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# MEDIA CENSORSHIP AND ACCESS TO TERRORISM TRIALS: A SOCIAL ARCHITECTURE ANALYSIS

DERIGAN SILVER\*

## I. INTRODUCTION

Although censorship, in its most basic form, deals with prior restraints on the press, because of the judiciary's traditional antipathy toward prior restraints<sup>1</sup>—even when national security information is involved<sup>2</sup>—and the ease of dissemination brought about by the Internet, preventing the media from accessing information has become an alternative to outright media “censorship.” For example, soon after the Pentagon first dealt with the dissemination of national security information via WikiLeaks,<sup>3</sup> Defense Secretary Robert Gates tightened media access to the Pentagon by requiring all department officials to notify the Department of Defense's Office of Public Affairs prior to any communication with the news media or the public.<sup>4</sup> Gates reminded government employees that revealing unclassified but “sensitive, pre-decisional or otherwise restricted information” to the press without approval was prohibited.<sup>5</sup> Similarly, recent terrorism trials have made the federal courts a battleground for access to information related to terrorism and a proxy for media censorship.

Although the U.S. Supreme Court has repeatedly found there is a First Amendment right of access to judicial proceedings for the press and the public,<sup>6</sup> the terrorist attacks of September 11, 2001 gave rise to new access controversies as the government

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1. See, e.g., *Org. for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Near v. Minnesota*, 283 U.S. 697 (1931).

2. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

3. See Stephanie Strom, *Pentagon Sees a Threat from Online Muckrakers*, N.Y. TIMES, Mar. 18, 2010, at A10.

4. Memorandum from Robert Gates, Sec'y of Def., to Deputy Sec. of Def. (July 2, 2010) (on file with author), available at [http://www.rcfp.org/news/items/docs/20100910\\_105806\\_dod\\_memo\\_2.pdf](http://www.rcfp.org/news/items/docs/20100910_105806_dod_memo_2.pdf) (regarding interactions with the media).

5. *Id.*

6. See, e.g., *Press-Enter. Co. v. Riverside County Superior Court*, 478 U.S. 1 (1986) [hereinafter *Press-Enter. II*]; *Press-Enter. Co. v. Riverside Cnty. Superior Court*, 464 U.S. 501 (1984) [hereinafter *Press-Enter. I*]; *Globe Newspaper Co. v.*

sought to close judicial proceedings and seal records in cases with connections to terrorism. The first such controversy began just ten days after the attacks when Chief Immigration Judge Michael J. Creppy issued a directive mandating closure of all "special interest" immigration hearings.<sup>7</sup> In December, 2001, a Michigan immigration judge held a closed hearing to decide if Rabih Haddad, who had overstayed his tourist visa and was suspected of having connections to al-Qaeda, could be deported. Several media organizations, along with members of Haddad's family and the public, sued, contending the closed proceeding was unconstitutional. Both a federal trial court and the U.S. Court of Appeals for the Sixth Circuit agreed that the First Amendment right of access established in *Richmond Newspapers, Inc. v. Virginia*<sup>8</sup> applied, even though the immigration hearings were not actually court proceedings but administrative, quasi-judicial proceedings. The courts held that the Creppy directive requiring blanket closure of all "special interest" hearings was unconstitutional.<sup>9</sup> A few months later, however, in a case involving closed deportation hearings in Newark, New Jersey, the Third Circuit issued a contradictory decision, ruling 2-1 that there was no constitutional right of access to such proceedings.<sup>10</sup> In 2003, the U.S. Supreme Court refused to hear an appeal in the case, thereby failing to resolve the conflict between the two circuits.<sup>11</sup>

Five years later, the Court's 2008 ruling that foreign detainees at Guantánamo Bay have the right to challenge their imprisonment in civilian courts opened the door for more battles over government secrecy.<sup>12</sup> In more than 100 cases brought as a result of the ruling, the Justice Department filed unclassified documents under seal, thereby restricting access to judges, lawyers and government officials. The secrecy, the government said, was

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Superior Court, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

7. E-mail from Michael Creppy, Chief Immigration Judge of the U.S., to all Immigration Judges (Sept. 21, 2001, 12:20 PM) (on file with author), available at <http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/aclu/creppy092101memo.pdf>. (regarding cases requiring special procedures). "Special interest" cases are those in which sensitive or national security information may be presented, including any information related to terrorist investigations.

8. 448 U.S. at 573.

9. *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 948 (E.D. Mich.), *aff'd*, 303 F.3d 681 (6th Cir. 2002).

10. *N.J. Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 538 U.S. 1056 (2003).

11. *N.J. Media Group, Inc. v. Ashcroft*, 538 U.S. 1056 (2003).

12. *Boumediene v. Bush*, 553 U.S. 723 (2008).

necessary because some unclassified documents mistakenly contained classified information. On June 1, 2009, a federal district judge ruled the wholesale sealing of unclassified documents violated the public's First Amendment and common law right of access to judicial records.<sup>13</sup> "Public interest in Guantánamo Bay generally and these proceedings specifically has been unwavering. The public's understanding of the proceedings, however, is incomplete without the factual returns. Publicly disclosing the factual returns would enlighten the citizenry and improve perceptions of the proceedings' fairness," Judge Thomas Hogan wrote.<sup>14</sup> He gave the government until July 29 to make public the unclassified documents or request continued secrecy for specific words or lines highlighted in colored marker with an explanation of why the material should be protected.<sup>15</sup>

Unfortunately, these battles have continued well into 2010. In April, a federal appeals court judge abruptly closed the courtroom just one minute after arguments began in the case of a Guantánamo Bay detainee.<sup>16</sup> The move was particularly unsettling because the detainee's representative and the Justice Department had both consented to a public hearing. In May, the Pentagon barred four reporters from reporting on the military commission proceedings at Guantánamo Bay because they published articles identifying a witness whose identity had been protected by the presiding judge, even though the witness's name had already been released to the public on multiple occasions.<sup>17</sup> Although the Pentagon recently received praise from news organizations that had protested Guantánamo policies as unduly restrictive when the Department of Defense (DOD) revised its rules for reporters covering military trials at Guantánamo,<sup>18</sup> these incidents show that the battles over access and

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13. *In re Guantánamo Bay Detainee Litig.*, 624 F. Supp. 2d 27 (D.D.C. 2009).

14. *Id.* at 37.

15. *Id.* at 34. See also *Parhat v. Gates*, 532 F.3d 834, 853 (D.C. Cir. 2008) (ordering the government to "specifically explain[] why protected status is required for the information" it sought to keep secret).

16. See Nadia Tamez-Robledo, *D.C. Appeals Court Suddenly Closes Guantánamo Detainee Hearing*, REPS. COMMITTEE FOR FREEDOM PRESS (Apr. 5, 2010), <http://www.rcfp.org/newsitems/index.php?i=11353>.

17. See Jeff Stein, *Papers Protest Reporters' Ejection From Guantánamo*, WASH. POST SPY TALK (May 6, 2010), [http://blog.washingtonpost.com/spy-talk/2010/05/papers\\_protest\\_reporters\\_eject.html](http://blog.washingtonpost.com/spy-talk/2010/05/papers_protest_reporters_eject.html).

18. See Rosemary Lane, *Pentagon Relaxes Reporter Guidelines at Guantánamo Bay*, REPS. COMMITTEE FOR FREEDOM PRESS, (Sept. 14, 2010, 6:19 PM), <http://www.rcfp.org/newsitems/index.php?i=11555> (noting that new guidelines allowed media organizations to use edited photos and videos, narrowed the definition of "protected information," and provided for an appeals process in

media censorship are far from settled. In addition, they raise numerous important questions about the balance of power between the government, the people and the press in the United States of America.

This Article contends that using the social architecture metaphor—which focuses on how the law creates and distributes power between groups—is particularly well suited to understanding the importance of access to the trials of terrorist suspects. Specifically, the article argues it is important that the “architecture of power”<sup>19</sup> created by the U.S. Supreme Court in cases that have provided for a First Amendment right of access to criminal trials not be replaced with an architecture that more closely resembles cases that have dealt with access to national security information and locations. In these cases, rather than decide cases by focusing on the societal benefits of open government, courts have typically focused on the individual facts of each case without an eye toward the larger social architecture the decisions create. This article posits that an architecture of presumptive access that still allows for a case-by-case closure—as opposed to an architecture of presumptive secrecy with case-by-case disclosure—is consistent with the original architecture of the Constitution and First Amendment and advances trust in the government as it fights terrorism.

Part II discusses social architecture theory and the law, with a focus on how the theory has been applied to cases involving access to government information. Part III examines the social architecture of the Supreme Court’s rulings in cases that have established a First Amendment right of access to judicial proceedings. Part IV describes cases in which courts have considered a First Amendment right of access to national security information and locations and the architecture—or lack of architecture—created by these cases.<sup>20</sup> Part V argues that if this architecture is applied to terrorism trials, it will breed distrust of the government and its handling of terrorism and undermine the independence of the judiciary. In addition, it argues that limit-

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which organizations could challenge decisions to classify information as “protected”). See also U.S. DEP’T OF DEF., MEDIA GROUND RULES FOR GUANTÁNAMO BAY, CUBA (Sept. 10, 2010), <http://www.defense.gov/news/d20100910groundrules.pdf> [hereinafter GUANTÁNAMO MEDIA GROUND RULES].

19. Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083, 1087 n.19 (2002) (the term “architecture of power” refers to a “particular power structure [created] . . . by the law.”).

20. Because the Supreme Court has considered so few cases dealing with access to national security information, this section discusses both Supreme Court cases and lower court cases dealing with a First Amendment based right of access.

ing access to these proceedings is unnecessary because of the allowance for case-by-case closure and the ability of federal judges to use the Classified Information Procedures Act (CIPA),<sup>21</sup> which is designed to protect national security information during federal criminal proceedings. Finally, this Article contends that through the use of proper public policy, such as the Pentagon's new guidelines, judicial decisions and statutory law, such as CIPA, the architecture established by the Constitution, the First Amendment and the Court's judicial access jurisprudence can be used to reinforce the public's right to know about the prosecution of terrorists, advance the press' ability to report on matters of public concern and strengthen the independence of the judiciary.

## II. SOCIAL ARCHITECTURE THEORY AND THE LAW

Several authors have used the social architecture metaphor to "emphasize that legal and social structures are products of design"<sup>22</sup> and judicial decisions create architectures of power that can determine who controls information. Applying the concept to privacy law, Daniel J. Solove, one of the first scholars to apply the term "social architecture" to refer to the social structures created by law,<sup>23</sup> wrote that the metaphor captures how the law structures social control and freedom in a society.<sup>24</sup> Just as the architecture of a building can be designed to determine how people interact,<sup>25</sup> Solove and others suggest that social architecture can be designed by law to determine how groups interact in society.<sup>26</sup> Legal and computer science scholar Barbara van Schewick wrote, "Just as the architecture of a house describes its basic inner structure, the architecture of a complex system describes the basic inner structure of the system."<sup>27</sup> The term "architecture" has been used to describe how computer code can

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21. 18 U.S.C. app. 3 §§ 1-16 (2006).

22. Daniel J. Solove, *Identity Theft, Privacy, and the Architecture of Vulnerability*, 54 HASTINGS L.J. 1227, 1239 (2003).

23. Solove credited Lawrence Lessig and Joel R. Reidenberg for the idea that architecture refers to more than the design of physical spaces. See Solove, *supra* note 19, at 1087 n.19; Solove, *supra* note 22 at 1239.

24. Solove, *supra* note 22, at 1239.

25. See generally THOMAS A. MARKUS, BUILDINGS AND POWER: FREEDOM AND CONTROL IN THE ORIGIN OF MODERN BUILDING TYPES (1993) (describing how architecture can be used to influence social structure); Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039 (2002) (describing how the way that neighborhoods and buildings are designed can affect criminal behavior).

26. Solove, *supra* note 22, at 1239.

27. BARBARA VAN SCHEWICK, INTERNET ARCHITECTURE AND INNOVATION 3 (2010).

determine whether the Internet is a vehicle for freedom of expression or an instrument of control,<sup>28</sup> to examine judicial behavior in a collegial context by exploring how judicial behavior is impacted by socially prominent and proximate jurists,<sup>29</sup> and to analyze the public policy and technological foundations of telecommunication and Internet companies and technologies that promote the dissemination of information by private citizens.<sup>30</sup>

Recently, social architecture theory has also been applied to laws governing access to government information,<sup>31</sup> congressional deliberations regarding a federal shield law,<sup>32</sup> and the power relationships created by cases dealing with national security information.<sup>33</sup> Professor Cathy Packer wrote that law is both the means and the product of a construction process and that legal analysis that goes beyond discussing individual cases by examining the architecture they create “brings a much clearer understanding of the impact of and solutions for a variety of legal problems.”<sup>34</sup> The key idea behind the social architecture metaphor is that creating an architecture of power is about “the common good as much as it is about individual rights.”<sup>35</sup> Packer wrote that when courts discuss the distribution of power between groups they are actively creating architecture, whether they acknowledge it or not, in addition to deciding individual cases. For example, Packer wrote, “[O]ne of the clearest examples of a court constructing social architecture” is *New York Times v. Sulli-*

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28. See, e.g., LAWRENCE LESSIG, *CODE 2.0*, at 2 (2006); SCHEWICK, *supra* note 27, at 3; Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy and Rules Through Technology*, 76 *TEX. L. REV.* 553, 553–55 (1998); Joel R. Reidenberg, *Rules for the Road for Global Electronic Highways: Merging Trade and Technical Paradigms*, 6 *HARV. J.L. & TECH.* 287, 296 (1999); Timothy Wu, *Network Neutrality, Broadband Discrimination*, 2 *J. ON TELECOMM. & HIGH TECH. L.* 141 (2003).

29. See Daniel M. Katz, Derek K. Stafford, & Eric Provins, *Social Architecture, Judicial Peer Effects and the Evolution of the Law: Toward a Positive Theory of Judicial Social Structure*, 24 *GA. ST. U. L. REV.* 977 (2008).

30. See Jack M. Balkin, *Media Access: A Question of Design*, 76 *GEO. WASH. L. REV.* 933 (2008).

31. See Cathy Packer, *Don't Even Ask! A Two-Level Analysis of Government Lawsuits Against Citizen and Media Access Requestors*, 13 *COMM. L. & POL'Y* 29 (2008).

32. See Cathy Packer, *The Politics of Power: A Social Architecture Analysis of the 2005–2008 Federal Shield Law Debate in Congress*, 31 *HASTINGS COMM. & ENT. L.J.* 395 (2009).

33. See Derigan Silver, *Power, National Security and Transparency: Judicial Decision Making and Social Architecture in the Federal Courts*, 15 *COMM. L. & POL'Y* 129 (2010).

34. Packer, *supra* note 31, at 39.

35. Solove, *supra* note 19, at 1116.

*van*,<sup>36</sup> in which “the Court empowered the media to scrutinize the behavior of government officials by creating a constitutional defense against libel suits filed by public officials.”<sup>37</sup> According to Packer, “[T]he social architecture created by *Sullivan* tipped the balance of power toward government critics and away from government officials.”<sup>38</sup> Professor Jack Balkin, on the other hand, noted that *Sullivan* was just as important in that it created architecture that favored “powerful media organizations” increasing their private power without necessarily granting any power to private citizens.<sup>39</sup> Thus, the case is so important because it created an architecture of power that went beyond the protection of an individual right and created an architecture of power between the press and the government as well as between the press and the people.

In addition to providing a metaphor for how law structures the power relationship between individuals or groups and the government, social architecture theory is an excellent conceptual framework for examining how power is distributed among the branches of government. In this way, social architecture is simply a new way to describe the important concept of separation of power outlined by individuals such as James Madison, who wrote at length about the distribution of power in *The Federalist*.<sup>40</sup> As Packer noted, “While the social architecture metaphor is new in the law, the idea that law distributes power” was a key issue for the Framers of the Constitution.<sup>41</sup> In addition, political scientists have noted that the power structures established by the Constitution are the beginning of the process, rather than the end. For example, although they did not use the term social architecture, basing their analysis on the strategic account of judicial decision-making, Lee Epstein and Jack Knight wrote that members of the

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36. 376 U.S. 254 (1964).

37. Packer, *supra* note 31, at 33 n.23.

38. Packer, *supra* note 32, at 404.

39. Balkin, *supra* note 30, at 943. It is important to note that lower courts continue to struggle with who should receive protection in defamation cases. Although *Sullivan* focused on the identity of the plaintiff in a defamation suit and a later Supreme Court case, *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), focused on the subject matter of the defamatory statement, due to dicta in multiple Supreme Court opinions some lower courts still focus on the identity of the *defendant* in defamation cases. These courts continue to hold that private citizens are not granted the same level of protection—or architecture of power—as media defendants when sued for defamatory statements. See Ruth Walden & Derigan Silver, *Deciphering Dun & Bradstreet: Does the First Amendment Matter in Private Figure-Private Concern Defamation Cases?*, 14 COMM. L. & POL'Y 1, 31–34 (2009).

40. See THE FEDERALIST NOS. 47, 48, 51 (James Madison).

41. Packer, *supra* note 32, at 398.

judiciary must actively balance their desires with the powers and desires of other government institutions.<sup>42</sup> They argued that judges must be strategic actors who consider the preferences of other actors and the institutional context in which they act. According to this line of reasoning, judges must be cognizant of the power structure that exists between the branches of government and behave strategically when making decisions that alter or affect that architecture.

### III. ACCESS TO THE COURTS

#### A. *Supreme Court Cases*

The U.S. Supreme Court has found that the First Amendment guarantees a broad right of access to criminal judicial proceedings and documents. It is important to note, however, that the Court did not initially frame access to the judiciary as a First Amendment issue. Although the Court addressed judicial secrecy in a number of cases between 1947 and 1966,<sup>43</sup> the Court discussed access in terms of the Sixth Amendment, not the First, and said the Sixth Amendment right to a public trial belonged to the accused, rather than the public or the press.<sup>44</sup> For example, in a 1979 case involving a pretrial evidence suppression hearing, the Court wrote, "The Constitution nowhere mentions any right of access to a criminal trial on the part of the public; its guarantee, like the others enumerated, is personal to the accused."<sup>45</sup>

In 1978, the Court considered a right of access to judicial documents in *Nixon v. Warner Communications, Inc.*,<sup>46</sup> when television networks appealed an order of the U.S. District Court for

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42. See LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 10 (1998). See also Robert Lowry Clinton, *Game Theory, Legal History, and the Origins of Judicial Review: A Revisionist Analysis of Marbury v. Madison*, 38 AM. J. POLI. SCI. 285 (1994); Lori Hausegger & Lawrence Baum, *Inviting Congressional Action: A Study of Supreme Court Motivations in Statutory Interpretation*, 43 AM. J. POLI. SCI. 162 (1999); Jack Knight & Lee Epstein, *On the Struggle for Judicial Supremacy*, 30 LAW & SOC'Y REV. 87 (1996).

