The two speeds of free speech in court reporting

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The speed of "reporting"

We have the right, through constitutions and conventions, to trial within a "reasonable time"[1]. When events of a certain “dramatic” sort happen, "reasonable" speeds up.

When the bombings of the Boston Marathon occurred in April, there was no immediate arrest, and in an age of immediacy, that took too long. There were, of course, the usual conspiracy theories, but then also the more clinical dissection of photos of the scene around the attacks.

Forums on websites such as 4chan and Reddit collected all the images they could to look for anyone suspicious. "Baddies" were on the loose and they needed to be caught, and the police were working too slowly.

Oops777, who set up a Reddit forum to examine photos from the Boston bombings, told the website Buzzfeed:

> The worst case scenario is we waste our time, but the best is that we find something the FBI missed — which is why all suspicious information that isn’t ruled out, is sent to the FBI.[2]

But even if the FBI was looking at the same images - as they most likely were - it was not in full public view.

When asked about the images on the Reddit feed going viral, Oops777 said:

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[1] European Convention on Human Rights, November 4, 1950 (with subsequent amendments) (http://www.echr.coe.int/Documents/Convention_ENG.pdf).

[2] John Herman, “The man behind the internet’s hunt for the Boston bomber”, Buzzfeed, April 17, 2013 (http://www.buzzfeed.com/jwherrman/the-man-behind-the-internets-hunt-for-the-boston-bomber).

> That is a shame, things shouldn't be going any further than this forum and the FBI. Unfortunately media outlets are already playing the 'who done it' game themselves, which is obviously dangerous when done by a paper [or] TV outlet (see Daily Mails report on the bombings - they have multiple 'who's this guy' pictures).[3]
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> He or she added: I think I'm going to post something in the forum to try and keep users from spreading anything outside of the forum.[4]

The FBI, in response to reports of an arrest, issued a statement about the media coverage, but not the internet speculation. It said:

> Since these stories often have unintended consequences, we ask the media, particularly at this early stage of the investigation, to exercise caution and attempt to verify information through appropriate official channels before reporting.[5]

Buzzfeed itself concluded the article with: "On Reddit, or 4chan, there is no distinction between verification and reporting. It's all public."[6]

The world of reporting is speeding up. It tumbles down the hill after the rolling public, desperate to catch the immediacy of their social interactions, opinions and declarations online. Even as much as it might play follow the leader by imitating popular non-journalism ideas, reporters will always see "amateurs" racing ahead in the distance.

Even as The Leveson Report[7] in 2012 chased after and chastised the "professionals", the "amateurs" were already so far ahead as to be out of sight.

Ironically perhaps, in Leveson's set up as a judicial inquiry - posting material online, allowing television coverage and other new media - it utterly failed to see the "reportage" that was faster than the one it was investigating, and indeed to see its own nature or position as a court of conflict of divergent speeds of free speech.

In our effort as "professional" reporters to catch those galloping ahead of us, we have begged, borrowed and stolen the content from the "amateurs" in the

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[3] Ibid.
[4] Ibid.
[5] Brett LoGiurato, screengrab of FBI statement, April 17, 2013 (https://twitter.com/BrettLoGiurato/status/324596768711004161/photo/1).
[6] Buzzfeed, April 17, 2013.
[7] Lord Justice Leveson, "The Report into the Culture, Practices and Ethics of the Press", November 29, 2012 (http://www.levesoninquiry.org.uk).

distance. *The Guardian* recently launched a new platform to solicit "user generated content", or free stuff as I call it. *Huffington Post* relies heavily on the work of others, the opinions of anyone, and user-generated content. Aggregators of content, purporting to be journalists, repeat anything and everything being said online as fast as they can, acquiring vast quantities of followers, which are the envy of "traditional" or what some call "legacy" media.

In the example of the Boston Marathon attacks, justice, perceptions of justice and the chasing after or even lust for justice, exist well outside formal courtrooms. The argument in this paper is that the courts exist as a unique space where both speeds of speech and reporting must exist and reach the same ultimate destination.

