THE BOSTON PHOENIX

Secrecy by judicial fiat: Suppressing vital truth

BY HARVEY A. SILVERGLATE
MARCH 15, 2002

Bernard Cardinal Law has finally taken responsibility for his decades-long failure to address the problem of sexual abuse of children by priests. To keep a lid on the scandal, the Church insisted on sealing from public view the court-litigation files of the scores of lawsuits brought over the years against pedophile priests. For their parts, victims' attorneys acknowledge that their acquiescence to the impoundment of court files, while protecting their clients' identities, allowed the problem to go undetected and enabled predator priests to strike again.

However, one powerful class of culprits in this conspiracy of silence has faced no criticism: judges. Although the litigants may have made the request, it was judges who ordered these files closed. To paraphrase a popular aphorism, being a judge means never having to say "I'm sorry."

The practice of sealing files and thereby keeping the public in the dark has grown increasingly common in a variety of cases. For years, only child-custody and divorce cases, and later, cases involving trade secrets, were routinely sealed. Now the practice is widespread, albeit rarely justified, Moreover, there is virtually no reason to seal an entire litigation file — a practice that has also increased over time. In some limited circumstances, particularly sensitive testimony or private documents (such as tax returns or personal diaries) might properly be sealed, especially when they belong to a witness rather than to a party to the lawsuit. But the existence, nature, and outcome of a lawsuit should always be disclosed, even if in some cases a party is listed as "John Doe" to protect the identity of, say, a minor.

Although sealing court records is sometimes necessary, when a person claiming to have suffered abuse by someone acting in an institutional capacity enters the forum of public justice to obtain redress, and when such a defendant is hauled into court because of alleged unlawful activity, there is no justification for secrecy. Unlike the typically pedestrian transactions of a divorce or juvenile-custody proceeding, the priest sex-abuse cases represent a matter of significant and legitimate public concern.

There are other reasons for exercising extreme restraint in sealing litigation records. All too often, sealing is an unconstitutional violation of the public's right to know: public scrutiny is essential to keeping the justice system honest. Open records also help people monitor possible overreaction and false accusations stemming from a given case — the "witch hunt" mentality.

The Trial Court of Massachusetts operates under the Uniform Rules on Impoundment Procedure, which provide the following guidance for when files should be impounded: "The court shall consider all relevant factors, including, but not limited to, the nature of the parties and the controversy, the type of information and the privacy interests involved, the extent of community interest, and the reason(s) for the request. Agreement of all parties or interested third persons in favor of impoundment shall not, in itself, be sufficient to constitute good cause."

What stands out is the short shrift judges often give to "the extent of community interest." Our judicial system is open. Only in rare instances have closed trials and hearings been permitted, and even then transcripts have often been supplied after the fact. In 1948, the US Supreme Court reviewed a previously unprecedented event in American jurisprudence when a criminal-court judge closed a trial to the public. In that case, *In re Oliver*, the high court noted that it was "unable to find a single instance of a criminal trial conducted" in secret in all of American history; nor had it "found any record of even one such secret criminal trial in England since abolition of the Court of Star Chamber in 1641." Secret trials, the Court admonished, are "a menace to liberty."

So, too, are secret files of cases — both civil and criminal — that never make it to trial. Had the priest-pedophile cases gone to trial, the proceedings would, of course, have been public. Even without trial, the public interest in the accusations and legal settlements is no less pressing. Since it seems our courts cannot be trusted to use discretion in deciding when impoundment serves the public interest, the legislature should amend the sealing procedures to create a strong, explicitly stated presumption that the public has a vital interest in the business conducted in its courts.

Joshua Gewolb assisted in research for this piece.