43. See, e.g., *Sheppard v. Maxwell*, 384 U.S. 333, 349-50 (1966) (stating that the Supreme Court has traditionally been unwilling to place direct limitations on the freedom of the news media to report on courtroom proceedings); *Estes v. Texas*, 381 U.S. 532, 538-39 (1965) (discussing the importance of public trials); *In re Oliver*, 333 U.S. 257, 268-69 (1948) (discussing the "Anglo-American distrust for secret trials"); *Craig v. Harney*, 331 U.S. 367, 374 (1947) ("A trial is a public event. What transpires in the court room is public property.").

44. See, e.g., *In re Oliver*, 333 U.S. at 266-68 (discussing the purpose of the Sixth Amendment).

45. *Gannett Co. v. DePasquale*, 443 U.S. 368, 379-80 (1979).

46. 435 U.S. 589 (1978).

the District of Columbia that held that the networks could not make copies of tape recordings made by the Nixon administration and introduced into evidence at the Watergate criminal trials. Although the Court acknowledged a common law right of access to documents in the possession of the judiciary,<sup>47</sup> instead of framing the question in terms of access, the Court ducked the question of a right of access and took a position that was not argued by either side or contained in any brief.<sup>48</sup> Instead of ruling on the existence of a right of access, the Court held that the release of the records would ultimately be controlled by the Presidential Recordings Act.<sup>49</sup> Writing for the Court, Justice Lewis F. Powell, Jr. justified this rationale by relying on a textual analysis of the Act<sup>50</sup> and the reasoning that courts were not as well equipped to handle the details of access to presidential records as were the other two branches of government.<sup>51</sup> The Court failed to address any of the major legal issues raised by either side in a meaningful way, dismissing any access arguments in one short section by citing *Saxbe v. Washington Post Co.*, *Pell v. Procunier* and *Zemel* for the proposition that the press had no greater rights of access than the public.<sup>52</sup>

One year later, in *Gannett Co. v. DePasquale*,<sup>53</sup> the Court once again dismissed the First Amendment claims of the press, focusing on the Sixth Amendment instead. *Gannett* involved the closure of a courtroom during a pretrial hearing to suppress evidence in a murder case.<sup>54</sup> Although the trial judge indicated there was a constitutional right of access to judicial proceedings, he concluded that such a right had to be balanced with the

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47. *Id.* at 597.

48. *Id.* at 602–03 (“At this point, we normally would be faced with the task of weighing the interests advanced by the parties in light of the public interest and the duty of the courts. . . . We need not decide how the balance would be struck if the case were resolved only on the basis of the facts and arguments reviewed above. There is in this case an additional, unique element that was neither advanced by the parties nor given appropriate consideration by the courts below.”).

49. *Id.* at 603. The Presidential Recordings Act is currently codified at 44 U.S.C. §§ 2201–2207 (2006).

50. *Nixon*, 435 U.S. at 603 n.15. Both sides argued that the Act did not apply to the records. The Court quoted from the text of the Act to support its ruling that it did.

51. *Id.* at 606.

52. *Id.* at 608–10 (citing *Estes v. Texas*, 381 U.S. 532, 589 (1965) (Harlan, J., concurring); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974); *Zemel v. Rusk*, 381 U.S. 1, 16–17 (1965)).

53. 443 U.S. 368 (1979).

54. *Id.* at 375.

accused's right to a fair trial.<sup>55</sup> Relying upon *In re Oliver*<sup>56</sup> and *Estes v. Texas*<sup>57</sup> to support its argument, the Court ruled that the "constitutional guarantee of a public trial is for the benefit of the accused."<sup>58</sup> Although Justice Potter Stewart's majority opinion discussed the need for transparency in a democracy,<sup>59</sup> ultimately Stewart concluded that "[r]ecognition of an independent public interest in the enforcement of Sixth Amendment guarantees is a far cry . . . from the creation of a constitutional right on the part of the public."<sup>60</sup> Stewart avoided discussing *Gannett's* claim that the order violated the First Amendment by noting even if there was such a right,<sup>61</sup> the trial judge had already dealt with the issue by weighing the competing societal interests involved.<sup>62</sup>

Despite these rulings, in 1980—just one year after *Gannett*—the Court limited the ability of judges to bar the public from attending trials based on the First Amendment in *Richmond Newspapers, Inc. v. Virginia*<sup>63</sup> and began the process of creating an architecture of presumptive access. *Richmond* began when a judge ordered a courtroom closed during a murder trial.<sup>64</sup> Although the trial was over, in a seven-to-one decision that produced seven different opinions, the Court reversed the order for closure, holding that the First Amendment prohibited closing a criminal trial to the public "[a]bsent an overriding interest articulated in findings."<sup>65</sup>

The various opinions in *Richmond* focused heavily on historical and structural/functional analyses of the First Amendment's role in self-governance. In part, *Gannett* explains this—because the Court had just ruled the previous term there was no constitutional right of access to trials under the Sixth Amendment, the justices had to distinguish *Richmond* by finding a right of access in

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55. *Id.* at 392–93.

56. 333 U.S. 257 (1948).

57. 381 U.S. 532 (1965).

58. *Gannett*, 443 U.S. at 381.

59. *Id.* at 383.

60. *Id.* Furthermore, the Court noted that even if there had been a common law right to attend trials that was intended to be incorporated by the Sixth Amendment, there was certainly no evidence there had ever been a common law right to attend pretrial hearings. *Id.* at 387–89.

61. *Id.* at 392. ("We need not decide in the abstract, however, whether there is any such constitutional right. For even assuming, *arguendo*, that the First and Fourteenth Amendments may guarantee such access in some situations, a question we do not decide, this putative right was given all appropriate deference by the state *nisi prius* court in the present case.")

62. *Id.* at 392–93.

63. 448 U.S. 555 (1980).

64. *Id.* at 559.

65. *Id.* at 581.

the First Amendment. Although Chief Justice Warren Burger's plurality opinion distinguished *Richmond* from *Gannett* because it dealt with *trials* as opposed to *pretrial hearings*,<sup>66</sup> as Justice Harry Blackmun pointed out in his concurring opinion, the *Gannett* majority wrote twelve separate times that its opinion applied "to the *trial* itself."<sup>67</sup> Thus, as Justice Byron White noted in his concurring opinion, because of *Gannett* the Court was "required" to make *Richmond* a First Amendment case.<sup>68</sup>

Chief Justice Burger's plurality spent ten pages discussing "the history of criminal trials being presumptively open" and the benefits openness brings to society.<sup>69</sup> Considering the benefits of transparency, Burger wrote that "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."<sup>70</sup> Justice William Brennan's concurring opinion also delved deeply into historical analysis, examining the "legacy of open justice" to conclude that "[a]s a matter of law and virtually immemorial custom, public trials have been the essentially unwavering rule in ancestral England and in our own Nation."<sup>71</sup>

Chief Justice Burger's plurality also included a functional analysis of the First Amendment, discussing the "right of access," the "right to gather information," and the "right to receive information and ideas," all rights he found in the First Amendment.<sup>72</sup> Burger went on to examine "constitutional structure" and the Framers' intent, reasoning that even though the Constitution contained no provision explicitly guaranteeing the right to attend criminal trials, the Court had recognized that some unenumerated fundamental rights were "indispensable to the enjoyment of rights explicitly defined."<sup>73</sup>

Justice Brennan's concurrence also discussed democratic theory, the structural benefits of openness to society,<sup>74</sup> how dif-

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66. *Id.* at 564.

67. *Id.* at 601-02 (Blackmun, J., concurring).

68. *Id.* at 581-82 (White, J., concurring) ("This case would have been unnecessary had [*Gannett*] construed the Sixth Amendment to forbid excluding the public from criminal proceedings except in narrowly defined circumstances. But the Court there rejected the submission of four of us to this effect, thus *requiring* that the First Amendment issue involved here be addressed." (emphasis added)).

69. *Id.* at 564-75 (plurality).

70. *Id.* at 572.

71. *Id.* at 590-93 (Brennan, J., concurring).

72. *Id.* at 576 (plurality). Ultimately, Burger concluded it was not crucial how the right was described. *Id.*

73. *Id.* at 580.

74. *Id.* at 593-97 (Brennan, J., concurring).

ferent First Amendment theories or values might support a right of access, and the "countervailing interests" that might justify restricting access.<sup>75</sup> While Justice John Paul Stevens also discussed how to balance access and other interests,<sup>76</sup> he wrote that the case represented a landmark First Amendment decision that newsgathering was protected. Stevens wrote: "This is a watershed case. Until today the Court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever."<sup>77</sup> Importantly, Justice Stevens' opinion suggested the case was about a broad right of access that included—but might not be limited to—access to the judiciary,<sup>78</sup> a fact that would later be discussed by several cases dealing with access to national security information.

Two years after *Richmond*, the Court continued to expand access to the judiciary based on the First Amendment. In *Globe Newspaper Co. v. Superior Court*<sup>79</sup> the Court held unconstitutional a Massachusetts statute<sup>80</sup> that had been construed as requiring trial judges to exclude the press and public from trials for sexual offenses involving a victim under the age of 18 during the testimony of the victim. Writing for the six-to-three majority, Justice Brennan held that a court could only deny the constitutional right of access to trials on a case-by-case basis when the denial was necessary to advance a compelling governmental interest and was narrowly tailored to serve that interest.<sup>81</sup>

In *Globe*, Brennan elaborated on the structural benefits transparency brings. Although Brennan was quick to acknowledge that the right of access to the judiciary was not explicitly mentioned in the First Amendment, he relied on the Framers' intent to support his claim that there was a broad constitutional right of access. He wrote:

[T]he Framers were concerned with broad principles, and wrote against a background of shared values and practices. The First Amendment is thus broad enough to encompass those rights that, while not unambiguously enumerated in

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75. *Id.* at 597-600.

76. *Id.* at 583 (Stevens, J., concurring).

77. *Id.* at 582.

78. *Id.* at 584 ("[T]he First Amendment protects the public and the press from abridgment of their rights of access to information about the operation of their government").

79. 457 U.S. 596 (1982).

80. MASS. GEN. LAWS ANN., ch. 278, § 16A (West 1981).

81. *Globe*, 457 U.S. at 607.

the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights.<sup>82</sup>

Brennan went on to cite and quote previous decisions that supported the idea that a right of access was protected by the First Amendment because access was necessary to protect the free flow of information about government in order to ensure the proper functioning of a democratic society.<sup>83</sup> Brennan also wrote that the right of access was protected by the Amendment both because of the history of open judicial proceedings and the "particularly significant role" a right of access to the judiciary "play[ed] . . . in the functioning of the judicial process and the government as a whole."<sup>84</sup> Thus, like Stevens' concurring opinion in *Richmond*, Brennan's language suggested that access to the judiciary was just one part of a broader constitutional right of access.

The Court continued to expand access to courtrooms in the 1980s, consistently deciding the cases based on a First Amendment right of access, or at least a need to balance access with the proper functioning of the judicial system. In 1984, in *Press-Enterprise Co. v. Riverside County Superior Court (Press-Enterprise I)*,<sup>85</sup> the Court ruled that as an integral part of a criminal trial, jury selection was subject to the First Amendment presumption of openness. In the opinion of the Court, Burger used both the historical arguments<sup>86</sup> he articulated in previous cases and Brennan's discussion of the structural benefits openness brings to the justice system.<sup>87</sup> Perhaps the most detailed First Amendment argument came in Justice Stevens' concurring opinion. Once again, the language of Stevens' opinion was not limited to the benefits of transparency in the judicial process. Returning to his focus on democratic theory and the benefits of open government, Stevens wrote that access to the judiciary was simply a part of a greater right of access to information held by the government.<sup>88</sup>

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82. *Id.* at 604.

83. *Id.* at 604–05 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966), and citing *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940); *Richmond*, 448 U.S. at 587–88 (Brennan, J., concurring); *id.* at 575 (plurality) (the "expressly guaranteed freedoms" of the First Amendment "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government").

84. *Id.* at 606.

85. 464 U.S. 501 (1984).

86. *Id.* at 506–08.

87. *Id.* at 508–10.

88. *Id.* at 517 (Stevens, J., concurring) (quoting *Richmond*, 448 U.S. at 575 (plurality opinion); *id.* at 584 (Stevens, J., concurring)). In addition, Stevens

In 1986, in *Press Enterprise v. Riverside County Superior Court* (*Press-Enterprise II*),<sup>89</sup> the Court held that a First Amendment-based presumption of openness extended to criminal pretrial hearings as well. Writing for the majority once again, Chief Justice Burger used both historical and structural arguments to establish a test for deciding when a particular type of judicial proceeding was presumptively open. Under the so-called "experience and logic" test, if a court proceeding was traditionally open to the public and "public access play[ed] a significant positive role in the functioning of the particular process in question," the proceeding was presumptively open to the public.<sup>90</sup>

Interestingly, using historical analysis and First Amendment theory to support his arguments, Justice Stevens dissented. Although Stevens again clearly stated his belief that "a proper construction of the First Amendment embraces a right of access to information about the conduct of public affairs,"<sup>91</sup> he disagreed that preliminary hearings in criminal trials should be open. Citing his own dissent in *Globe* as well as his own concurring opinion in *Richmond*, Stevens wrote, "[T]he freedom to obtain information that the government has a legitimate interest in not disclosing . . . is far narrower than the freedom to disseminate information, which is 'virtually absolute' in most contexts."<sup>92</sup> Stevens contended that the majority's historical analysis did not support a constitutional right of access because Burger's discussion focused on common law access<sup>93</sup> while its structural analysis would go too far, requiring almost all judicial proceedings, including civil and grand jury proceedings, to be open to the public.<sup>94</sup> Although Stevens reaffirmed his belief in a constitutional right of access, he wrote that in the situation at hand, "The constitutionally grounded fair trial interests of the accused if he is bound over for trial, and the reputation interests of the accused if he is not, provide a substantial reason for delaying access to the transcript for at least the short time before trial."<sup>95</sup>

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cited two cases, *Zemel v. Rusk*, 381 U.S. 1, 17 (1966) and *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972), in which, according to Stevens, the Court had "implicitly endorsed" a right of access.

89. 478 U.S. 1 (1986).

90. *Id.* at 8.

91. *Id.* at 18 (Stevens, J., dissenting).

92. *Id.* at 20.

93. *Id.* at 24-25.

94. *Id.* at 26-28.

95. *Id.* at 29.

#### IV. ACCESS TO NATIONAL SECURITY INFORMATION AND LOCATIONS

##### A. *Supreme Court Cases*

Although there is evidence that military documents were marked “secret” as early as the Revolutionary War, the official system that controls classified information in the United States traces its origins to an executive order<sup>96</sup> issued by Franklin D. Roosevelt in March 1940.<sup>97</sup> The system was modified shortly after the conclusion of World War II,<sup>98</sup> and important changes came again in an executive order issued in September 1951.<sup>99</sup> Nineteen years after President Roosevelt created the modern classification system, the Supreme Court first reviewed the executive’s ability to classify national security information in a case involving the government’s revocation of a civilian contractor’s security clearance in *Greene v. McElroy*.<sup>100</sup> Although on the surface the case was not about access to national security information, an important dissent in the case made it the first time a member of the Supreme Court wrote about the power of the executive branch to prevent access to national security information.

In 1951, William L. Greene was vice president and general manager of Engineering and Research Corporation (ERCO), a company that developed and manufactured various mechanical and electronic products for the armed forces.<sup>101</sup> While working on classified projects, Greene was denied a renewal of his security clearance based on information indicating he had associated with Communists, visited officials of the Russian Embassy, and

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96. Exec. Order No. 8,381, 3 C.F.R. 634 (1938–1943).

97. HAROLD C. RELYEA, CONG. RES. SERVICE, SECURITY CLASSIFIED AND CONTROLLED INFORMATION: HISTORY, STATUS, AND EMERGING MANAGEMENT ISSUES 2 (2008), <http://www.fas.org/sgp/crs/secrecy/RL33494.pdf>.

98. Exec. Order No. 10,104, 3 C.F.R. 299 (1949–1953), *reprinted as amended in* 18 U.S.C. § 795 (1970).

99. Exec. Order No. 10,290, 3 C.F.R. 789 (1949–1953). There were three “sweeping innovations” introduced in Executive Order 10,290. First, because the order indicated the Chief Executive was relying upon “the authority vested in [him] by the Constitution and statutes, and as President of the United States,” it strengthened the President’s discretion to make official secrecy policy. Second, information was now classified in the interest of “national security” rather than in the interest of “national defense.” Finally, the order extended classification authority to nonmilitary entities throughout the executive branch so long as they had “some role in ‘national security’ policy.” See RELYEA, *supra* note 97, at 3. For a discussion of the evolution of the ability to classify information from 1953 to 2008, see *id.* at 3–5.

100. *Greene v. McElroy*, 360 U.S. 474 (1959).

101. *Id.* at 475.

attended a dinner given by an allegedly Communist front organization.<sup>102</sup> Although the court of appeals recognized that Greene had suffered substantial harm from having his security clearance revoked, it held that Greene's suit presented no justiciable controversy. That is, the court held there was no controversy present "which the courts can finally and effectively decide, under tests and standards which they can soundly administer within their special field of competence."<sup>103</sup> The court concluded the executive branch alone was responsible for the classification of national security information.<sup>104</sup>

Although the case presented issues related to the inherent powers of Congress and the President to control national security information, avoiding the larger issues presented by the case, the Supreme Court identified the principle question of law as whether Greene had been denied due process. In an opinion by Chief Justice Earl Warren, the Court validated Greene's claim that the DOD had "denied him 'liberty' and 'property' without 'due process of law' in contravention of the Fifth Amendment."<sup>105</sup> The Court held that without explicit authorization from either the President or Congress, the DOD was not empowered to create a security clearance program "under which affected persons may lose their jobs and may be restrained in following their chosen professions on the basis of fact determinations concerning their fitness for clearance made in proceedings in which they are denied the traditional procedural safeguards of confrontation and cross-examination."<sup>106</sup> Thus, the majority was very clear that it was steering away from legal questions of access and executive power.<sup>107</sup>

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102. *Id.* at 478.