Justice must be seen to be done

When I came to the UK to study journalism, one of the tenets I learned was that "justice must be seen to be done". I believe in that phrase so passionately I made it the seventh of the 11 principles which form the basis for my own news website.[8]

The expression is normally credited to Lord Chief Justice Hewart, in the case of The King v Sussex Justices; Ex parte McCarthy in 1924[9]. The deputy clerk of the court had retired with the justices in making their verdict in a road crash case, upon which it was realised that the clerk was a member of the firm of solicitors acting for one of the parties in the case. Even though the clerk was not consulted by the justices, the original decision was quashed by the King's Bench Division because of the possibility of perceived bias. In his ruling Baron Hewart said:

> A long line of cases shows that 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.
>
> And:

[8] Tomorrow, 2012 (http://tomorrow.is/). See Appendix for list of principles within the model for journalism applied to the site.

[9] The King v Sussex Justices; Ex parte McCarthy [1924] KB 256

> The answer to that question depends not upon what actually was done but upon what might appear to be done. Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice.[10]
>
> *The King v Sussex Justices*

Now, conversely, Baron Hewart has repeatedly been described as "the worst chief justice ever"[11], which I would argue makes his summary all the more valid: if you do not see justice being done badly, how do we know that it has been done badly?

In the UK, reporters and indeed any member of the public are bound by legislation, particularly the UK Contempt of Court Act 1981, to ensure a fair trail for an accused person and also for the sake of the integrity of the legal system.

The reporter's justification for being present, more recently than Baron Hewart's statement, can come from the European Convention on Human Rights (ECHR)[12].

> Article 10 - Freedom of Expression:
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> 1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.
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> Article 6 - Right to a fair trial

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[10] Ibid.

[11] Jackson's The Machinery of Justice in England, Cambridge University Press, Cambridge (8th ed, 1989) p375. As cited by The Honourable JJ Spigelman, Chief Justice of New South Wales, in keynote address to the 31st Australian Legal Convention Canberra, on October 9, 1999.

[12] ECHR,1950.

> 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 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.
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> *ECHR, 1950*

The US has an older conception of free speech and public trials. And where you might think the older would look to public "morals" as justification for closing the doors, it is in some ways purer. The US is also, perhaps as a direct consequence, home to much more open courts and to the "faster" form of free speech when it comes to representations of justice, as seen in the Boston Marathon example.

Under the US Bill of Rights[13]:

> Amendment VI
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> 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 defence.
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> Amendment I
>
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
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> *US Bill of Rights*

The UN Declaration of Human Rights[14] is not a legally binding document, but is now considered *jus cogens*, a pre-emptory norm of international law. It

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[13] United States. National Archives and Records Administration. The Bill of Rights. (http://www.archives.gov/exhibits/charters/bill_of_rights.html).

offers an even clearer vision of the future, of expression without borders, where public trials do indeed include the entire world body public.

> Article 10:
>
> Everyone 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 11:
>
> (1) Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.
>
> Article 19:
>
> Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.
>
> *UN Declaration of Human Rights*

In court reporting, these articles are wedded to each other, and if you were to merge UN articles 10 and 19 into an “open justice article”, you would get:

"Regardless of frontiers", everyone has the “freedom to seek, receive and impart information”, at a “public hearing by an independent and impartial tribunal", which is guaranteed by right.

Or, alternatively:

Everyone has the right to public trial, where anyone and everyone has the “freedom to seek, receive and impart information and ideas through any media and regardless of frontiers".

But how, exactly, do we balance the “freedom” of speech and the “right” of a public trial?

The "right" to speak, to report, is an inherent right but not something that we or others are obliged to fulfil: we may choose to be silent or choose not to bother the public with a story which we do deem not vital (or only remotely so)

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[14] UN Declaration of Human Rights, December 10, 1948 (https://www.un.org/en/documents/udhr/).

to the common interest. It is a freedom.[15] But the right to a public trial weighs as an obligation on civil society because it singles out an individual – the alleged perpetrator of some wrong-doing – as a possible liability to the well-being (safety, security) of the whole. The trial of someone, who is, of course, innocent until proven guilty, is not a choice in the way that speech is.

