that public access may allay. Finally, I extend Simonson's reasoning: her reframing and expansion of the public's right of access to courtrooms is not only logical, but also reinforces the role of the Sixth Amendment speedy-trial guarantee as well as prudential concerns about criminal justice's technicality and obscurity.

If the public had a mere right to information or data, the press could fill that role, or broadcasting over closed-circuit television or the Internet could suffice. But Simonson's argument is more ambitious,

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¹ Jocelyn Simonson, *The Criminal Court Audience in a Post-Trial World*, 127 HARV. L. REV. 2173, 2177 (2014).

because it understands spectators as participants, who not only see justice done but take part in doing it.² The goal is not simply a fully informed citizenry, but a participatory morality play.

The logical extension of Simonson's argument, it seems, is that the rights to watch, hear, and maybe even comment are structural checks that serve the public's interest in seeing justice done and in helping to do justice itself. Though the Sixth Amendment is cast as a right of defendants and so might be waivable, the First is not. Defendants, then, should not be able to waive the right to an audience unilaterally.

Understandably, Simonson is no absolutist and recognizes the need for exceptions. Several categories of cases raise difficult questions of line-drawing. First, there are cooperating witnesses and others who fear retaliation for their testimony, particularly in cases involving organized crime and gangs. The public has an undeniable interest in hearing these witnesses in order to check abuses, such as perjury, excessive leniency, and the skewing of enforcement toward victimless drug dealing. At the same time, pure transparency would chill much cooperation, allowing reigns of terror to silence witnesses who would otherwise do their civic duty to come forward. And often the only reason prosecutors are willing to offer a favorable plea is in exchange for preserving an undercover officer's or informant's cover so that he can continue to root out more crime. Full transparency would thwart such undercover work.³

Second, there are vulnerable victims and witnesses, particularly victims of rape, domestic abuse, and child molestation. Requiring openness across the board might keep many of them from coming forward in the first place, making them even more powerless and allowing defendants effectively to silence their accusers.

Third, some defendants are ashamed or embarrassed enough that they are unwilling to plead guilty or be sentenced in the presence of their friends, family, or victims. They may be in denial to others or even to themselves. Closing hearings or courtrooms may help to facilitate their guilty pleas.⁴

Judges must handle some such cases in chambers, sidebar conferences, or sealed courtrooms. But the default rule should be one of openness, or at least as much openness as is compatible with physical

² See *id.* at 2184–90.

³ See Stephanos Bibas, *Brady v. Maryland: From Adversarial Gamesmanship Toward the Search for Innocence?*, in *CRIMINAL PROCEDURE STORIES* 129, 150–51 (Carol S. Steiker ed., 2006); cf. Daniel C. Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels*, 8 *FED. SENT'G REP.* 292 (1996) (discussing prosecutors' reasons for offering substantial rewards for cooperation).

⁴ See Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 *CORNELL L. REV.* 1361, 1377–79 (2003).

safety. I am suspicious of closing courtrooms for court administrators' mere convenience or for the third category of cases above, where defendants seek to avoid public shame and private guilt. If they are barred from seeing the proceedings, victims and the public may feel that the defendant has cheated justice. The defendant's friends and relatives may believe that he was unjustly convicted — still maintaining, for instance, that the rape victim consented or asked for it. And defendants who never have to confront their victims or the public may remain in denial about the wrongfulness of their own acts or their need for reform. As twelve-step programs such as Alcoholics Anonymous teach, in order to overcome an addiction or similar problem, one must admit that he has a problem in the first place. Letting defendants avoid such shame may harden their denials, impeding treatment in prison and so increasing recidivism. That problem is especially acute for defendants who seek to slide through the system with no-contest pleas, which neither admit nor deny guilt, or *Alford* pleas, which affirmatively protest innocence.⁵

The broader dynamic here is a disjunction in the criminal justice system between the principals (victims, defendants, and members of the public) and their agents (police, prosecutors, judges, and defense lawyers). The agents evidently prefer to move cases through the system quickly, sometimes secretly, and without public monitoring or interference. Defendants' friends, relatives, and victims are annoying inconveniences, grit that slows down the assembly line.⁶ But the public rightly wants to monitor and check the performance of its public servants and the quality of justice they administer. Citizens also want their day in court, to see justice done. That is a powerful and enduring metaphor, one that should shape court processes far more than it currently does.

Simonson's argument should lead us to consider two related problems. The first is delay. Justice delayed is justice denied, and the Sixth Amendment expressly guarantees speedy trials so that victims, defendants, and the public may see justice done promptly. Yet judges and lawyers have become too comfortable with letting cases drag on for years, sometimes for their own scheduling convenience. A greater concern for the public interest might lead to accelerating charges, convictions, and punishments. Perhaps the speedy-trial guarantee ought to be seen as an unwaivable structural check, a right of the public to follow cases, participate, and hold officials accountable. (The Supreme Court recognized the public's interest in speedy trials in *Barker v.*

⁵ See *id.* at 1395–99, 1401–07.

⁶ See MARKUS DIRK DUBBER, VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS 26 (2002). See generally STEPHANOS BIBAS, THE MACHINERY OF CRIMINAL JUSTICE (2012) (developing the metaphor of criminal justice as an assembly line).

Wingo,⁷ but never gave the right enough bite to make it meaningful.) At the very least, routine continuances ought to require more justification than just the parties' consent.

The second problem is technicality. As our legal system has grown increasingly professionalized over the last two centuries or so, rules of evidence, procedure, and substantive law have proliferated and grown technical and opaque. In the federal system and (to a lesser extent) in many states, a spectator at a sentencing hearing will hear the judge drone on about offense levels, aggravating and mitigating adjustments, criminal-history scores, and points. This mathematical gobbledygook can at least partly obstruct the common-sense moral judgment and evaluation of the criminal and his crime, as well as his remorse and amends.⁸

Lawyers instinctively trust intricate rules as the surest path to fairness and equality, mistrusting the masses and fearing discrimination. Yet, as I have argued elsewhere, rules have hardly banished discrimination, and lawyers are too quick to disparage the public's sense of justice and fairness, including virtues such as mercy.⁹ Moreover, public access can promote representation of minority communities that are under-represented among criminal justice professionals.

Courts will never banish legalese entirely or translate it thoroughly. But they can still do much more to simplify rules and translate them into plain English. Ideally, audience pressure and reactions to patterns of unfair verdicts would even push courts back toward liability, defense, and punishment rules that accord with lay retributive intuitions. (Perhaps audience members might blog and tweet their complaints, leading to snowballing media coverage and generating electoral pressure on prosecutors and legislators to reform.) Intelligibility would thus increase not only fairness but also democratic legitimacy. Both procedural and substantive fairness help to increase the legal system's legitimacy in the public's eyes, fostering public compliance and cooperation.¹⁰

In short, Simonson's Article is an important contribution to appreciating the public's role in criminal justice today. Spectators are not passive, but active — not warm bodies, but citizens engaged in monitoring criminal justice. If they can watch, hear, and understand everyday hearings, they can monitor, understand, and improve criminal justice. Our system is far too opaque, technical, and hidden. But even modest reforms to let the sun shine in would be steps in the right direction.

⁷ 407 U.S. 514, 519–20 (1972).

⁸ BIBAS, *supra* note 6, at 35.

⁹ *Id.* at 39–40, 119–26.

¹⁰ See TOM R. TYLER, WHY PEOPLE OBEY THE LAW 125–30, 135–40, 163–65 (1990); Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453 (1997).