103. *Greene v. McElroy*, 254 F.2d 944, 953 (D.C. Cir. 1958) ("Greene makes no claim of lack of compliance by the Government with its own regulations. He attacks the Secretary's decision on its merits and as a matter of constitutional right. But for a court to hear de novo the evidence as to Greene's fitness to be assigned to a particular kind of confidential work would be a bootless task, involving judgments remote from the experience and competence of the judiciary.")

104. *Id.* ("[A]ny meaningful judgment in such matters must rest on considerations of policy, and decisions as to comparative risks, appropriate only to the executive branch of the Government. It must rest also on a mass of information, much of it secret, not appropriate for judicial appraisal." (citing *Dayton v. Dulles*, 254 F.2d 71 (D.C. Cir. 1958), *rev'd on other grounds*, 357 U.S. 144 (1958))).

105. *Greene*, 360 U.S. at 492.

106. *Id.* at 493.

107. *See id.* at 508 (reiterating that the Court was not deciding "whether the President has inherent authority" to create a program that suspended due

Justice Tom C. Clark, however, wrote an important dissenting opinion, which argued the case presented a “clear and simple” legal question: was there a constitutional right of access to government information?<sup>108</sup> Taking this characterization of the case directly from the Solicitor General’s brief,<sup>109</sup> Clark was critical of the majority’s narrowing of the issue as well as its reasoning. He argued that the Court was ignoring “the basic consideration in the case . . . that no person, save the President, has a constitutional right to access to governmental secrets.”<sup>110</sup> Clark wrote that although the majority’s opinion *claimed* to avoid answering the constitutional question of the executive branch’s ability to classify information, its decision was actually establishing a dangerous precedent during a dangerous time. Alluding to the Cold War, Clark wrote that the Court’s decision to strike down the program “for lack of specific authorization” was “indeed strange, and hard for me to understand at this critical time of national emergency.”<sup>111</sup> In addition, although the majority opinion never mentioned a “right of access” and Clark’s dissent did not specifically mention a First Amendment right of access to government information, Clark concluded that the majority opinion would be read to guarantee some sort of broad right of access in the future.<sup>112</sup>

In *Zemel v. Rusk*, a case which would later be cited by a number of access cases, the Court was asked to determine if Louis Zemel had a First Amendment right to travel to Cuba in order to “satisfy [his] curiosity about the state of affairs in Cuba and make [himself] a better informed citizen.”<sup>113</sup> In 1962, roughly one year after the United States broke diplomatic ties with Cuba and declared U.S. passports invalid for travel to Cuba “unless specifically endorsed for such travel under the authority of the Secretary of State,”<sup>114</sup> Zemel filed a suit seeking a judgment declaring that he was “entitled under the Constitution and laws of the

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process, “whether congressional action” was necessary to create such a program, or even “what the limits on executive or legislative authority may be”).

108. *Id.* at 510–11 (Clark, J., dissenting).

109. *Id.* at 511 n.1 (“My brother Harlan very kindly credits me with ‘colorful characterization’ in stating this as the issue. While I take great pride in authorship, I must say that in this instance I merely agreed with the statement of the issue by the Solicitor General and his co-counsel in five different places in the Brief for the United States.”).

110. *Id.* at 513.

111. *Id.* at 515.

112. *Id.* at 524.

113. 381 U.S. 1, 4 (1965).

114. *Id.* at 3.

United States to travel to Cuba and to have his passport validated for that purpose."<sup>115</sup>

Although the Court acknowledged that banning travel to Cuba and "the Secretary's refusal to validate passports for Cuba renders less than wholly free the flow of information concerning that country," it refused to acknowledge the existence of a First Amendment issue.<sup>116</sup> Instead, relying on a First Amendment theory that did not embrace newsgathering, the Court concluded, "The right to speak and publish does not carry with it the unrestrained right to *gather* information."<sup>117</sup>

While the majority did not agree there was a First Amendment issue at stake, a dissent authored by Justice William O. Douglas and joined by Justice Arthur Goldberg identified a "peripheral" First Amendment issue presented by the case. Relying on *Kent v. Dulles*,<sup>118</sup> Douglas concluded the Court had already established that the right to travel both at home and overseas was protected by the Constitution.<sup>119</sup> Delving deeper into First Amendment theory, Douglas used a classic marketplace of ideas approach to support his contention that although the Secretary could prevent travel to dangerous locations, Cuba did not qualify as such a location.

[T]he only so-called danger present here is the Communist regime in Cuba. The world, however, is filled with Communist thought; and Communist regimes are on more than one continent. They are part of the world spectrum;

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115. *Id.* at 4.

116. *Id.* at 16-17. ("We must agree that the Secretary's refusal to validate passports for Cuba renders less than wholly free the flow of information concerning that country. While we further agree that this is a factor to be considered in determining whether appellant has been denied due process of law, we cannot accept the contention of appellant that it is a First Amendment right which is involved. For to the extent that the Secretary's refusal to validate passports for Cuba acts as an inhibition (and it would be unrealistic to assume that it does not), it is an inhibition of action. There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow.")

117. *Id.* at 17 (emphasis added).

118. 357 U.S. 116 (1958).

119. *Zemel*, 381 U.S. at 23-24 (Douglas, J., dissenting) ("We held in *Kent v. Dulles* that the right to travel overseas, as well as at home, was part of the citizen's liberty under the Fifth Amendment. That conclusion was not an esoteric one drawn from the blue. It reflected a judgment as to the peripheral rights of the citizen under the First Amendment. The right to know, to converse with others, to consult with them, to observe social, physical, political and other phenomena abroad as well as at home gives meaning and substance to freedom of expression and freedom of the press.")

and if we are to know them and understand them, we must mingle with them . . . .

The First Amendment presupposes a mature people, not afraid of ideas. The First Amendment leaves no room for the official, whether truculent or benign, to say nay or yea because the ideas offend or please him or because he believes some political objective is served by keeping the citizen at home or letting him go.<sup>120</sup>

Douglas concluded his opinion: "Restrictions on the right to travel in times of peace should be so particularized that a First Amendment right is not precluded unless some clear countervailing national interest stands in the way of its assertion."<sup>121</sup>

In 1988, a majority opinion finally addressed a right of access when the Court, in *Department of Navy v. Egan*,<sup>122</sup> ruled that it was solely the executive's role to classify and protect information and make decisions about access to national security information. In 1983, Thomas M. Egan lost his position at the Trident Naval Refit Facility in Bremerton, Washington when he was denied a required security clearance.<sup>123</sup> Egan appealed the decision to the Merit Systems Protection Board as provided by the section of the U.S. Code under which he was dismissed.<sup>124</sup> Although Egan initially won his appeal to the head of the Board, after the full Board ruled it had no power to review security clearance decisions, he appealed to the Court of Appeals for the Federal Circuit. The court of appeals, by a divided vote, reversed the full Board's decision that the Board had no authority to review the merits of a security-clearance decision.<sup>125</sup>

Identifying two legal issues presented—the right of access to information and the power of the executive branch—in a five-to-three decision, the Court reversed. Justice Blackmun's majority opinion began by noting, "It should be obvious that no one has a 'right' to a security clearance."<sup>126</sup> Blackmun wrote that although the statutory language of § 7513, which granted the power to review employment decisions to the Board was important, the

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120. *Id.* at 25–26.

121. *Id.* at 26.

122. 484 U.S. 518 (1988).

123. *Id.* at 520. Egan was denied clearance based upon California and Washington state criminal records for assault and being a felon in possession of a gun and for his failure to disclose on his application for federal employment two earlier convictions for carrying a loaded firearm. *Id.* at 521.

124. 5 U.S.C. § 7513 (1982).

125. *Egan v. Dep't of Navy*, 802 F.2d 1563 (Fed. Cir. 1986).

126. *Egan*, 484 U.S. at 528.

statute did not fundamentally alter the power of the executive under the Constitution to control national security information:

The President, after all, is the Commander in Chief of the Army and Navy of the United States. His authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant.<sup>127</sup>

Next, Blackmun wrote there was a compelling need to keep information secret and the executive branch had the unique ability to decide what should be kept secret, noting that the Court had long "recognized the Government's 'compelling interest' in withholding national security information from unauthorized persons in the course of executive business."<sup>128</sup> He wrote that "for reasons . . . too obvious to call for enlarged discussion," the protection of classified information must be committed to the broad discretion of the agency responsible<sup>129</sup> and it was "the generally accepted view that foreign policy was the province and responsibility of the Executive."<sup>130</sup> In conclusion he wrote, "Thus, unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."<sup>131</sup>

### B. Lower Court Cases

In 1973, in *Brunnenkant v. Laird*,<sup>132</sup> a relatively obscure and rarely cited case,<sup>133</sup> the D.C. District Court ruled that the First Amendment prevented the government from removing Siegfried

127. *Id.* at 527.

128. *Id.* (citing *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980); *United States v. Robel*, 389 U.S. 258, 267 (1967); *United States v. Reynolds*, 345 U.S. 1, 10 (1953); *Totten v. United States*, 9 U.S. 105, 106 (1876)).

129. *Id.* at 529 (quoting *CIA v. Sims*, 471 U.S. 159, 170 (1985)).

130. *Id.* (quoting *Haig v. Agee*, 453 U.S. 280, 293-94 (1981)).

131. *Id.* at 530 (citing *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953); *Burns v. Wilson*, 346 U.S. 137, 142, 144 (1953); *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); *Schlesinger v. Councilman*, 420 U.S. 738, 757-58 (1975); *Chappell v. Wallace*, 462 U.S. 296 (1983)).

132. 360 F.Supp. 1330 (D.D.C. 1973).

133. Westlaw.com's "Citing References" function reported only a single, unreported case that cited *Brunnenkant*, *Doviak v. Dep't of the Navy*, Appeal No. 01860381, 1987 WL 908627 (E.E.O.C. 1987).

Brunnenkant's security clearance solely for voicing his social and political opinions.<sup>134</sup> Although the court noted that in most cases involving national security the key legal issue was to balance competing interests, it wrote there was no need to engage in balancing here because the evidence overwhelmingly showed that Brunnenkant, a resident alien in the employ of a private contractor working for the U.S. government, lost his security clearance solely for voicing "heterodox political, social and economic views."<sup>135</sup> Relying upon the Supreme Court's ruling in *Bridges v. California*<sup>136</sup> and "other opinions too numerous to cite,"<sup>137</sup> District Judge John H. Pratt granted Brunnenkant's request for declaratory and injunctive relief. Although Pratt mentioned "balancing" competing interests in his opinion, he did not address any separation of powers issues. At no point did he mention deferring to the executive in matters of national security, hint that the court might be exercising its power in an area in was not meant to, or even cite *Greene*.<sup>138</sup>

Four years later, in 1977, the D.C. Circuit Court of Appeals heard two access cases. The first, *United States v. American Telephone & Telegraph, Co.*,<sup>139</sup> addressed national security information and the inherent power of both the executive and legislative branches of government. In the course of an investigation into the Justice Department's wiretapping program, the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce issued a subpoena for all national security request letters in the possession of the American Telephone & Telegraph Co. (AT&T). The Justice Department sued to enjoin AT&T from complying with the subpoena on the grounds "that compliance might lead to public disclosure of the documents, with adverse effect on national security."<sup>140</sup>

The court focused almost entirely on the separation of powers issues. First, the court addressed what it considered the "primary issue"<sup>141</sup> of the case, the political question doctrine.<sup>142</sup>

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134. *Brunnenkant*, 360 F.Supp. at 1332. ("[T]he withdrawal of plaintiff's security clearance, as a result of his expressions of opinion, is an unconstitutional invasion of his rights under the First Amendment.").

135. *Id.*

136. 314 U.S. 252 (1942).

137. *Brunnenkant*, 360 F.Supp. at 1332.

138. The entire opinion only cites one case other than *Bridges*, *United States v. Robel*, 389 U.S. 258 (1967).

139. 567 F.2d 121 (D.C. Cir. 1977).

140. *Id.* at 123-24.

141. *Id.* at 125-26.

142. The political question doctrine deals with the appropriateness of having a case decided by a court. A political question is one "that a court will

Both the legislative branch and the executive branch claimed in their briefs that the court did not have the authority to make a "determination of the propriety of [their] acts."<sup>143</sup> While Congress based its claim of "absolute discretion" on the Speech or Debate Clause,<sup>144</sup> the executive relied "on its obligation to safeguard the national security."<sup>145</sup>

The court disagreed with both parties, holding that "neither the traditional political question doctrine nor any close adaptation thereof is appropriate where neither of the conflicting political branches has a clear and unequivocal constitutional title, and it is or may be possible to establish an effective judicial settlement."<sup>146</sup> Citing the U.S. Supreme Court's 1962 decision in *Baker v. Carr*,<sup>147</sup> the court noted that simply because a political controversy or conflict existed between the other two branches of government did not inherently mean the issue was beyond the competency of the judiciary to decide.<sup>148</sup> Instead, the court wrote, the political question doctrine applied when only one branch had the "constitutional authority" to make a decision that would settle the dispute.<sup>149</sup>

The court then discussed at length which branch had the constitutional authority to control information classified for national security purposes. The court relied on the Framers' intent and the text of the Constitution, in combination with the Supreme Court's decision in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>150</sup> to reach its conclusion. First, the court concluded that the

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not consider because it involves the exercise of discretionary power by the executive or legislative branch." BLACK'S LAW DICTIONARY 1197 (8th ed. 2004).

143. *AT&T*, 567 F.2d at 127.

144. U.S. CONST. art. I, § 6, cl. 1.

145. *AT&T*, 567 F.2d at 127 n.17.

146. *Id.* at 127.

147. 369 U.S. 186, 217 (1962).

148. *AT&T*, 567 F.2d at 126.

149. *Id.* In addition, in a footnote the court cited a number of cases to support its conclusion that "disputes concerning the allocation of power between the branches have often been judicially resolved." *Id.* at n.13 (citing *United States v. Nixon*, 418 U.S. 683 (1974); *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935); *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952); *Myers v. United States*, 272 U.S. 52 (1926); *Campaign Clean Water, Inc. v. Train*, 489 F.2d 492 (4th Cir. 1973), *vacated on other grounds*, 420 U.S. 136 (1975); *State Highway Comm'n v. Volpe*, 479 F.2d 1099 (8th Cir. 1973)).

150. *Youngstown*, 343 U.S. 579. *Youngstown* involved an executive order issued in response to a strike called by the American Steel Workers Union in the latter part of 1951. The order directed the Secretary of Commerce to take possession of most of the steel mills in the country and keep them running. The Supreme Court held that the seizure order was not within the constitutional power of the President.

Framers did not intend for absolute authority over any area of governance to rest with any of the three branches. According to the court's opinion, the Framers expected that when "conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system."<sup>151</sup>

Next, moving from the Framers' intent to textualism, the opinion addressed the executive branch's claim that the Constitution conferred upon it absolute power in the arena of national security. Judge Harold Leventhal wrote that such a claim was not supported through textual analysis.<sup>152</sup> However, "most significant" to Judge Leventhal was "the fact that the Constitution is largely silent on the question of allocation of powers associated with foreign affairs and national security."<sup>153</sup> The opinion then invoked Justice Robert H. Jackson's much quoted passage from *Youngstown* that such powers are "within a 'zone of twilight' in which the President and Congress share authority or in which its distribution is uncertain."<sup>154</sup>

Thus, after also determining that it did not "accept the concept that Congress' investigatory power is absolute,"<sup>155</sup> the court attempted to balance the executive's interest in national security and Congress' interest in investigating the warrantless wiretapping program by using a "gradual approach."<sup>156</sup> However, while the court's balancing approach was somewhat analogous to the majority's opinion in *Greene*, it framed the case much closer to Clark's dissent, focusing on control of national security information.

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151. *AT&T*, 567 F.2d at 127.

152. *Id.* at 128.

153. *Id.*

154. *Id.* (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)). Jackson's full quotation reads:

When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

*Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

155. *AT&T*, 567 F.2d at 130.

156. *Id.* at 131.

Just a few months after its decision in *AT&T*, the D.C. Circuit was called upon in *Sherrill v. Knight*<sup>157</sup> to determine if the First Amendment rights of a journalist were violated by the White House's refusal to grant a press pass. While the case did not directly implicate national security information *per se*, it was decided as an access case, dealing with the ability of the executive branch of the government to curtail newsgathering based on concerns related to the safety of the President, and containing a detailed discussion of a constitutionally based right to know.

In 1966, when Robert Sherrill, the White House correspondent for *The Nation*, was denied a press pass based on the results of an investigation by the Secret Service, he filed for relief in federal district court, alleging that the denial of a press pass violated the First and Fifth Amendments to the Constitution.<sup>158</sup> When it reached the D.C. Court of Appeals, the circuit court found the case implicated the First and Fifth Amendments and the right of access.<sup>159</sup> First, however, the court dealt with the issue of justiciability<sup>160</sup> and the executive's constitutional power, soundly rejecting the government's attempt to frame the case in terms of separation of powers and its argument that the Constitution prohibited the judiciary from ruling on the case because access to the White House and the safety of the President were outside the power of the judiciary.<sup>161</sup>

Citing *Pell v. Procunier*<sup>162</sup> and dicta from *Zemel*<sup>163</sup> for the respective propositions that the press had no greater First Amendment right of access than the general public and the general public had no First Amendment right of access to the White

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157. 569 F.2d 124 (D.C. Cir. 1977).

158. See *Forcade v. Knight*, 416 F. Supp. 1025 (D.D.C. 1975). Thomas Forcade, a correspondent for the Alternate Press Syndicate who was also denied a White House press pass, was a second party to the complaint in the district court case. Although the judgment of the district court pertained to both Forcade and Sherrill, Forcade disclaimed further interest in the case after the parties appealed, but before the court of appeals ruled. *Sherrill*, 569 F.2d at 126 n.1.

159. *Sherrill*, 569 F. 2d at 128.

160. A justiciable case is one that is "capable of being disposed of judicially." BLACK'S LAW DICTIONARY 882 (8th ed. 2004).

161. *Sherrill*, 569 F. 2d at 128 n.14.

162. 417 U.S. 817, 833-34 (1974) ("The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally.").

163. *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965) ("For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right.").