How do you ensure the "right" to a public hearing? Unless one is addressing something like a totalitarian regime or so-called “banana republic,” one may assume that courts are “open”, both to justice and to the individual seeking redress through them. That's easily said, but not always easily or universally enacted. Saying the public has the freedom to walk in does not limit the ability of individual judges or entire judicial systems to restrict access.

Take, for example, the recent controversy over the Court of Protection having jailed a 50-year-old woman for five months for contempt of court, even though she was not present in court, nor was her lawyer, and with the sentence not being published.[16] Set up to manage the affairs of people judged to be unable to care for themselves, the Court of Protection automatically bars the public and press. The Lord Chief Justice has since ordered that no one can be jailed without a public announcement.[17]

If you limit public access to a case or court system, do you still let reporters in? Who counts as a "chosen one" of legitimate representation of and to the public, or of reporting practices?

For example, as a reporter in Greenock, I learned that if an alleged murderer made a first appearance in court, it was a closed hearing. But the bare details of the individual’s name and the charge were shown to the reporter in exchange for the free advertising of the name of his or her lawyer. A member of the public could not request such reporting privileges.

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[15] Strictly speaking, every “right” carries within it an “obligation”, namely of respect on the part of others for the person possessing that “right”.

[16] Kevin Rawlinson, “Anonymity for those jailed by 'secret courts' is wrong, says Lord Chief Justice”, The Independent, May 3, 2013 (http://www.independent.co.uk/news/uk/crime/anonymity-for-those-jailed-by-secret-courts-is-wrong-says-lord-chief-justice-8603505.html).

[17] Ibid.

In the Canadian province of Quebec, a proposal was advanced in 2011 to have designated “professional” reporters[18], giving them special access to government officials and beyond. But why should “the people” have less access to their government, or indeed to justice itself, than a select few? Why should court reporters have extra access? Should they be demoted to "public" status, or should the public be elevated?

Restricting or limiting a freedom is much easier than ensuring a right. Those with the freedom to speak, to observe and report those observations, must ensure that the right is upheld and fulfilled, because we cannot assume that the system will inherently ensure that rights are met.

The UK Supreme Court has rightly been praised for being more open than even its US equivalent, where cameras are still not allowed. But, however open the top courts of the land may be, what about the local ones?

I was a court reporter nearly every day for a year and a half in Greenock, covering the two, sometimes three courtrooms in the Sheriff Court building. Yet I never set foot in the lower District Court, and there were only a handful of instances where colleagues visited. No one ever sat in on a Childrens’ Hearing, which deals with youth crime and other issues.

Similarly, in 2012, the Open Justice Week encouraged members of the public to go into courts and see the law in action. I went into what used to be called the Glasgow division of the Asylum and Immigration Tribunal, but what is now termed the First-tier Tribunal (Immigration and Asylum chamber). I was recognised by the administrator on the front desk and some lawyers because, to my knowledge, I am still the only reporter to have ever set foot in the tribunals, even though it had been at least four years since I last visited. They

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[18] The idea was put forward by Quebec culture minister Christine St-Pierre (http://www.imediaethics.org/News/2210/Quebec_culture_minister_explains_call_to_license_journalists.php). A response can be found here (http://www.caj.ca/?p=1800). Also of note, in April 2013, a ban came into effect for use of texting, tweeting etc inside Quebec courts (http://j-source.ca/article/ban-twitter-quebec-courtrooms-goes-effect-today).

tried to exclude me from a case on the grounds that the person appealing to stay in the UK didn't want me there. As much as I respect the desire for privacy, in particular during the sensitive topic of immigration and asylum, an applicant or witness should not be able to decide whether or not the press can be present.[19] There are already procedures in place through the tribunal system to prevent identification of individuals. Some of these legitimately exist to protect those individuals. But, having struggled to get access to statistics about the system and then into individual tribunal courts, anonymity is also used to protect the government behind the system. Having courts or tribunals where there is no scrutiny whatsoever is potentially dangerous and it should justifiably breed caution and concern among the citizenry.

A decade ago, I visited the British Columbia Supreme Court building in Vancouver. You could walk down the hall and see various cases underway, with the doors wide open: it was literally “open justice”. When I popped in to the media room, the two reporters said that while they were based at the court, they didn’t report on it.