House, the government argued that denial of a White House press pass would violate the First Amendment “only if it is based upon the content of the journalist’s speech or otherwise discriminates against a class of protected speech.”<sup>164</sup> While the court wrote that denying a press pass on content-based criteria would be problematic, it also concluded that there were additional First Amendment arguments to consider. Chief among these was “the protection afforded newsgathering under the first amendment guarantee of freedom of the press.”<sup>165</sup> Citing a host of Supreme Court decisions, the court concluded:

[T]he protection afforded newsgathering under the first amendment guarantee of freedom of the press, requires that this access not be denied arbitrarily or for less than compelling reasons. Not only newsmen and the publications for which they write, but also the public at large have an interest protected by the first amendment in assuring that restrictions on newsgathering be no more arduous than necessary, and that individual newsmen not be arbitrarily excluded from sources of information.<sup>166</sup>

However, although the court clearly identified the First Amendment issue in the case, its focus on the specific pragmatic concerns of the case led it to conclude that while denial of a press pass could violate the First and Fifth Amendments, neither amendment justified requiring “the articulation of detailed criteria upon which the granting or denial of White House press passes is to be based.”<sup>167</sup> Instead, the court ordered the Secret Service to “publish or otherwise make publicly known the actual standard employed in determining whether an otherwise eligible journalist will obtain a White House press pass.”<sup>168</sup> Additionally, the court wrote that it expected courts to “be appropriately deferential to the Secret Service’s determination of what justifies the inference that an individual constitutes a potential risk to the physical security of the President or his family.”<sup>169</sup>

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164. *Sherrill*, 569 F.2d at 129.

165. *Id.*

166. *Id.* at 129–30. The court cited *Branzburg v. Hayes*, 408 U.S. 665, 681, 707 (1972), and *Pell*, 417 U.S. at 829–35, for the proposition that the First Amendment protected newsgathering; *Southeastern Promotions v. Conrad*, 420 U.S. 546 (1975), and *Lovell v. Griffin*, 303 U.S. 444 (1938), as requiring that access for the purpose of newsgathering not be denied for “less than compelling reasons”; and *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491–92 (1975), and *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), for the conclusion that the public had a right to receive information.

167. *Sherrill*, 569 F.2d at 128.

168. *Id.* at 130.

169. *Id.*

In 1991, the Southern District of New York considered the existence of a First Amendment right of access to a foreign arena in which American military forces were engaged in *Nation Magazine v. Department of Defense*.<sup>170</sup> The case involved a challenge to the DOD regulations governing press coverage of American military activities during periods of open hostilities. While the plaintiffs raised First Amendment right of access issues, the government put forth a variety of arguments involving justiciability and separation of powers, including standing, the political question doctrine and mootness.<sup>171</sup> In addition, before deciding these issues, the court stated that even in "the event the Court determines that at least some of the issues are not moot and that there is jurisdiction to hear the claims, a question remains whether the Court *should* exercise its power to address the controversy."<sup>172</sup>

Focusing on precedents, the court determined that a "long line of cases addressing the role of the judiciary in reviewing military decisions" had left the clear message that "[c]ivilian courts should 'hesitate long before entertaining a suit which asks the court to tamper with the . . . necessarily unique structure of the Military Establishment.'"<sup>173</sup> Yet, despite this strong language that seemed to favor the government's position that the case was outside judicial power, the court was unwilling to go so far as to accept the government's claim that *all* cases involving the military were outside the power of Article III courts.<sup>174</sup> Instead, the court found the cases cited by the government differed from the case at hand in that they had involved "direct challenges to the institutional functioning of the military in such areas as the relationship between personnel, discipline, and training."<sup>175</sup> Unlike that line of cases, the court ruled that the present case did not impact the executive's foreign relations powers or require the

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170. 762 F. Supp. 1558 (S.D.N.Y. 1991).

171. *Id.* at 1565.

172. *Id.* (emphasis added).

173. *Id.* at 1566-67 (quoting *Chappell v. Wallace*, 462 U.S. 296, 300 (1983)).

174. *Id.* at 1568 (concluding the plaintiffs' complaint alleged "claims that are judicially enforceable under the First and Fifth Amendments"). The court found the DOD's primary argument that "the political question doctrine bars an Article III court from adjudicating any claims that involve the United States military" unpersuasive. The court went on to state that "[u]nder this theory of separation of powers, a court would lack jurisdiction to hear any controversy that involved DOD, including any government actions that violated the rights of non-military personnel. This reasoning is inconsistent with large bodies of constitutional law." *Id.*

175. *Id.* at 1567.

court to move beyond its traditional area of expertise and, therefore, was justiciable.<sup>176</sup> On the issue of declaratory relief the court ruled that because the plaintiffs asserted that the existence of the DOD restrictions violated the First Amendment generally, and not simply as applied to operations in the Middle East, the court could hear the challenge.

Unfortunately for the media plaintiffs, that did not end the court's discussion. The court then wrote: "The question of the court's power to hear a case is, however, only the beginning of the inquiry. A separate and more difficult inquiry is whether it is *appropriate* for a Court to exercise that power."<sup>177</sup> Thus, although the court presented the case as dealing with a conflict between transparency and national security, the court also stated that it needed to consider what branch of government should strike the balance between these two competing interests:

At issue in this action are important First Amendment principles and the countervailing national security interests of this country. This case presents a novel question since the right of the American public to be informed about the functioning of government and the need to limit information availability for reasons of national security both have a secure place in this country's constitutional history. In short, this case involves the adjudication of important constitutional principles. The question, however, is not only which principles apply and the weighing of the principles, but also when and in what circumstances it is best to consider the questions.<sup>178</sup>

To determine if it *should* exercise its power, the court turned to a detailed discussion of First Amendment theory, specifically whether theories related to self-governance and the checking function of the press supported the establishment of a right to know.

Although the media organizations argued that they were not asking the court to establish a new constitutional right of access that required "affirmative assistance" from the government to provide information,<sup>179</sup> the court reasoned that the case involved

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176. *Id.*

177. *Id.* at 1570 (emphasis added).

178. *Id.* at 1571.

179. *Id.* ("The gravamen of plaintiffs' complaint is that, under the First Amendment, the press has a right to gather and report news that involves United States military operations and that DOD's pool regulations are an unconstitutional limitation on access to observe events as they occur. . . . In other words, plaintiffs claim that no affirmative assistance from the government

charting "new constitutional territory."<sup>180</sup> The court wrote that while the Supreme Court had considered cases involving the First Amendment and national security, none of those cases had directly addressed "the role and limits of news gathering under the First Amendment in a military context abroad," and therefore there was no direct precedent to rely upon.<sup>181</sup> Instead, the court turned to "case law on questions involving the access rights of the press and public" to answer the novel constitutional questions involving a right to access to military endeavors and whether press pools violated that right.<sup>182</sup>

Citing *United States v. Nixon*,<sup>183</sup> *Saxbe v. Washington Post*,<sup>184</sup> *Pell v. Procunier*,<sup>185</sup> *Houchins v. KQED*,<sup>186</sup> and *Greer v. Spock*,<sup>187</sup> the court concluded "there is no right of access of the press to fora which have traditionally been characterized as private or closed to the public, such as meetings involving the internal discussions of government officials,"<sup>188</sup> and limitations may be "placed on access to government controlled institutions."<sup>189</sup> Next, however, the opinion cited the judicial access cases *Richmond*<sup>190</sup> and *Globe*<sup>191</sup> as examples of the Supreme Court's support for a First Amendment-based right to know:

A fundamental theme in *Richmond* and *Globe* was the importance of an informed American citizenry. As the Court wrote, guaranteed access of the public to occurrences in a courtroom during a criminal trial assures "freedom of communication on matters relating to the functioning of government." Learning about, criticizing and evaluating government, the Supreme Court has rea-

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is being requested, only the freedom from interference to report on what is overtly happening in an allegedly open area.").

180. *Id.* at 1572.

181. *Id.* The court cited *Near v. Minnesota*, 283 U.S. 697, 716 (1931), *New York Times Co. v. United States*, 403 U.S. 713, 722-23 (1971), and *Snepp v. United States*, 444 U.S. 507, 514-15 (1980) as examples of the cases in which the Supreme Court had considered the balance between the First Amendment and national security.

182. *Nation Magazine*, 762 F. Supp. at 1571.

183. 418 U.S. 683 (1974).

184. 417 U.S. 843 (1974).

185. 417 U.S. 817 (1974).

186. 438 U.S. 1 (1978).

187. 424 U.S. 828 (1976).

188. *Nation Magazine*, 762 F. Supp. at 1571 (citing *Nixon*, 418 U.S. at 705 n.15).

189. *Id.* (citing *Houchins*, 438 U.S. at 16; *Greer*, 424 U.S. at 838; *Saxbe*, 417 U.S. at 850; *Pell*, 417 U.S. at 828).

190. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

191. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

soned, requires some "right to receive" information and ideas.<sup>192</sup>

In addition, the court suggested that in *Globe* the Court implied that access to other situations might also be included in the Amendment<sup>193</sup> and pointed out that Justice Stevens had written that the right to be informed about government operations was important "even when the government has suggested that national security concerns were implicated."<sup>194</sup> The court summarized:

Given the broad grounds invoked in these holdings, the affirmative right to gather news, ideas and information is certainly strengthened by these cases. By protecting the press, the flow of information to the public is preserved. As the Supreme Court has observed, "the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." Viewing these cases collectively, it is arguable that generally there is at least some minimal constitutional right to access.<sup>195</sup>

Having established the existence of some sort of right of access, the court speculated about how this would apply to the military. Although the court concluded that at least some right of access to the military might exist, it was uncertain because "military operations are not closely akin to a building such as a prison, nor to a park or a courtroom."<sup>196</sup> Ultimately, based on this uncertainty, the hypothetical nature of its discussion and the lack of concrete facts on which to apply precedent, the court refused to decide if there was a right of access. The Court wrote, "Pursuant to long-settled policy in the disposition of constitutional questions, courts should refrain from deciding issues presented in a highly abstract form, especially in instances where the Supreme Court has not articulated guiding standards."<sup>197</sup>

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192. *Nation Magazine*, 762 F. Supp. at 1572.

193. *Id.*

194. *Id.* (citing *New York Times Co. v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring)).

195. *Id.* (quoting *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978)). The court further cited *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972), for the proposition that "[w]ithout some protection for seeking out the news, freedom of the press could be eviscerated."

196. *Id.*

197. *Id.* (citing *Rescue Army Mun. Court of Los Angeles*, 331 U.S. 549, 575-85(1947)).

The court next considered whether the DOD's use of press pools gave preferential treatment to some members of the press. Again the court turned to Supreme Court precedent to support its discussion, this time focusing on the Court's public forum doctrine. First, the court discussed precedent that supported the plaintiffs' case, finding that because the government had decided to "open the door" to press coverage it had "created a place for expressive activity."<sup>198</sup> The Court wrote, "Regardless of whether the government is constitutionally required to open the battlefield to the press as representatives of the public, a question that this Court has declined to decide, once the government does so it is bound to do so in a non-discriminatory manner."<sup>199</sup> Citing *Sherrill*, the court ruled that government could not arbitrarily exclude some members of the press once it allowed others to cover the conflict.<sup>200</sup>

The court, however, then noted that the right to be free from discriminatory treatment was "not synonymous with a guaranteed right to gather news at all times and places or in any manner that may be desired"<sup>201</sup> and the press could be subjected to reasonable time, place and manner restrictions.<sup>202</sup> Thus, the court concluded that some restrictions might be appropriate at some point. After reaching this conclusion, however, the court declined to decide the issue. Instead, it concluded it was not faced with concrete enough facts to rule on the limitations on access.<sup>203</sup> Faced with two "significant and novel constitutional doctrines,"<sup>204</sup> and without clear direction from the Supreme Court or concrete facts to rule on, the court concluded that "based on all the circumstances of the case," the controversy was not "sufficiently concrete and focused to permit adjudication on the merits."<sup>205</sup>

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198. *Id.* at 1573 (citing *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 48 (1983), for the proposition that the government had created a limited public forum by establishing pools for coverage for the Persian Gulf conflict).

199. *Id.* (citing *Houchins v. KQED*, 438 U.S. 1, 16 (1978); *American Broad. Cos. v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977)).

200. *Id.* ("Once a limited public forum has been created, the government is under an obligation to insure that 'access not be denied arbitrarily or for less than compelling reasons.'" (quoting *Sherrill v. Knight*, 569 F.2d 124, 129 (D.C. Cir. 1977))).

201. *Id.*

202. *Id.* (citing *Grayned v. Rockford*, 408 U.S. 104, 115 (1972)).

203. *Id.* at 1574-75.

204. *Id.* at 1575.

205. *Id.* at 1568.

While to this day the Supreme Court has still not provided any clear direction, the D.C. District Court has twice decided cases very similar to *Nation Magazine* with nearly identical results. In *Getty Images News Service Co. v. Department of Defense*<sup>206</sup> and *Flynt v. Rumsfeld*,<sup>207</sup> the court engaged in similar First Amendment discussions as the *Nation Magazine* court, relied on almost identical precedents and again focused on the lack of a concrete controversy. In *Getty Images*, a case involving access to the U.S. government's detention center at Guantánamo Bay, the D.C. District Court discussed access, but ultimately determined that Getty had failed to demonstrate that injunctive relief was needed.<sup>208</sup> In the case, Getty Images News Services sought a preliminary injunction to enjoin the DOD to provide Getty with equal access to the detention facilities at Guantánamo Bay, to require the DOD to "promulgate standards and procedures ensuring equal access," and to compel the DOD to create a press pool for access to Guantánamo.<sup>209</sup> Getty alleged that the DOD's actions violated the company's First Amendment right to equal access to Guantánamo and Fifth Amendment right to equal protection, and that the company's First and Fifth Amendment rights had been violated "because adequate regulatory standards had not been developed and applied."<sup>210</sup>

In considering Getty's claim, the court primarily relied upon *Sherrill* and *Nation Magazine* to reach its conclusions. The court used these two cases to support Getty's argument that once the DOD "opened Guantánamo Bay to certain members of the press, all members of the press became constitutionally entitled to equal access to the detention facilities there."<sup>211</sup> In addition, after a discussion of *Sherrill*, the court concluded that, although it was "reluctant to interfere" with military conduct,<sup>212</sup> the First and

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206. 193 F. Supp. 2d 112 (D.D.C. 2002).

207. 245 F. Supp. 2d 94 (D.D.C. 2003).

208. *Getty Images*, 193 F. Supp. 2d at 118–25.

209. *Id.* at 113–14. In addition, Getty also sought to enjoin the DOD from excluding it from participation in the National Media Pool or any ad hoc or regional pools created during Operation Enduring Freedom. However, by the time the case reached the district court, Getty was granted membership in the National Media Pool and the Afghanistan regional pool no longer existed. *See id.* at 14–16.

210. *Id.* at 114. In addition, the media company argued its due process rights under the Fifth Amendment were violated because the company's competitors "had allegedly been delegated the power to regulate Getty's access to pool coverage." *Id.*

211. *Id.* at 118.

212. *Id.* at 121. The court agreed with the government's arguments "that the Guantánamo Bay Naval Base [was] not a public forum and that consideration of Getty's First and Fifth Amendment claims must be undertaken through

Fifth Amendments required, "at a minimum, that before determining which media organizations receive the limited access available" there must be some reasonable criteria to guide the DOD decisions.<sup>213</sup> Quoting the *Sherrill* court's discussion of First Amendment protection for newsgathering,<sup>214</sup> the court determined that the First Amendment required the government to have solid reasoning behind its decisions and refrain from arbitrary or capricious decision making.<sup>215</sup>

Ultimately, however, the court ruled that it was not the appropriate time to grant Getty's motion for an injunction. Although the court wrote that it was persuaded that Getty had raised "a serious question" relating to its request for equal access and that the DOD "at some point in time" would have to establish and publish non-arbitrary criteria and a process to govern media access, the court would not grant Getty's injunction.<sup>216</sup> To support this ruling, the court balanced Getty's interests and likelihood of success against the public's interest in *not* granting access.<sup>217</sup> The court weighed the potential harm to the public interest that a disruption at Guantánamo Bay would cause against Getty's "speculative" First Amendment claims.<sup>218</sup> The court reasoned that "absent some concrete and irreparable diminution of First Amendment rights," it was "not possible to conclude that the public interest favors the injunctive relief Getty seeks."<sup>219</sup> In its conclusion, the district court focused on the speculative nature of both a First Amendment right of access and Getty's claims that it was being harmed to support the decision not to grant an injunction.<sup>220</sup> One year later, the court adopted a similar stance in *Flynt*.

Like *Nation Magazine*, *Flynt* involved a magazine's claim that DOD regulations violated the "qualified First Amendment right"

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the prism of the heightened deference due to military regulations and decision-making." *Id.* at 119.

213. *Id.* at 121.

214. *Id.* at 119 (quoting *Sherrill v. Knight*, 569 F.2d 124, 129-30 (D.C. Cir. 1977)).

215. *Id.* at 121.

216. *Id.* at 124.

217. *Id.* At no time did the court consider the public's interest in receiving information about the Guantánamo Bay detention facility, terrorists or terrorism trials.

218. *Id.* at 123-24.

219. *Id.* at 124. While the court found in favor of Getty on parts one and two of the test, it found that the public interest outweighed the speculative nature of Getty's claims. *Id.*

220. *Id.*

of media access to the battlefield.<sup>221</sup> While the court discussed the First Amendment implications of access, it focused instead on the hypothetical nature of the claim and the need to practice judicial restraint in such situations. In 2001, *Hustler Magazine* requested that one of its correspondents be allowed “to accompany and cover American ground forces in Afghanistan and wherever else such forces may be utilized in this campaign against terrorism.”<sup>222</sup> While the *Hustler* correspondent was placed on a waiting list of journalists seeking to embed with conventional combat troops, because all of the ground forces in Afghanistan at the time were Special Operations Forces, the correspondent was not allowed to accompany any soldiers on actual missions.<sup>223</sup> In what would become a central argument to the case, the DOD claimed that it was “awaiting approval to allow reporters to accompany special forces on missions.”<sup>224</sup>

In challenging the DOD’s regulations, *Hustler* made two distinct claims. First, the magazine challenged the DOD regulations as applied,<sup>225</sup> charging that the DOD violated *Hustler’s* First Amendment rights by “improperly denying a *Hustler* correspondent the right to accompany combat forces on the ground in Afghanistan.”<sup>226</sup> Second, the magazine brought a facial challenge.<sup>227</sup> The opinion first considered *Hustler’s* as-applied challenge. The court held that it had no jurisdiction to address the issue because the controversy was not ripe for review, nor did *Hustler* have standing. Although *Hustler* attempted to insert the First Amendment into the argument by contending that a ripe controversy existed because the parties disagreed as to whether there was “a First Amendment right of media access to the battlefield,”<sup>228</sup> the court wrote that the “mere existence of a legal disagreement about the scope of the First Amendment [did] not make that disagreement fit for judicial review.”<sup>229</sup> Instead,

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221. *Flynt v. Rumsfeld*, 245 F. Supp. 2d 94, 99 (D.D.C. 2003).

222. *Id.* at 97.

223. *Id.* at 97–98.

224. *Id.* at 99.