There is a very real danger here that only high-profile cases, where a dozen or more reporters all pile in to the same press bench or side rooms set up for the overflow, will get covered. A handful of local courts will get the occasional local reporter or blogger, but it is easier to spend a day writing multiple pieces commenting on what others are writing than to spend a day, or perhaps even weeks watching just one case. There has to be a desire to see that justice is done.

As Alexander Hamilton wrote in *The Federalist*,[20] one of the 1788 publications setting out the principles of a new United States, on the subject of the "integrity and moderation of the judiciary":

> "Considerate men, of every description, ought to prize whatever will tend to beget or fortify that temper in the courts: as no man can be

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[19] A full description of the incident can be found by Tristan Stewart-Robertson, “’The clients don’t want you in there’: Glasgow’s most secretive courts”, March 2, 2012 (http://openjusticeuk.blogspot.co.uk/2012/03/clients-dont-want-you-in-there-glasgows.html).

[20] Alexander Hamilton, “The Federalist No. 78: The Judiciary Department”, Independent Journal, June 14, 1788 (http://www.constitution.org/fed/federa78.htm).

> sure that he may not be to-morrow the victim of a spirit of injustice, by which he may be a gainer to-day. And every man must now feel, that the inevitable tendency of such a spirit is to sap the foundations of public and private confidence, and to introduce in its stead universal distrust and distress."

If a tree is on trial for falling in the woods, is it a fair prosecution if nobody heard it?

You can argue for televised courts, as in the US, where anyone can see justice in action. But the reality is that a majority of courts are not covered, particularly smaller ones where the risk of flawed justice is perhaps greatest.

The New York Times, in a year-long investigation in 2006, described the inner workings of town and village courts in New York State.

It read:

> Sometimes the public is not admitted, witnesses are not sworn to tell the truth, and there is no word-for-word record of the proceedings.
> Nearly three-quarters of the judges are not lawyers, and many — truck drivers, sewer workers or laborers — have scant grasp of the most basic legal principles. Some never got through high school, and at least one went no further than grade school.
> But serious things happen in these little rooms all over New York State. People have been sent to jail without a guilty plea or a trial, or tossed from their homes without a proper proceeding. In violation of the law, defendants have been refused lawyers, or sentenced to weeks in jail because they cannot pay a fine. Frightened women have been denied protection from abuse.[21]

Reporters, like those at *The New York Times*, are trained to challenge the system, but in theory the public could do so themselves. The question then becomes whether they would actually report their observations and whether they attend only once in their lifetime or on a regular basis to observe and report?

Assuming that TV cameras are not allowed in, the "public" must be present directly or be represented by reporters. If reporters are to represent the public, there is a real danger that they will be given elite privileges or access to

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[21] William Glaberson, “In Tiny Courts of N.Y., Abuses of Law and Power” The New York Times, September 25, 2006 (http://www.nytimes.com/2006/09/25/nyregion/25courts.html).

documents and people, when in fact any member of the public should be able to demand the same access, whether with the intention of publishing it or not. But if you open all courts to everyone on all occasions, how do you protect rape victims who normally give evidence in courtrooms closed to all but legal officials, jurors and the press? The press SEES that justice is done, but uses its education, training and professional code to protect the vulnerable. But what if the press isn't there? What if a member of the public asks to be there but may or may not publish in an official capacity? Do only registered reporters get to see that justice is done? Should the public trust even those chosen few? Who watches the watchers of court, to paraphrase the expression; and then, who watches the watchers of the watchers? And are all watchers and watchers of watchers and watchers of watchers of watchers equal in their position as public and public representatives, and equal in the freedom of expression accorded to them to ensure the rights to a public trial?

There is a clash here between the requirements of public justice and the capacity and capabilities of the public to see justice.

The end of "self-regulation" and the rise of the self

That takes us finally to the subject of self-regulation. If you have been in the UK at all in the past two years, and in some cases beyond, you know there has been an obsession with the concept of self-regulation. We are told that the press must not be allowed to self-regulate, because that system has failed, most notably to stop the illegal accessing of mobile phone voice messages. Now, leaving aside the fact that it was, actually, the justice system which principally failed to stop criminality emanating from a handful of reporters, when it comes to court reporting, we are trained and governed both by legal restrictions to varying degrees, and also by the corporate and organisational codes of our employers, unions, and other professional bodies. You can look to those codes and examine and challenge them in a public space or debate.

Put that in contrast to the drive for more "citizen" or amateur voices, those anonymous individuals examining photos from the Boston Marathon. There, the "self" is entirely individual and there is rarely an accessible code to determine where their "red lines" of what is appropriate or inappropriate for court coverage might be. You can argue that there is a degree of regulation by the "masses" reacting to individual voices, either condoning or condemning, but they are not bound to any universal or applicable professional code. Should they be? Is that contrary to the spirit of freedom of expression and speech? Or does that fall within the context of the right of the accused to receive a fair and impartial trial?

Given the professional, corporate codes governing reporters - so often rejected now in the UK as ineffective without legal backing - courts are subject to two speeds of free speech: the immediate and reactive speed and morals of the individual "observer", and the professional, edited and theoretically balanced speed of the reporter.

The professional "void" inherent in citizen journalism, however “professionally” its agents may believe they are acting, is absolved of having to protect sources, protect vulnerable witnesses from identification, or even to presume innocence in "reporting" their observations. The free speech of trained reporters is, in fact, less free than that of the citizen journalists who are replacing them, by virtue of their education, employment requirements and professional codes to balance a "need to know" against, for example, the naming of a rape victim. Although an amateur would be prosecuted for identifying a victim, like any professional reporter, it would be after the fact. And, it could be argued, there is considerably less danger of in it happening from a trained court reporter.

So we have these two speeds, of corporate "self" regulation, and of individual "self" regulation, both subject to law but potentially possessing very different understandings of morality and speeds at which morality is applied.

And I would add a third speed that we may someday have to consider as well. Programs such as Twitter "bots" that automatically retweet anything with

key words or hashtags are completely detached from both corporate and individual "self" regulation.[22] In effect, this has become a case of the technology regulating itself, quite apart from any law or morality. It might involve a human operator who could some day be held responsible under law, assuming that one could identify him or her, but they are not in our “open court”. Nor is justice being seen to be done. Nevertheless, it would potentially be recognised as free speech, under the US Supreme Court decisions of Talley v California (1960)[23] or McIntyre v Ohio Elections Commission (1995)[24] which both related to anonymous campaign literature.

Justice Hugo Black wrote in the majority opinion in 1960:

> There can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression ... Anonymous pamphlets, leaflets, brochures and even books have played an important role in the progress of mankind.

Could we not add now to the list now anonymous blogs, tweets and social media generated by robots and automated technology?

"Professional" reporters cannot cover all courts at all times. Our corporate-regulated speech is essential and, though slower, ensures that justice is done. But the "amateur" observers and an engaged civil society who can be "on the ground" more widely and react more quickly, however potentially risky morally or legally, are equally vital, "as no man can be sure that he may not be to-morrow the victim of a spirit of injustice".

Both amateurs and professionals are required for justice and need each other.

The professional observer, the reporter, will be the one to navigate and argue for openness in the courts on behalf of, among others, those same

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[22] British MPs were told about the “harvesting” of content by websites, which might also be classed as technological “self” reporting (http://www.pressgazette.co.uk/local-worlds-steve-auckland-clarifies-montgomery-human-interface-comments-we-are-not-doing-away?utm_source=dlvr.it&utm_medium=twitter).

[23] Talley v California 362 U.S. 60 (1960)

[24] McIntyre v Ohio Elections Commission 000 U.S. U10296 (1995)

amateurs, who may sincerely want to "see justice done", but may never see fit, or be under any obligation, to publish their observations. The slower mode of free speech of the professional is required to enable the faster free speech of the amateur, even if they choose not to use it.

Finally, if you pardon the Paris Métro analogy. . .

If we do not have those two speeds of free speech, justice isn't so much blind, but we stumble blindly on an unlit moving walkway. And that can only end badly.

Appendix