225. “A claim that a law or government policy, though constitutional on its face, is unconstitutional as applied, usually because of a discriminatory effect; a claim that a statute is unconstitutional on the facts of a particular case or in its application to a particular party.” BLACK’S LAW DICTIONARY 244 (8th ed. 2004).

226. *Flynt*, 245 F. Supp. 2d at 99.

227. “A claim that a statute is unconstitutional on its face—that is, that it always operates unconstitutionally.” BLACK’S LAW DICTIONARY 244 (8th ed. 2004).

228. *Flynt*, 245 F. Supp. 2d at 102.

229. *Id.*

because the DOD was still technically “awaiting permission” to allow journalists to travel with the only troops on the ground, the court held the issue had not been settled and was, therefore, not ripe for review. It wrote *Hustler’s* as-applied claims were “not fit for judicial decision at this juncture because defendants have not made a final decision with respect to plaintiffs’ request for access to combat ground forces in battle.”<sup>230</sup>

Next, considering *Hustler’s* facial challenge, although the court admitted that “there may be a limited or qualified right of media access to the battlefield”<sup>231</sup> based on the First Amendment, it declined to definitively decide the issue. Instead, the court turned to the issue of judicial power, writing that the case was more about the role of the courts in making decisions than it was about the First Amendment. The court held it could decide the case under the political question doctrine because *Hustler* was not making a claim that went to “the heart of the military’s ‘goals, directives and tactics’” by challenging the DOD’s regulations.<sup>232</sup> The court wrote:

In their facial challenge claims plaintiffs do not ask the Court to delve into tactical decisions made by defendants. They ask the Court only to consider whether a First Amendment right of media access to the battlefield exists—a right they themselves characterize as a ‘qualified right of access’ subject to reasonable Executive Branch regulations—and, if so, to direct defendants to enact guidelines that comport with such First Amendment protections.<sup>233</sup>

However, the court never truly addressed the existence of a First Amendment “qualified right of access.” Instead the court ruled that just because it had jurisdiction to hear the facial challenge, that conclusion did “not necessarily result . . . in adjudication of plaintiffs’ claims on the merits at this time.”<sup>234</sup> Quoting the admonition from *Getty Images* that “the absence of a concrete controversy is of particular concern in light of the important constitutional issues at stake and the national defense interests that might be implicated,”<sup>235</sup> as well as a lengthy passage from *Nation*

230. *Id.* at 101.

231. *Id.* at 108.

232. *Id.* at 106–07.

233. *Id.* at 107.

234. *Id.*

235. *Id.* at 109 (quoting *Getty Images News Servs. Corp. v. Dep’t of Defense*, 193 F. Supp. 2d 112, 113, 118 (D.D.C. 2002)).

*Magazine*,<sup>236</sup> the court concluded the “prudent course” was to “delay resolution of these constitutional issues until and unless plaintiffs are denied access after having pursued their request through normal military channels.”<sup>237</sup> The court therefore “declined to exercise its discretion” to consider the facial challenge.<sup>238</sup>

## V. CONCLUSION

There are a number of significant differences between access cases involving the judiciary and access cases involving national security, and comparing the cases leads to a number of interesting conclusions. First, it is clear that the Supreme Court has sent mixed signals to lower courts about the existence of a First Amendment based right of access. With the exception of a few early cases, the Court has framed access to judicial proceedings as a First Amendment issue that advances trust in the judicial system and the democratic process. As the *Nation Magazine* court noted, in cases that have considered a right of access to the judiciary, the Supreme Court has consistently articulated a broad right of access—a right that might not even be limited to the judiciary.<sup>239</sup> In addition, the opinions in these cases reference a wide range of sources for this right, including Framers’ intent, structural and functional analysis, and historical evidence. However, because the discussion of a broad right of access that extends beyond judicial proceedings and documents has never been fully articulated or endorsed by the Court, lower courts considering access to national security information or locations have had trouble determining when or if there is a right of access. For example, as noted, when faced with the question, the

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236. *Id.* (“In order to decide this case on the merits, it would be necessary to define the outer constitutional boundaries of access. Pursuant to long-settled policy in the disposition of constitutional questions, courts should refrain from deciding issues presented in a highly abstract form, especially in instances where the Supreme Court has not articulated guiding standards. . . . Since the principles at stake are important and require a delicate balancing, prudence dictates that we leave the definition of the exact parameters of press access to military operations abroad for a later date when a full record is available, in the unfortunate event that there is another military operation. Accordingly, the Court declines to exercise its power to grant plaintiffs’ request for declaratory relief on their right of access claim.” (quoting *Nation Magazine v. Dep’t of Defense*, 762 F. Supp. 1558, 1572 (S.D.N.Y. 1991) (citing *Rescue Army v. Municipal Court of L.A.*, 331 U.S. 549, 575–85 (1947))).

237. *Id.* at 110.

238. *Id.*

239. 762 F. Supp. at 1572.

*Nation Magazine* court discussed the different approaches and conflicting results in Supreme Court access cases.<sup>240</sup>

In addition, analysis of these cases indicates that confusion over the existence of the right to know is also the product of the judiciary's reluctance to intrude into an area where it does not have expertise or concludes it would be intruding on the constitutional authority of another branch of government. The national security cases clearly demonstrate the judiciary's extreme reluctance to become involved in another branch of government's affairs. Although courts considering access to national security locations or information have engaged in discussions of a First Amendment right of access, ultimately, most of the courts focused on other issues that allowed them to avoid deciding the cases based on a right of access. While some of the cases specifically presented the issues in terms of justiciability, mootness or the political question doctrine, others engaged in discussions of the need to balance the powers of the separate branches of government or decided the facts of the case were not developed enough to intercede on behalf of the press.

The importance of the courts' concern with their own power and role is highlighted by the fact that in the national security access cases discussions about separation of powers often overshadowed discussion of balancing government transparency with national security or the benefits transparency brings to the democratic process. Only three of the national security access opinions—the majority opinion as well as Justice White's dissent in *Egan*, and *Nation Magazine*—specifically presented the cases as dealing with the need to balance national security with the First Amendment and transparency concerns and decided the cases by focusing on the issue.<sup>241</sup> The *Nation Magazine* court was particularly clear that the case was about balancing the two issues. Although *Sherrill*,<sup>242</sup> *Getty Images*,<sup>243</sup> and *Flynt*<sup>244</sup> all discussed balancing transparency with another factor, the opinions relied on practical case specific considerations to reach their decisions and refused to break new constitutional ground on amorphous or shifting facts. No lower court was willing to advance a right of access based on abstract issues and hypothetical situations. Although they have been willing to consider extending a consti-

240. *Id.*

241. See *Dep't of Navy v. Egan*, 484 U.S. 518, 527–28 (1988); *id.* at 534–38 (White, J., dissenting); *Nation Magazine*, 762 F. Supp. at 1571.

242. *Sherrill v. Knight*, 569 F. 2d 124 (D.C. Cir. 1977).

243. *Getty Images News Services Co. v. Dep't of Def.*, 193 F. Supp. 2d 112 (D.D.C. 2002).

244. *Flynt v. Rumsfeld*, 245 F. Supp. 2d 94 (D.D.C. 2003).

tutional right of access well beyond the courtroom, they have not seen fit to actually rule on whether such a right exists, instead focusing on other issues and waiting for the Supreme Court to clarify how far access extends.

While this approach was particularly evident in the lower court national security cases, it was also present in at least one Supreme Court case, *Warner Communications*,<sup>245</sup> in which the Court decided the question presented would best be answered outside of the judiciary. As noted, instead of confronting the executive or legislative branches, the Court declined to rule on the existence of a right of access, and instead held that the Presidential Recordings Act would ultimately control the release of the records.<sup>246</sup> In an argument that was very similar to the national security access cases, Justice Powell's majority opinion simply stated that the courts were not well equipped to handle the details of access to presidential records<sup>247</sup> and failed to address major access issues raised by the case.

Thus, when confronted with another branch of government, although many courts engaged in detailed discussions of the benefits of a First Amendment right of access, ultimately most courts found other ways to reach a conclusion. Although a few courts have voiced concerns or put restraints on the executive branch's ability to control national security information,<sup>248</sup> the general trend has been for courts to rule that they are not qualified to consider the cases dealing with national security.<sup>249</sup>

There are a number of explanations for courts' desire to not decide these cases. First, it is possible that this emphasis is related to legitimate constitutional questions and concerns. Several of the cases discussed above focused on which branch of government was given the power to control national security information by the Constitution or focused on the Framers' intent to determine who should have the power. For example, in

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245. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589 (1978).

246. *Id.* at 603.

247. *Id.* at 606.

248. See *Dep't of Navy v. Egan*, 484 U.S. 518, 534 (1988) (White, J., dissenting); *Greene v. McElroy*, 360 U.S. 474 (1959); *United States v. American Tel. & Tel. Co.*, 567 F.2d 121 (D.C. Cir. 1977).

249. See, e.g., *Hall v. U.S. Dep't of Labor, Admin. Review Bd.*, 476 F.3d 847 (10th Cir. 2007); *Bennett v. Chertoff*, 425 F.3d 999 (D.C. Cir. 2005); *Hill v. White*, 321 F.3d 1334 (11th Cir. 2003); *Reinbold v. Evers*, 187 F.3d 348 (4th Cir. 1999); *Makky v. Chertoff*, 489 F. Supp. 2d 421 (D.N.J. 2007); *Nickelson v. United States*, 284 F. Supp. 2d 387 (E.D. Va. 2003); *Cobb v. Danzig*, 190 F.R.D. 564 (S.D. Cal. 1999); *Edwards v. Widnall*, 17 F. Supp. 2d 1038 (D. Minn. 1998); *Stehney v. Perry*, 907 F. Supp. 806 (D.N.J. 1995). *But see* *Ranger v. Tenet*, 274 F. Supp. 2d 1 (D.D.C. 2003).

*Egan*, Blackmun wrote that the authority to protect national security information flowed directly from the Constitution and fell on the President "as head of the Executive Branch and as Commander in Chief."<sup>250</sup> Second, it could be related to practical concerns with the ability and/or expertise of the courts to deal with national security information. Several courts have stated their concerns with the judiciary's inability to know what information might be dangerous to national security or the inability of courts to properly control and house national security information.<sup>251</sup>

Finally, it is possible that it is related to inter-institutional constraints placed on the judiciary. Scholars who advance the "strategic account" of judicial decision-making have argued that judges are strategic actors who must consider the preferences of other actors and institutions and the institutional and historical context in which they act.<sup>252</sup> The judiciary is but one part of our governmental structure that must take into account the desires and powers of the other branches of government. While the Constitution set out the powers of each branch, scholars have noted that this was only the beginning of a long process by which political institutions take shape.<sup>253</sup> Rather than being static, the powers of our political institutions are defined through "sequences of events . . . either unanticipated by the framers or unspecified in the [Constitution]."<sup>254</sup> Under this analysis, it is clear that in national security access cases, the courts are being mindful of the desires and powers of other political institutions.

Because they deal with the powers of the other branches of government, the national security access opinions become especially important to consider when discussing access to terrorism trials. In the judicial access cases, concerns with intruding upon another branch of government were, of course, not present. Because the justices were in effect creating rules for their own house, the Court had leeway to rely upon structural and functional arguments to create a system of access and dissemination without worrying about overextending their power. After the September 11, 2001, terrorist attacks, however, the U.S. government has claimed a need to conduct numerous judicial proceedings in secret, based on national security concerns. Therefore, because these cases will combine judicial access and national

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250. *Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988).

251. *See, e.g., Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1369-70 (4th Cir. 1975).

252. *See, e.g., EPSTEIN & KNIGHT, supra* note 42, at 10-18.

253. *Knight & Epstein, supra* note 42, at 88.

254. *Id.*

security access cases, it is helpful to analyze access to terrorism trials under the conceptual framework offered by social architecture theory in order to ensure the values and architecture advanced by the judicial access cases continue to be reinforced, even when dealing with national security information.

As Daniel Solove wrote, all law should be used to establish an “architecture of power” that maintains the appropriate balance of power in relationships.<sup>255</sup> Discussing the need for social architecture in privacy law, Solove wrote that too often the law only works at the surface of a problem, “dealing with the overt abuses and injuries that may arise in specific instances. But thus far the law does not do enough to redefine the underlying relationships that cause these symptoms.”<sup>256</sup> Similarly, although many of the national security cases outlined above are clear examples of judges discussing power relationships, they are too frequently decided on issues related to specific circumstances of the cases rather than on architecture.

When judges, politicians and other government officials consider cases or public policy dealing with access to terrorism trials, it is important to remember the nation’s original social architecture, as established by the Constitution and the First Amendment. As noted in several cases discussed above, the Framers of the Constitution were acutely aware of the dangers of the accumulation of power in the same hands.<sup>257</sup> For example, referring to an architecture of power that went beyond a focus on the individual complaint, the D.C. Circuit wrote in *ATT*<sup>258</sup> that the Framers expected that when “conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system.”<sup>259</sup> The court further admonished that “each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation” in order to avoid “the mischief of polarization.”<sup>260</sup>

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255. Solove, *supra* note 19, at 1087.

256. DANIEL J. SOLOVE, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE 100* (2004).

257. *See, e.g.*, THE FEDERALIST NO. 47, at 239 (James Madison) (Lawrence Goldman ed., 2008) (writing the accumulation of power “in the same hands . . . may justly be pronounced the very definition of tyranny”).

258. *United States v. Am. Tel. & Tel. Co.*, 567 F.2d 121 (D.C. Cir. 1977).

259. *Id.* at 127.

260. *Id.*

In addition, when judges and policy makers move beyond separation of powers concerns to focus on balancing national security and transparency or, more fundamentally, the relationship between the government, the press and the people, they can still focus on architecture. It is important to remember the Framers were heavily influenced by the writings of John Locke, a seventeenth century Enlightenment philosopher who proposed a government based on the consent of the governed in his book the *Second Treatise of Government*.<sup>261</sup> Locke was concerned with what form a legitimate government should take and how to establish the conditions necessary for peace and security. Locke focused on the restriction of state power to create private spheres of civil liberty.<sup>262</sup> Locke's understanding of the social contract is based on the pre-existing rights of the individual, which are retained even when the individual enters into the collective. To Locke, "because government existed solely based on the consent of the governed, the government could not take away pre-existing rights, such as the right to free expression."<sup>263</sup> Historians have argued that to Locke, a free and open press was the best way to guarantee citizens' protection from government tyranny that may impinge on these natural rights,<sup>264</sup> government should be judged by the governed through the free exchange of ideas,<sup>265</sup> and citizens need as much information about their government as possible in order to function in a democracy.<sup>266</sup> In terms of social architecture theory, Locke "proposed a social architecture in which power ultimately belonged to citizens, not those who governed them."<sup>267</sup>

Therefore, judges and other policy makers must keep in mind the balance of power between the branches and the architecture created by the First Amendment even when considering cases under the backdrop of events like the terrorist attacks of September 11. While it is true that in Lockean philosophy government's central purpose is to protect each individual's rights against invasion *and* to protect "the entire society from having the rights of its members robbed from them by another nation's

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261. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* (Thomas P. Peardon, ed., Bobbs-Merrill Co. 1975) (1690).

262. See, e.g., *id.* at 32 (writing "the end of law is not to abolish or restrain, but to preserve and enlarge freedom").

263. Silver, *supra* note 33, at 172-73.

264. FREDRICK SEATON SIEBERT, *FREEDOM OF THE PRESS IN ENGLAND 1476-1776*, at 261 (1965).

265. DAVID A. COPELAND, *THE IDEA OF A FREE PRESS* 92 (2006).

266. *Id.* at 92-93.

267. Packer, *supra* note 32, at 401.

war-launching invasion,"<sup>268</sup> these two values must *always* coexist. Advocating for an architecture of power that embraces these notions goes beyond arguing that courts should recognize the individual rights of the plaintiffs in access to terrorism trial cases. It advocates decisions that empower both the courts and society in a broad and meaningful way.

There are several ways for judges and policy makers to reinforce the architecture established by the Constitution and First Amendment, as well as uphold the structure created by the judicial access cases, while also ensuring that national security information is protected during trials involving terrorist suspects. First, judges should be mindful of the Supreme Court's discussion of the long history and benefits of access to court proceedings and documents. Opening criminal trials to the public contributes to fairness, reliability and trust in the judicial system<sup>269</sup> and a right of access is necessary to protect the free flow of information about government in order to ensure the proper functioning of a democratic society.<sup>270</sup> In addition, open trials have a "therapeutic value" for the community,<sup>271</sup> a value that is especially important in terrorism cases given the effect of the terrorist attacks of September 11 on the American public. Furthermore, by actively deciding when to grant access—as courts have traditionally done in the judiciary cases—rather than deferring to other branches of government—as courts have done in the national security access cases—the judiciary will remain an independent, co-equal branch of government.

Finally, an architecture of access is especially important in cases dealing with terrorism trials because access to the judiciary by the press serves an especially important function in these cases. Because national security is important to every person in the United States, yet trials involving terrorism are located geographically distant from so much of the population, providing access to the press so that they may serve as "surrogates for the public"<sup>272</sup> is vital. As one scholar wrote:

Cases involving national security necessarily deal with information that is of broad public interest to people

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268. Thomas B. McAfee, *Restoring the Lost World of Classical Legal Thought: The Presumption in Favor of Liberty Over Law and the Court Over the Constitution*, 75 U. CIN. L. REV. 1499, 1507 (2007).

269. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980).

270. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604–05 (1982).

271. *Richmond*, 448 U.S. at 570–71 (1980) (writing that open criminal trials provide "an outlet for community concerns, hostility and emotion").

272. *Id.* at 572–73.

outside of the geographic region in which the proceeding is taking place. Thus, as the interest in the case increases, the ability of interested individuals to monitor the proceedings decreases. Thus, . . . access . . . serves an even more important purpose and should be subject to an even more rigorous analysis.<sup>273</sup>

Additionally, it is important to note that the architecture of presumptive access created by the Supreme Court is not without limits. The Court has determined that although there is a First Amendment right of access to criminal trials, such a right can be overcome by an overriding or compelling interest, so long as that right is narrowly tailored, that is, as brief as possible to serve the interest. In *Press-Enterprise I*, the Court wrote:

The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.<sup>274</sup>

While such an architecture would allow for the closing of terrorism trials in cases that truly warrant it for a narrow amount of time when the court specifically articulates why the closure is necessary, it would certainly not allow for the arbitrary closure of courtrooms or the removal of an entire case from a public docket.<sup>275</sup>

However, although this Article calls for the judiciary to take a greater role in providing access to terrorism trials, it is important to remember that constitutional doctrine provides only one way in which constitutional principles—and thus social architecture—can be advanced. As Professor Jack M. Balkin noted, “Sometimes [First Amendment] values are best enforced . . . by legislatures, administrative agencies, and by courts interpreting

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273. Michael P. Goodwin, *A National Security Puzzle: Mosaic Theory and the First Amendment Right of Access in the Federal Courts*, 32 HASTINGS COMM. & ENT. L.J. 179, 201 (2010).

274. *Press-Enter. Co. v. Riverside County Superior Court*, 464 U.S. 501, 510 (1984).

275. See, e.g., *M.K.B. v. Warden*, 540 U.S. 1213 (2004). After September 11, Mohamed Kamel Bellaouel, an Algerian man married to a U.S. citizen, was detained in Miami, Florida, for overstaying his student visa. Bellaouel was held for five months, during which time he was transferred to Virginia to testify at the trial of September 11 conspirator Zacarias Moussaoui. See Meliah Thomas, *The First Amendment Right of Access to Docket Sheets*, 94 CALIF. L. REV. 1537 (2006), for a more detailed discussion of the case.

statutes and regulations.<sup>276</sup> Statutory law—such as the Classified Information Procedures Act (CIPA)<sup>277</sup>—can also work to reinforce a social architecture of access and accountability. Because CIPA, which governs the use of classified information when such information is used in federal prosecutions, allows judges the ability to control national security information, court closures and blocking access to trial is not needed. When classified information must be used in a criminal proceeding, CIPA provides for in camera review by the presiding judge to determine if the information is relevant to the proceeding<sup>278</sup> and gives the judge tools for dealing with the classified information. For example, the judge may order the government to delete certain portions of the information, present an unclassified summary of the information, or summarize what the classified information might tend to prove.<sup>279</sup>

While the statute itself has no bearing on public access, it does provide the judiciary with a valuable tool that might alleviate concerns that the judiciary is not properly equipped to deal with national security information. This in turn allows the courts to maintain the appropriate balance of powers with the other branches of government—an important goal of social architecture—without having to worry about dangers to national security. Together, the ability to close trials for a specific, narrowly tailored reason and CIPA, ensure national security information is safe during terrorism trials. A 2008 study of terrorism prosecutions based on publicly available information concluded that no security breach has occurred during a terrorism trial because of a court's failure to close a docket or judicial proceeding and there is no evidence of a leak in a case in which CIPA has been invoked.<sup>280</sup>

Additionally, public policy—such as the Pentagon's new guidelines for reporters covering the detention and trials of terrorism suspects at Guantánamo Bay, Cuba—should embrace the

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276. Balkin, *supra* note 30, at 941.

277. 18 U.S.C. app. 3 §§ 1–16 (2006).

278. *Id.* § 6(a), (d).

279. *Id.* § 4.

280. See JAMES J. BENJAMIN, JR. & RICHARD P. ZABEL, HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN FEDERAL COURTS 88 (2008). <http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf>. While it is possible that classified information might be able to prove otherwise, this provides another example of why transparency can benefit the government. If there are examples of how the mishandling of national security information by the judiciary has led to breaches of national security, this information does nothing to inform the debate of access to terrorism trials if this information itself is classified and unavailable to the public.

notion that the press is a vital component of the democratic process. As noted, in September 2010, in response to complaints from media organizations, the DOD created new "Media Ground Rules" for Guantánamo Bay. In addition to other provisions, the ground rules narrowed the definition of "protected information,"<sup>281</sup> stated journalists would not be in violation of the rules for republishing protected information where that information was "legitimately obtained" in the course of independent newsgathering<sup>282</sup> and stated the "Defense Department [would] facilitate media access to military commissions to the maximum extent possible, in an effort to encourage open reporting and promote transparency."<sup>283</sup> While there were still a number of issues to be worked out, media organizations expressed the belief that the new guidelines were a good faith effort to "address the problems that have prevented reporting from Guantánamo to be as complete and accurate as it ought to be."<sup>284</sup>

In sum, by focusing on architecture in judicial decisions, statutory law and public policy, the government can ensure an architecture of power that promotes core democratic values and the proper sharing of both power and information. While being mindful of the appropriate balance of power is important in all cases dealing with national security, it is especially important in cases dealing with access to national security information. As Professor Cathy Packer wrote, disputes about access to information are about "the fundamental relationship among the government, the media and the public" because "[i]nformation is power, and the proper sharing of this power source is critical to the proper operation of a democratic government."<sup>285</sup>

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281. GUANTÁNAMO MEDIA GROUND RULES, *supra* note 18, at 4. Protected information includes classified information, information "which could reasonably be expected to cause damage to national security," and information "subject to a properly-issued protective order." *Id.*

282. *Id.*

283. *Id.* at 6.

284. Lane, *supra* note 18, at 1 (quoting comments from John Walcott, the Washington bureau chief of McClatchy, the third largest newspaper company in the United States).

285. Packer, *supra* note 31, at 32-33.



## **The Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Offenses**

### **Introduction**

A strong and independent judiciary that fairly and expeditiously adjudicates terrorism and other national security offenses is critical for public confidence in the legitimacy of judicial institutions, is an effective deterrent to terrorism, and minimizes the risk of violations of fundamental human rights.

As it is commonly understood, the concept of judicial independence includes the duty and ability of a judge to decide each case according to an objective evaluation of evidence that is presented and an impartial application of the law without the influence of outside factors.<sup>1</sup> In doing so, judges also fulfill one of their primary responsibilities – ensuring that the fundamental rights of all parties to a case have been fully respected.<sup>2</sup> This is especially true in high profile cases, including those involving terrorism. These cases not only bring with them increased national and international scrutiny, they also present unique challenges to those tasked with adjudicating them.

The concepts of independence, impartiality, and fairness have both an objective and a subjective component. The authority of a judiciary to exercise its powers is frequently found in a given State’s constitution or similar founding document and the enabling legislation that supports it. Additionally, national courts often adopt rules to further clarify their operating procedures. Taken as a whole, these laws and procedural rules should create a comprehensive framework that consistently protects and advances an independent and impartial judiciary which upholds the rule of law and engenders public confidence in the exercise of its authority.<sup>3</sup> Nevertheless, the best constructed system on paper is not guaranteed to produce the legitimacy and trust that comes

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<sup>1</sup> The right to a competent, independent, and impartial tribunal is articulated in Article 10 of the Universal Declaration of Human Rights, U.N. Ga. Res.217 (December 10, 1948) [hereinafter UDHR] and Article 14 of the International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (December 16, 1966) (hereinafter ICCPR).

<sup>2</sup> *Basic Principles on the Independence of the Judiciary*, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985, U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985), paragraph 6.

<sup>3</sup> *The Basic Principles on the Independence of the Judiciary*, infra, outlines key elements and standards that can assist states in achieving an independent and impartial judiciary: a) Selection process for judges that is de-politicized, transparent and based on objective qualifying criteria; b) Defining length of the term of office and ensuring security of tenure during that term (appointments may be for “life” or to a mandatory age of retirement); c) Establishing remuneration for judges, including pensions, and clearly articulating objective evaluation criteria and a process for disqualification and removal of judges from office; d) Institutional guarantees of judicial independence related to the management of the courts and the assignment of cases; and, e) Providing an operating budget for the judiciary that is administered by the judicial system.

from the public's perception of its integrity. Rather, such trust derives more from actual practice than it does from formal legal requirements.

Recognizing that each legal system is unique and that actual practice is tied to a State's individual history, culture, national laws, and regulations, the Global Counterterrorism Forum's (GCTF) Criminal Justice and Rule of Law (CJ-ROL) Working Group nevertheless believed that a set of good practices on the role of the judiciary in handling counterterrorism (CT) and other national security cases within a rule of law framework, developed by senior judges and justice sector experts from around the globe, could support the development of a strong and independent judiciary in States, assist judges to more effectively adjudicate cases that involve terrorism while ensuring the rights of all parties involved in the cases, in particular the fair trial rights of the accused and the protection of victims and witnesses.

The good practices identified are: 1) the necessity for specially-trained judges; 2) the use of continuous trials in terrorism cases; 3) developing effective trial management standards; 4) the establishment of special measures to protect victims and witnesses; 5) the right of the accused to a fair trial with counsel of his choosing; 6) the necessity for rules regarding the use and protection of intelligence information, sources, and methods in trial; 7) effective courthouse and courtroom security; and 8) developing media guidelines for the court and trial parties. This memorandum elaborates on these good practices, all of which reinforce the United Nations' Global Counter-Terrorism Strategy.

Recognizing that States can only implement those aspects of any set of good practices that their legal systems allow for, all States are strongly encouraged to implement the below, non-binding good practices that are appropriate to their circumstances and consistent with their domestic law, regulations, and national policy, while respecting applicable international law. States are also encouraged to share their experiences implementing these good practices with the GCTF CJ-ROL Working Group and, where appropriate, other relevant multilateral fora. As is the case with the GCTF's [\*Rabat Memorandum on Good Practices for Effective Counterterrorism Practice in the Criminal Justice Sector\*](#) (*Rabat Memorandum*), these good practices for the judiciary focused on terrorism cases must be built on a functional criminal justice system that is capable of handling such criminal offenses while protecting the rights of the accused.

### **Good Practice 1: *Identify and Assign Specially Trained Judges***

States should consider the use of specially-trained judges to adjudicate terrorism and other national security offenses. In most instances it is preferable that such judges be assigned at the inception of the case, so that the assigned judge can be responsible for all phases of the case up to the final resolution in the form of a verdict. The development of a cadre of specially-trained

judges<sup>4</sup> and their assignment to individual high profile and/or complex terrorism or other national security cases has several benefits to a criminal justice system. For example, this helps:

- Create efficiency, consistency, and continuity in the operation of the court and the management of the individual case;
- Ensure that the judges are appropriately trained and prepared to address the complex and nuanced issues and challenges inherent in terrorism and other national security cases while, at the same time, ensuring the case is conducted within a rule of law framework with full respect for the human rights and fundamental freedoms of the accused person; and
- Implement specialized training and professional development related to handling the complex and sensitive issues particularly related to terrorism offenses and provide efficiencies to accommodate changes to the law.

### ***Good Practice 2: Support the Use of Continuous Trials in Terrorism and other National Security Cases***

A fair and expeditious criminal trial is a fundamental component of a functioning, effective justice system and an inherent right of the person charged.<sup>5</sup> However, in many legal systems, protracted legal proceedings and inherent delays remain a critical barrier to an effective, efficient, and just resolution of criminal cases. Delays also contribute to increasing community disillusionment with the justice system and decreasing satisfaction with the law. The negative impact of delays is shared by all of the participants in the judicial process: the accused, who is often detained pending trial; the victims and their family, who have been harmed by the offenses committed against them; and the community that demands justice, safety, and protection. For most judicial systems, the harm invariably includes taxing scarce judicial resources. The use of continuous trials provides for case management efficiency, lowering costs, and saving scarce resources.<sup>6</sup>

One of the significant factors contributing to delays in the justice system is the discretionary practice of non-continuous criminal trials, where evidence is heard by the court in piecemeal fashion, with cases effectively spread out over the course of many months or even years. While limited judicial or court resources and a shortage of available court time due to the volume of cases are often cited for the use of this discretionary practice, the costs of non-continuous trials to both parties and to the justice system as a whole can far outweigh the perceived benefits. The negative effects of non-continuous trials include the following:

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<sup>4</sup> Judges selected for such training should be experienced judges who have already handled serious cases and demonstrate the appropriate judicial temperament. The specialized training should be continuous throughout the time they are sitting on the bench.

<sup>5</sup> ICCPR, *infra*, Art. 14.3.c

<sup>6</sup> The GCTF *Rabat Memorandum* Good Practice 5 encourages States to adopt incentives for terrorist suspects and others to cooperate in counterterrorism investigations and prosecutions.

- Promoting a culture of delays and general tardiness in the justice system. This in turn, generally, results in a lack of focus on the case by both defense and prosecuting counsel. The lack of focus often results in modifications to charges or the defense theory over time causing further delays, or late or piecemeal production of evidence, potentially putting the accused in a disadvantageous posture<sup>7</sup> and increased potential for evidence to be misplaced or lost;
- A decreased incentive for both government and the accused to seek pre-trial resolution in systems where a pre-trial disposition mechanism exists;
- A failure of the courts to streamline the trial process through effective case management, such as not setting a pre-trial schedule with set dates and required performance and not identifying issues of contention that may be resolved prior to the commencement of a trial;
- Increasing the hardship on witnesses and victims by requiring multiple appearances. This generally increases the likelihood of work and personal conflicts which can act as disincentives for non-professional witnesses to cooperate;
- Magnifying the anxieties associated with participation and increasing the opportunities for intimidation or obstruction of justice caused by prolonged trial proceedings. All of which can cause witnesses and victims to become disillusioned with the justice system and not want to cooperate with authorities; and,
- An adverse impact on the ability of the accused to receive a fair trial, especially where the accused is detained during pre-trial and trial.

While all the underlying factors that have led many States to adopt the use of protracted proceedings cannot be addressed by the judiciary, a trial judge is responsible for safeguarding both the rights of the accused and the interests of the public in the administration of the criminal justice system. In all cases, the trial judge should:

- Seek to avoid delays, continuances, and extended recesses, except for demonstrated good cause;
- Be proactive in ensuring punctuality, the strict observance of scheduled court hours, and the effective use of working time to identify and resolve issues that may result in delays;

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<sup>7</sup> Production of evidence refers here to an obligation of the prosecution authority to disclose the evidence that it intends to use to prove the charges lodged and also includes exculpatory evidence that it may possess.

- Permit full and proper examination and cross-examination of witnesses, but also require such examination to be conducted fairly, objectively, and within reasonable time constraints; and
- Not permit unreasonable repetition or permit counsel to pursue clearly irrelevant or improper lines of inquiry.

It is recommended that where such authority does not now exist, States should ensure that judges have the authority to compel witnesses to appear at hearings or trial and otherwise have authority to manage the progress of a case. For example, some States have established guidelines for the length of time various stages of the trial process may take.

### **Good Practice 3: *Develop Effective Trial Management Standards***

As a general principle, judicial trial management is the key element to ensuring that the parties are prepared to proceed, the trial commences as scheduled, and proceeds to fair conclusion without unnecessary delays or interruption. Assigning a terrorism-related criminal case to a specific judge, once charges have been filed in a court of competent jurisdiction, and increasing continuity of trial days enhances the effectiveness of judicial management in expediting a criminal case. In support of effective judicial management of a complex or high profile criminal case, such as those involving suspected terrorists, the court should also develop trial management standards or rules that can consistently be applied. Good management practices and procedures begin with the scheduling of a pre-trial/trial management conference(s) as soon as possible as after the judge receives the case. Records of what was decided or ordered at each conference should be maintained in a manner consistent with domestic legal requirements.

At the conference(s) the judge and the lawyers for both sides should, *inter alia*, address:

- The schedule for various segments of the pre-trial process, including disclosure of evidence as required by applicable law;
- The timetable for the filing of documents or pre-trial motions with the court;
- The identification of special requirements or accommodations – especially that qualified interpreters are available as necessary; and
- The identification of any witness issues or other specific legal, evidentiary, or procedural complexities that may require court action or have the potential to delay proceedings.

Further, the trial judge, after consultation with the parties, should:

- Set a firm trial date, ensuring continuity and predictability;

- Outline the rules of court procedure, to include guidance on conduct of the parties, witnesses, and spectators to maintain appropriate decorum and the formality of trial proceedings;
- Review the scheduling of witnesses to ensure that there is continuity and review the nature of their testimony to avoid unnecessary duplication or determine if some evidence, if uncontested, may be presented with mutual agreement, such as through stipulations; and
- Be receptive to using technology, as may be available, in managing the trial and the presentation of evidence.

In sum, the characteristics that support a trial judge's ability to manage a courtroom effectively include: being decisive; being consistent; requiring punctuality; minimizing trial interruptions; and, developing knowledge of the applicable law.

***Good Practice 4: Support Special Measures to Protect Victims and Witnesses in the Trial Process***<sup>8</sup>

The traditional rules of procedure designed to support due process of law and the public perception of a fair trial process may not provide the appropriate protection in terrorism cases where witnesses fear that the revelation of their identity to the defendant, his/her associates, or the public may expose them, their friends, and/or family to serious harm. While the issue of witness protection is generally in the province of the investigating and prosecuting authority, the court plays an important role in protecting the rights of witnesses and victims in the trial process, thus encouraging their continued vital participation.

As a general good practice, the trial judge in cases involving terrorism or other national security offenses should have a flexible approach to address the unique demands or needs related to victims and witnesses as they arise. Upon the formal request of either party, the court may also adopt special measures to ameliorate any specific threat or general threat that is identified, if it supports a secure trial environment and does not unduly infringe on the fair trial rights of the parties. In determining whether special measures are warranted, the trial judge, in the exercise of his/her inherent jurisdiction to control the court proceedings, should consider the specific facts and circumstances of the case as well as the special or relevant circumstances of specific witnesses or victims that may diminish the quality of the evidence given due to the fear of testifying. Upon determining that protective measures are warranted, the trial judge should apply protective measures that address the specific concerns of the witness or victim without unduly infringing on the fair trial rights of the opposing party. Such protective measures might include:

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<sup>8</sup> This Good Practice is intended to complement the GCTF [\*Madrid Memorandum on Good Practices for Assistance to Victims of Terrorism Immediately After the Attack and in Criminal Justice Proceedings\*](#).

- The redaction of a victim's or witness' name and address from written statements provided to the defense as a part of pre-trial disclosure;
- Imposing a ban on the publication of the name and address of the witness/victim in connection with the proceedings or in the alternative closing the courtrooms to the public for portions of the hearings or trial proceedings;
- When permitted by law and in exceptional circumstances, the trial court may allow witness anonymity. Such orders are frequently sought in instances when intelligence or security agents as well as undercover police officers are called to testify; and
- When permitted by law and where appropriate, one or more of the following special techniques: (i) use of a pseudonym (e.g., "Witness A"); (ii) concealing the physical appearance – allowing the witness to testify in light disguise, such as a wig, glasses, fake facial hair or facial distortion via a digital alternation of the image of the witness to make it unrecognisable in the public broadcast of the proceedings or testifying from behind a screen; (iii) voice distortion – digitally altering the witness's voice to render it unrecognisable in the public broadcast of the proceedings; (iv) expunging the public record – removing information from a publicly released court transcript about a protected witness that could lead to the witness' identification; (v) permitting video link testimony – allowing a witness to testify via a secure video-link and not be present in a courtroom; and/or (vi) permitting disclosure limitations – limiting the time when the prosecution or defense can have access to the identity of the witnesses of the other party and limiting as much as possible the circulation and subsequent potential for compromise of sensitive material.

### ***Good Practice 5: Supporting the Right of the Accused to a Fair Trial with Adequate Legal Representation***

The *UDHR* and the *ICCPR* identify a number of individual rights related to criminal prosecutions, including: (1) the right to a fair hearing without undue delay; (2) the right to a public hearing and pronouncement of judgement with limited exceptions; (3) presumption of innocence; (4) freedom from compulsory self-incrimination; (5) the right to be informed promptly and in detail of the accusation; (6) adequate time and facilities to prepare a defence; (7) the right to legal assistance; (8) the right to examine witnesses; (9) the right to an interpreter; (10) the right to appeal the conviction and sentence; and (11) freedom from ex-post facto laws.<sup>910</sup>

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<sup>9</sup> Article 14 of the *ICCPR* states that everyone charged with a criminal offence shall be entitled to be tried in his or her presence and to defend himself or herself in person or through legal assistance of his or her own choosing or assigned to him or her where the interests of justice so require, in a fair and public hearing by a competent, independent and impartial tribunal established by law.

<sup>10</sup> In addition the *UDHR* and *ICCPR*, other international instruments relating to the right to a fair trial may be applicable, e.g., the fair trial rights for vulnerable persons, such as children (article 12 of the Convention on the

Additionally, the Convention Against Torture (CAT) contains a wide range of measures to make more effective“ the prohibition against torture or other cruel, inhuman, or degrading treatment or punishment. Article 15 of the CAT requires that any information made as a result of torture shall not be admitted as evidence in a trial, and Article 14 requires that victims of torture obtain redress.<sup>11</sup>

The above rights are particularly vulnerable to abuse in terrorism cases where defendants may lack the means to provide for their defense. Moreover, given the nature of terrorism-related offenses, and the impact they can have on a nation, there is the very real potential for many to call for the abrogation of the rights of the accused persons. This highlights the particular need for judges to ensure the rights of the accused are fully respected. A key component of that process is effective legal representation of all accused persons in terrorism cases.

Ideally, and in most developed legal systems, a public defender service is established by statute and is maintained as an independent agency to ensure that it is free from any undue influence. With a dedicated budget and the support of legal aid commissions and bar associations, this arm of the criminal justice system has the ability to develop its own policies and practices, selecting and funding legal counsel to ensure that all defendants, including those who cannot afford legal counsel, have access to the legal services they need. However, where such does not now exist, the courts can support the efforts of government agencies and non-governmental bodies to provide legal representation for those accused of committing terrorism offenses in the short term and encourage the development of a viable long-term solution to ensure this critical right.<sup>12</sup> The courts or a trial judge may adopt the following good practices to ensure effective legal representation for those charged with terrorism offenses in all critical phases of court proceedings:

- Inform the accused of his/her right to counsel and legal aid services that might be available;
- Secure lawyer services to represent individuals appearing in court without a lawyer, along with qualified interpreters as necessary;
- Ensure that defense counsel is assigned and notified of appointment, as soon as feasible after arrest, detention, or request for counsel as mandated by applicable law;
- Ensure that qualified defense counsel is provided access to the accused as needed, and sufficient time in a confidential space within which to meet with the client;

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Rights of the Child) and people with disabilities (article 13 of the Convention on the Rights of Persons with Disabilities).

<sup>11</sup> *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, U.N. Ga. Res. A/39/46, Arts. 14 and 15 (December 10, 1984); *see also ICCPR*, *infra*, arts. 3 and 7; *UDHR*, *infra*, arts. 5 and 8,

<sup>12</sup> In those countries where no public defender service exists, the bar associations are strongly urged to support the courts by creating a robust program to provide defense counsel for indigent defendants.

- Support the generally-recognized principle that, where possible, the same attorney should continuously represent the client until completion of the case; and
- Take appropriate steps to ensure that all aspects of the court's or trial judge's interaction support equal treatment between defense counsel and the prosecution as equal contributors to the justice system.

***Good Practice 6: Support the Development of a Legal Framework or Guidelines for the Use and Protection of Evidence from Intelligence Sources/Methods<sup>13</sup>***

One of the basic principles of a fair hearing is that the individual charged with a criminal offense be informed of the evidence that supports the allegations that have been formally lodged. In many legal systems, the government is required, either as part of the investigation or the pre-trial process, to disclose evidence to the accused person, especially that which might be potentially exculpatory or otherwise might have a negative impact on the weight of the evidence in the prosecution case, or may have been specifically requested by the accused to support a proposed defense theory. A significant exception to the requirement to disclose relevant material in its "original form" is when the information involved is from intelligence sources and methods and is either classified<sup>14</sup> or otherwise declared to involve national security concerns by the government. This issue arises frequently in cases involving terrorism charges.

Rabat Good Practice 6 recommends the development of an appropriate legal framework that outlines the rights and responsibilities of the parties involved as well as the procedures that are to be followed in these very specific circumstances.<sup>15</sup> The focus is to appropriately balance the national security concerns of a government and the fair trial rights of the accused. Those States that already have well developed legal frameworks and procedures to address this issue generally take one of two recognized approaches, which can, more or less, be viewed as the "common law" approach and the "civil law" approach. The primary difference between the two approaches is the point in the case at which they address the issue. Both approaches though have a common starting position, and that is to determine if the information can be declassified without harm to the sources, methods, witnesses or national security, so that it may be included with all other evidence or information in the case. If the information cannot simply be declassified, that is where the two approaches diverge.

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<sup>13</sup> This Good Practice is designed to complement Good Practice 6 of the GCTF *Rabat Memorandum*, as well as the recommendations on the implementation of *Rabat Good Practice #6* being developed by a group of experts under the GCTF Criminal Justice and Rule of Law Working Group (CJROL). Those recommendations will be published as the Frankfort Memorandum when formally adopted.

<sup>14</sup> While the definitions of "classified information" varies from legal system to legal system, the term is commonly understood to have the following components: (1) information that an authorized official of a government has identified; (2) pertaining to a particular subject or subject matter; (3) that is within the custody or control of the government in question (4) and by the authority and assessment of that government official/agency, may cause damage to the national security or foreign relations of the country if disclosed to unauthorized recipients.

<sup>15</sup> In developing these legal frameworks, States should recognize that classified intelligence or other sensitive national security information may also be relevant and necessary in criminal cases other than terrorism cases.

The civil law approach generally addresses this issue in the investigative phase of the case. Most States that follow the civil law approach cannot include intelligence information in the file as evidence. Rather intelligence is provided to prosecutors, police, or magistrates/investigating judges for lead purposes so that a law enforcement investigation may be developed to produce the necessary evidence. Where it appears classified information needs to be turned over, some States following the civil approach have developed different means to obtain an independent review of the intelligence. For example, one State uses an independent commission to review the relevant intelligence and decide if it can be declassified and turned over. Another State uses a national level terrorism prosecutor – who is not involved in the case - to review all relevant intelligence and decide what should be turned over.

The “common law” approach generally addresses the issue with the trial court in the pre-trial phase of the case. The prosecutor, working with the relevant intelligence agencies, identifies what classified or otherwise sensitive national security information is relevant to the case. The prosecutor then files a motion with the trial court or other appropriate court *ex parte* advising the court that there is classified information involved in the case and the prosecution is requesting an *ex parte, in camera* hearing to address the proposed redactions, summaries, or substitutions for the classified information. The judge’s primary role at this stage is to ensure that the information that will be turned over to the defense still provides the accused with the essence of the case against him or that which is exculpatory or otherwise favorable to the accused, thus ensuring the accused’s right to a fair trial is secure while still addressing the national security concerns.<sup>16</sup> If the prosecuting authority objects to the position of the court and, in its opinion, a proposed alternative does not mitigate the threat to national security, the prosecution authority should have the option to terminate the prosecution or to proceed in the case without the use of the evidence that would have supported a conviction or withdraw the charge(s) to which the potential exculpatory information would have been relevant. If the decision is made to proceed, the court may request that the prosecuting authority modify the charges in accordance with its ruling.

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<sup>16</sup> In reaching its determination, the court should determine: (1) whether the information is relevant and necessary for the government’s case; (2) whether the relief sought by the government infringes on the accused’s right to a fair trial; (3) in the event that the information in question has been requested by the defense, the court may determine whether the information is reasonably available and whether its significance outweighs the difficulty, expense, and/or delay that might result in requiring the government to disclose it in a form that allows the government to declassify the information so that the defense may use it. If the court determines that the information is relevant and disclosure necessary, the court should consider the following alternatives/options in striking an appropriate balance in protecting both parties’ interests: (1) redacting some or all of the classified or sensitive information from documents before requiring their production; (2) substituting unclassified descriptions of the classified or sensitive information or a summary of the entire document; (3) substituting a statement or other form of the information, admitting the relevant facts the classified information would tend to prove. Throughout this process the court must maintain an appropriate record to satisfy its legal obligations and support an accused’s appellate rights.

***Good Practice 7: Contribute to the Development of Enhanced Courthouse and Judicial Security Protocols and Effective Courtroom Security***<sup>17</sup>

Given the history of violence and acts of intimidation that have accompanied terrorism cases in many countries, providing the necessary security for judges,<sup>18</sup> court personnel, victims, and witnesses, is essential to ensure a fair and effective criminal justice system that is free from intimidation, retaliation, and obstruction of justice. It also increases the likelihood that victims and witnesses will more consistently trust the criminal justice system to resolve disputes and protect those already traumatized by acts or threats of violence. Although the potential for disruptions, intimidation, and violence cannot be eliminated altogether, it has become clear that the most effective approach is to have all parts of the justice system coordinate their operations and function in a collaborative effort to address the issue of security. The judiciary has the opportunity to facilitate this interaction in many ways, contributing to the development of appropriate procedures and practices that balance the need for a secure environment with one that is transparent, accessible, and which supports the due process of law rights of those accused of criminal conduct.

While security solutions for courthouses vary in complexity and are tied to available resources, judges can contribute to the development of basic rules that may promote a secure environment in their respective courthouses, for the just and orderly adjudication of criminal offenses. For example, they can assist in the development of rules for applying enhanced safety measures in the courthouse through coordination with responsible security/court officers and request sufficient funds to make the courthouse as safe as necessary from the appropriate authorities. Once developed, the security policy and accompanying procedures should be triggered when charges involving terrorism or other national security offenses are filed in the jurisdiction. Enhanced security, as appropriate, may include: (1) increased police or other security staff both in and outside the courtroom; (2) the strategic use of security checkpoints and screening procedures; (3) the use of metal detectors, x-ray scanning devices, and other screening technology at the public entrance(s) to the courthouse and courtroom; (4) prohibiting the possession of cell phones and other electronic devices in the courthouse and courtrooms; and (5) separate and secure parking and entrances for judges, prosecutors, and court personnel.<sup>19</sup>

In addition, strong judicial leadership is essential to successful implementation of rules of procedure and conduct in the individual courtrooms to ensure a secure and fair trial environment. This leadership is particularly important in terrorism cases because the heightened tensions and emotional atmosphere that accompany such cases have the potential to impact the conduct of the judicial proceedings. While judges alone cannot initiate change, their support and leadership are critical to reforming court practice.

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<sup>17</sup> Good Practices 4, 7, and 8 are intended to complement GCTF Rabat Good Practice 1.

<sup>18</sup> States should also give consideration to extending security measures for judges and their families outside of the courthouse.

<sup>19</sup> States are strongly encouraged to have security assessments of all court facilities conducted by experts and to implement the necessary security measures as soon as possible.

Like all effective leaders, judges must have a vision for what can and should be accomplished in their respective trial environments. This vision should be clearly communicated by the words and actions of the presiding judge to court personnel, the litigants, and the victims and witnesses who may participate in the trial process.

For example, trial judges can:

- Assist in the adoption of courtroom rules supporting a secure trial venue that can be consistently applied in all cases; these courtroom rules should clearly outline courtroom requirements for the litigants, for those actively participating in the trial process, and for observers in the courtroom. The rules should be reinforced by the judge/court security as appropriate throughout the duration of the case;
- Discuss court security with the litigants, including the accused, during pre-trial conferences and meetings and prior to the beginning of court proceedings. These conduct guidelines should be highlighted daily and consistently applied throughout the proceedings; and
- Take steps to reduce the risk of threats, intimidation, and confrontation involving victims and witnesses and to increase their safety. These may include: (i) designating seating arrangements for victims, witnesses, and family members to help reduce opportunities for intimidation within the courtroom; (ii) ordering staggered departures of the various groups and parties; and, where possible, (iii) providing secure waiting areas for victims and witnesses and separate entrances and exits to and from the courtroom for court personnel, the accused, and witnesses. Judges should be thoughtful in their approach, exercising discretion in fashioning appropriate security solutions for threats that are identified.

**Good Practice 8: *Develop and Articulate Media Guidelines for the Court and Parties***

Trials involving the prosecution of terrorism offenses are generally high profile by their nature, inviting scrutiny from the general public and the media.<sup>20</sup> As a general rule, timely access to accurate information of court proceedings increases transparency and public confidence in the fairness of the justice system. The judiciary should develop rules and procedures for media coverage of public judicial proceedings, with good practices including the following:

- Providing the trial judge with latitude to control the conduct of the proceedings to:
  - (i) maintain decorum and prevent distractions; (ii) guarantee the safety of any court official, party, witness, or juror (where applicable); and (iii) ensure the fair and impartial

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<sup>20</sup> In states where terrorism and other national security offenses are not tried in a public court or are otherwise closed to the public, close media coverage is limited because of a lack of access and in some situations, may be prohibited by law.

administration of justice in the pending case.

- Where the media is seeking special or additional coverage of the case, the court should establish a consistent policy that requests by representatives of the media for such coverage are made in writing to the trial judge, prior to the scheduled trial date or specific trial event. Written requests for specific or enhanced coverage may be supported by affidavits as appropriate. Notification that the media has requested such coverage should be provided by the court to the attorneys of record in the case, with the parties provided an opportunity to object.<sup>21</sup>
- Before denying, limiting, suspending, or terminating media coverage, the trial judge may hold a hearing, if such a hearing will not delay or disrupt the judicial proceeding or receive affidavits to consider the positions of the parties.
- Any finding that media coverage should be denied, limited, suspended, or terminated should be supported by a finding of the court that outlines the underlying justifications for its actions.
- The court may prohibit the use of any audio pickup, recording, broadcast, or video close up of conferences, which occur in a court facility, between attorneys and their clients, between co-counsel of a client, and between counsel and the presiding judge held at the trial.
- When more than one request for media coverage is made and the trial judge has granted permission, the court may request that the media select a representative to serve as a liaison and be responsible for arranging "pooling" among the media if such is required by limitations on equipment and personnel as a result of courtroom space limitations or as directed by the court.<sup>22</sup>
- Where non-print media is covering a trial, the judge may impose additional guidelines which limit the use of photographic and audio equipment to that which does not produce distracting sound or light and may limit or prohibit the use of moving lights or flash attachments.

**Good Practice 9: *Ensuring Victims of Terrorism Access to Justice***

The GCTF's [\*Madrid Memorandum on Good Practices for Assistance to Victims of Terrorism Immediately After the Attack and in Criminal Justice Proceedings\*](#), sets forth good practices aimed at providing victims greater access to justice. These good practices empower victims and

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<sup>21</sup> Examples may include requests to use video or still cameras or other electronic recording or broadcast devices

<sup>22</sup> "Pooling" arrangements include procedures for cost sharing, access to and dissemination of material, and selection of a pool representative if appropriate. In the absence of advance media agreement on disputed equipment or personnel issues, the trial judge may exercise discretion and exclude all contesting media personnel from a proceeding.

emphasize their intrinsic human value. Providing victims a voice throughout the justice process, allows victims' stories to be heard and thereby raises awareness of devastating human effect and impede future recruitment of terrorist cells. Including victim views in the process can also lead to more confidence in the judicial system on the part of victims and the public. The end result is a safer, more secure world for everyone.

Victim participation in prosecutions as witnesses who can provide crucial evidence increases the likelihood of successful prosecutions. By also providing a face to the suffering caused by the violent acts of the terrorists, victims help ensure that convicted terrorists will be appropriately punished. Successful prosecutions and appropriate sentences not only remove individual terrorists from the population but disrupt the activity of cells and reduce future recruitment.

The trial judge plays a vital role in protecting victims' rights by ensuring that victims are treated with dignity and respect through court proceedings. Therefore, courts should consider the following:

- Taking precautions to safeguard them from secondary and repeat victimization during court proceedings;
- Ensuring that prosecutors or victim witness professionals have advised victims of their rights under the law;
- Providing victims adequate advanced notice of all hearings and continuances so that victims have the opportunity to exercise any rights that they have under national law; and
- Unless prohibited by law or impossible for safety reasons, allowing victims to attend court hearings. If attendance is not possible, ensuring that victims receive notice of any pertinent outcomes or rulings that occur during the proceedings.

Consistent with national law, providing victims with opportunities to have their views heard and considered by the court either in person or in writing through the submission of a victim impact statement.

# PRESS, FREE SPEECH AND CONTEMPT OF COURT IN INDIA

## 4.1 Introduction

The success or failure of any democratic system depends largely on the extent to which civil liberties is enjoyed by the citizens. Maximum development of an individual is the aim of a democracy by guaranteeing significant rights and freedom to the maximum extent. In a popular democracy, people are supreme and all the three organs of the state, i.e. Legislature, Executive and Judiciary are to serve them. Consequently, service providers are accountable towards their masters and masters have the right to check and criticize if they do not act or behave properly. Master's right to check, criticize and control may be effectively exercised through the right to freedom of speech and expression guaranteed under Article 19(1) (a) of the Constitution of India. But excess to information is very foundation of this freedom of speech and expression. Unless, access to information will be provided, it will not be practicable not to effective exercise of freedom of speech and expression; and in turn check, criticize and control of service providers.<sup>1</sup>

Free press<sup>2</sup> is the hallmark of a democratic society. It has to play a vital role in safeguarding the rights and liberties of people. This freedom is based on thinking writing, printing and publishing with free access to information. The press has the same right as an ordinary citizen of the country. Though freedom of speech and expression include freedom of the press also,<sup>3</sup> it has no special privileges, which are enjoyed by the legislature<sup>4</sup> or the head of the state.<sup>5</sup>

Democracy can thrive not only under the vigilant eye of its legislature, but also the care and guidance of public opinion and the press is par excellence, the

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<sup>1</sup> J.P. Rai, 'Informed Citizenry and Contempt', Supreme Court Journal, Vol. 5, 2009, p. 19.

<sup>2</sup> According to R.C.S. Sarkar, freedom of the Press has three important elements. They are, freedom of publication, freedom of circulation and freedom of access to all sources of information. R.C.S. Sarkar, 'The Press in India', 1984, p.35.

<sup>3</sup> Romesh Thappar v. State of Madras, AIR 1950 SC 124: Also See, Brij Bhushan v. State of Delhi, AIR 1950 SC 129.

<sup>4</sup> Art. 105 of the Constitution guarantees special privileges to Parliament and its members, which include freedom of speech, immunity from legal proceedings for anything said in Parliament and also for the publication made under the authority of Parliament. Corresponding provision with regard to state legislature is contained in Art. 194.

<sup>5</sup> Art. 59 and Article 158 and second schedule of the Constitution of India guarantee certain privileges to the President of India and Governor of a State.

vehicle through which opinion can become articulate. So, freedom of press is essential to political liberty. The purpose of the press is to advance public interest by publishing facts and opinions without which masters will not be able to have effective control over source providers. At the same time baseless, frivolous, unwanted facts and information may cover the dignity of the institution, so, the need is to make balance between freedom of press to publish facts and dignity of the judiciary.<sup>6</sup>

Freedom of speech and expression of the individual and the media does not, confer an absolute right to speak and disseminate without responsibility whatever one wishes, nor does it provide unrestricted or unbridle immunity for every possible use of language and prevent the punishment of those who abuse this freedom. Constitution of India in Article 19(2) attempts to strike a balance between individual liberty and state control and authorize the state to impose certain reasonable restrictions.<sup>7</sup>

The increased role of media in today's globalized and tech savvy world was aptly put the world of Justice in the hand that rule the press, radio screen and magazine, rules the country. Judiciary is also not left unaffected by the effect of 'mass media'. It comes as no surprise that court, the judiciary and the legal profession has not escaped heightened scrutiny. Today the media capitalize on enduring Indian appetite for law and regularly turn to it both to provide information and captivate more and more time in the nightly news broadcast in T.V. and full space in daily newspaper are devoted to judicial matter especially criminal cases. The more the people go into details of a case the more burdens over it become for the judges to pronounce their judgment in a case. The critique may be good, but we cannot overlook the ill-effects of which it has one hand we have the right to freedom of press enshrined in the Constitution of India on the other hand right of the accused for a fair trial unbiased by pre-trial publicity. It is important to look at how the two can be reconciled.<sup>8</sup>

#### **4.2 Historical Development of Press Laws in India**

Men do not live by bread alone. No doubt, food enriched his body but knowledge and information fulfill him, make him completely perfect and rational

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<sup>6</sup> Supra note 1, at p. 20.

<sup>7</sup> K.D. Gaur, 'Constitutional Right and Freedom of Media in India', Journal of Indian Law Institute, Vol. 36, 1999, p. 436.

<sup>8</sup> Abhinav Shrivastava, 'Effect of Media in Adjudication of Criminal Trial', Cri. LJ, 2005, p. 124.

being. Therefore, quest for knowledge and thirst for information are time inherent phenomenon as old as the 'man' himself. In other words, there has been an inherent desire in man to know and then act on the basis of the information. This curiosity has made him knowledgeable and herald a new era of progress and prosperity of the society with ideas, information and knowledge has been not only achieved tremendous success in his life but also brought about and all around development in the society. Lack of information might pose a serious threat even to his survival and degrade his personality. Hence, for his own safety and prosperity he strive his best in acquiring and exchanging information with his fellow beings. Continuous and prolonged hard work in this regard resulted, among other things in the setting up of media including the newspaper.<sup>9</sup>

The history of the press in India is the history of its struggle for freedom. It is a story of how repressive measures were undertaken to control the press and how they were tightened or relaxed to meet newer exigencies through which the country passed over two centuries.<sup>10</sup>

#### **4.2.1 Ancient Period**

During ancient period news was travel orally by words of mouth. The Hindu mythology records the exploits of one man oral newspaper who supplied news to both heaven and earth. He was Narada, a Rishi by modern standards, he could be considered as reporter. At a later stage, machinery was developed to keep the ruler informed of the main currents of the life of the people. Such information was transmitted verbally by messenger who reported orally and that at a much later stage it was reduced to writing.<sup>11</sup>

The earliest reference to an organization for the collection of news in ancient India is found in the ordinance of Manu on important historical document. It shows that the intelligence organization was divided into two sections namely the external and internal intelligence administration. For external intelligence, Manu advises the ruler to appoint an ambassador learned in all treaties, who understood gestures

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<sup>9</sup> K.S. Padhy, 'The Press in India', 1977, p. 1.

<sup>10</sup> Supra note 2 at p. 17.

<sup>11</sup> K.C. Sharma, 'Journalism in India', 2007, pp. 58-59.

expression. The internal intelligence was organized in dual fashion. The news was first expected from the administration and then from spies.<sup>12</sup>

The idea, news and messages were disseminated by the wandering monk through oral communication speech and spoken word were beyond doubt the most important vehicle of human communication.<sup>13</sup>

During the Rigvedic period the King's autocracy was limited by the popular bodies called the Sabha and Smiti. In Smiti all people were supposed to be present in the assembly. In each Sabha and Smiti there was one person employed who look at matter happening surrounding. King employed spies (spasa) to watch over the conduct of the people. The foremost function of the spasa was to gather news and them inform to king.<sup>14</sup> The great epic of the Aryans were the Ramayana and the Mahabharata. During both period the news were gathered through secrets agents, and these news and messages were communicated through oral communication. In Ramayana Hanuman was selected as an ambassador to the court of Ravana to deliver the message from Rama to return Sita.<sup>15</sup>

According to Kautilyas Arthashastra there were altogether 10 Kings in the Mauryan dynasty who ruled from (520-185 B.C.). According to this there were 18 department of administration and one of them was intelligence. Contact with the general public was maintained through agent and informant. They broadcast the idea of King and brought him report on public opinion. Secret agents conveyed their information by means of writing concealed in musical instrument or through sign, recitation or song or, general public was informed by beating drums.<sup>16</sup>

One of the greatest Indian empires and the grandson of the Chandragupta Maurya devised his over means of communication. During his regime all the imperial edicts were unscribed on cooper plates, rocks and stone pillar. Daily news covering the events and happening were published in the form of small picture drawn on the walls of temple with ink or colour which could be erased easily. Policy decision

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<sup>12</sup> Suresh Kumar, 'Press in India', Vol. 1, 2006, p. 1.

<sup>13</sup> V.S. Gupta, 'Handbook of Journalism and Mass Communication', 2001, p. 68.

<sup>14</sup> Vidhya Dhar Mahajan, 'History of India', 1981, pp. 68-69.

<sup>15</sup> Id. at p. 79.

<sup>16</sup> Id. at p. 157.

taken by the rulers were also communicated to the people through announces who made this announcement in a crowded gathering by beating a tom-tom.<sup>17</sup>

#### 4.2.2 Medieval Period

During the Mahmud Ghazni there was no special network of news gathering and informing the people. There was only one special department of intelligence. Those for intelligence gathering were collected 'sarran' and horse courier for urgent missives was called Khail sarran. The main work of 'sarran' was to collect the news happening in surrounding and to inform the King. Sarran was like the reporters or spy.<sup>18</sup> A new feature was the news writer or (Munshi) posted at every town. He was to report every day or by every third day for which special horse courier and runners were kept ready at every Kos. Minister of state news was appointed. The fresh concept of two way news transmissions was adopted, wherein the people were also kept informed about the well being of ruler. This system of news letter and news writers becomes the hallmark of communication system of this regime.<sup>19</sup>

In order to maintain regular and speedy communication there were two ways through which news or messages were communicated to king. The first was horse post and the second was foot post. The horsemen carried letters with the jingling bells till he reached the station.<sup>20</sup>

During the period of Akbar the system of Dak-Chowki was established to procure and transmit secret news and messages. Secret agents were employed together the news. Provisions were made to ensure that every news was counter checked or precision. The Wagai Navis and Swami Nagar were like the present day regional news correspondents serving a news agency, reporting both the local news and district level happening. The Wagai Navis had his network of grassroots level stringed in each district and pargana, who kept him informed with all current news. The Wagai Navis usually send his reports weekly and Swami Nagar weekly. The Akbar Navis system organized by Akbar set off the nascent form of newspaper. These gradually evolved into periodical news letter. The era also saw the emergence of the official ante typographic newspapers which were indeed the confidential reporters and special

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<sup>17</sup> Supra note 9, pp. 1-2.

<sup>18</sup> Supra note 12 at p. 4.

<sup>19</sup> Id. at p. 5.

<sup>20</sup> K.M. Munshi, 'The History and Culture of the Indian People', 1960, pp. 454-455.

news letter discussed for instant perusal of the monarch. From this there emerged the akhhar or private news periodical call.<sup>21</sup>

Aurangzeb established an efficient system of information officers. News writers were appointed to various administrative units in their territory, and were changed with the function of sending reports to the headquarters of the administration. These manuscript reports were submitted exclusively for office use.<sup>22</sup>

Aurangzeb's army was also a good source of information. His army not only received the news from the headquarters but also communicated the same to it. There were in addition spies who were also obliged to send report weekly about other important matters.<sup>23</sup> These handwritten letters, mentioned visit of the emperor to mosques on other holy places, hunting expedition, detail of the representation made to him and news items of similar nature. Secret information was conveyed along with the general news whenever necessary.<sup>24</sup>

Thus, we can conclude that in Ancient and Medieval India news were gathered or collected by secret agents. In ancient India news were conveyed to King through oral method, but in medieval India this news was conveyed to King through written newsletter and general public were informed by beating drum. That means in India there was no newspaper or newsletter which directly informed the general public.

### **4.2.3 Modern Period**

Indian Legal History relating to the development of the concept of freedom of the press has similarly been studied under the two periods. The first period belongs to pre-independence or; and the second one states the post independence position of the concept.

#### **4.2.3.1 Pre Independence Period**

The growth and development of press in India has had a chequered history. In India Print Media has been a product of struggle against the continuing repressive measure of British ruler over long period of time.<sup>25</sup>

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<sup>21</sup> Supra note 12 at p. 6.

<sup>22</sup> Id. at p. 60.

<sup>23</sup> Supra note 9, pp. 2-3.

<sup>24</sup> Id. at p. 3.

<sup>25</sup> Supra note 13 at p. 91.

The origin of the press in India can be traced to immigration of European in India. The Portuguese introduced the Press in India.<sup>26</sup> The Christian missionaries brought the first printing press to India in 15<sup>th</sup> and 16<sup>th</sup> centuries. It was mainly concentrated for propagating Christianity among the Hindus and prompts them to Christianity.<sup>27</sup>

Printing in India originated in Goa in 1550 and the Spanish Coadju Brother John de Bustamante, Known as the Indian Guttenberg, was the first printer. The first book published in India was the Jesuits of Goa in 1557. In 1674 a printing press was set up in Bombay.<sup>28</sup> It is significant to mention that even though the first printing press set up in the third quarter of the 16<sup>th</sup> century, publication of a newspaper was delayed by more than two centuries.<sup>29</sup>

The establishment of the East India Company in 1600 introduced by Anglo-Saxon law in India and a series of enactments were directed against the press since the emergence of the East India Company. From 1797, regulations were issued for the pre-inspection of all news-papers under threat of deportation.<sup>30</sup> Early newspapers, generally of English concerns, were published by Englishmen in India. These were usually very critical of the government and led to conflict plus the establishment of a strict censorship. Among the earliest champions of the freedom of the press in India were Englishmen, and one of them, James Silk Buckingham, editor of Calcutta Journal had been too free in his criticism of officials and their doings that he was expelled from India by the then acting Governor-General, Adam.<sup>31</sup> In 1799, the Governor-General issued regulations to submit all materials for publication for pre-censorships by the secreting to the Government of India. Those regulations were abolished during the tenure of Warren Hastings.<sup>32</sup> In 1823, licensing of the press was introduced by an ordinance. This Ordinance was replaced later on by Metcalf's Act, 1835 which was made applicable to the whole of the territory to the East India Company, require the printer and publisher of every newspaper to declare the location of the premises of its publication. Although Bentik had allowed great freedom of the

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<sup>26</sup> N. Jayaplan, 'Journalism', 2001, Delhi, p. 304.

<sup>27</sup> Shelton Gurnarrantne, 'Handbook of Mass Media', 2000, p. 87.

<sup>28</sup> Diwakar Sharma, 'Mass Communication in 21<sup>st</sup> Century', 2004, , p. 45.

<sup>29</sup> Supra note 9, at p. 5.

<sup>30</sup> Rajeeve Dhavan, 'On the Law of Press in India', Vol. 26, 1984, p. 241.

<sup>31</sup> J.L. Nehru, 'The Discovery of India', 1965, p. 316.

<sup>32</sup> A. Jaitley, 'Press Fetters', 302 Seminar, 1984, p. 30.

Press, he took the view that public safety required a control of the press. His successor Metcalf, incurred the displeasure of the Directors by removing all press restrictions by legislation in 1855. This position continued till 1857 when under the stress of 'Mutiny' conditions, a rigorous licensing of 'Printing-Presses' was established by the 'Gagging Act' of Canning.<sup>33</sup>

In 1857, Lord Canning's Act was applied to all kinds of publication, including books and printed papers, in any language, European or Indian. In 1867, the press and Registration of Books Act, 1867 was enacted with an object to control publication of anonymous literature. This law required essential information regarding the owner, editor and printer. The Vernacular Press Act, 1878 was directed against newspapers published in Indian languages, for publishing and suppressing seditious writings. Under the provisions of this Act, 'The government was given the power to work and to confiscate the plant, deposit, etc., in the event of the publication of undesirable matter'. This 'Gagging Act' did not permit any appeal against the orders of a Magistrate, empowered the Government to issue search warrants and to enter premises of any press, even without orders from any court. Later on, Lord Rippon repealed the Vernacular Press Act, in 1881.<sup>34</sup>

The year of 1908 was a year of discontent and unrest in India and it was also a year of constitutional reforms. The Newspapers (incitement to offences) Act was passed by the Imperial Legislative council in June, 1908 by which an undesirable newspaper may be killed by District Magistrate, its press, plant, machinery and tools and every printing or other materials, connected with it confiscated and the very name of the paper obliterated forever. It has only to be made out that the paper contained an 'incitement to any violence' and woe to the owner and proprietor of the press in which the paper was printed.<sup>35</sup> Indian Press Act, 1910 put fetters on expression of public opinion. The Defence of India Regulations was promulgated on the outbreak of the First World War in 1914. These regulations were intended against aliens and enemies in Great Britain but, in real sense, had been put in force against devoted workers for Indian constitutional reforms.<sup>36</sup>

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<sup>33</sup> K.A.N. Sastri, 'Advanced History of India', 1970, p. 666.

<sup>34</sup> J.S. Sharma, 'Encyclopedia India', Vol. 2, 1981, p. 1035.

<sup>35</sup> R. Parthasarathy, 'A Hundred years of Hindu: The Epic Story of India Nationalism', 1948, p. 186.

<sup>36</sup> Id., pp. 210-211.

In 1919, Government of India adopted a policy of repression in Punjab after the war and promulgated the Rowlatt Act. It was named after the British Judge who recommended the drastic measure; Rowlatt Bill was passed into law on March 19, 1919. It was an iniquitous piece of legislation and draconian provisions of the Act were directed against the patriotic people of India. The launching of the Civil Disobedience Movement, in 1931, for the attainment of Swaraj, prompted the government to promulgate an ordinance to 'control the press' which was later embodied in the Press (Emergency) Powers Act, 1931. Originally a temporary Act, it was made permanent in 1935.<sup>37</sup>

Before 1947, it is noteworthy that the role of the press was chiefly concerned with the problem of securing at the earliest possible the early transfer of power to Indian hands. 'Freedom of the Press' is part of the larger freedom of the country and until the century is free the press has necessarily to work under the limitations arising from factors and forces that are imposed on it.<sup>38</sup> In other hands, it can be said that freedom of the press suffers in the hands of a despotic Monarch. Hence, fettered press may become one of the greatest scourges with which the hands of a despotic power can be armed and one of the most dreadful engines of tortured with which it can track the mind.<sup>39</sup> This was the Pre-constitutional History of Indian Press.

#### **4.2.3.2 Post Independence Period**

Soon after gaining Independence, the Government of India set up a 'Press Laws Inquiry Committee' in 1947 under the Chairmanship of Sri Ganga Nath Jha. The committee was required to (i) examine and report to the government on the laws regulating the Press in a Principal countries of the world including India; (ii) to review the Press Laws of India with a view to examine if they were in accordance with the fundamental Rights formulated by the constituent Assembly of India; and (iii) to recommend to the government any measures of reform with press laws considered expedient upon such review.<sup>40</sup> The committee recommended that an explanation

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<sup>37</sup> D.D. Basu, 'Law of the Press in India,' 1980, p. 251.

<sup>38</sup> Supra note 35 at p.735.

<sup>39</sup> B.M. Sankhdher, 'Press, Politics and Public Opinion in India', 1984, p. 78.

<sup>40</sup> Supra note 34.

should be added to section 153 A<sup>41</sup> of the Indian Penal Code to the effect that it did not amount to an offence under that section to advocate a change in social and economic order provided that adequacy did not include violence. The committee recommended the repeal of the Foreign Relations Act, 1932, the Indian States (Protection) Act, 1934 and the Indian Press (Emergency Power) Act, 1931 which did not find a place in the ordinary law of the country, should be incorporated into that law at suitable places. It was further recommended that section 124 A<sup>42</sup> of the Indian Penal Code should be amended in such a way as to apply only to those acts which either incited disorder or were intended or tended to incite disorder. It was further suggested that section 144<sup>43</sup> of the 'Code of Criminal Procedure' should not apply to the press and separate provision should be made for dealing with the press in urgent cases of apprehended danger. Amongst these eight recommendations made, the most important was that before taking action against the press under emergency legislation the provincial government should invariably consult the Press Advisory Committee or a similar body.<sup>44</sup>

### 4.3 Meaning, Concept and Scope of Freedom of Press

It was Abraham Lincoln who had stated that "Democracy is a government of the people, by the people, for the people". Justice Hidayatullah would however add "Democracy is also a way of life and it must maintain human dignity, equality and the rule of law. It requires strong public opinion, independence and fearlessness in the press and in educated men and woman who are not complaint to authority wrongly exercised."<sup>45</sup> This is indeed so, as a vigilant public opinion expressed in diverse way including through the Medium of the press is the *sine qua non* of a vibrant democratic society. For this it is essential that the press do enjoy full freedom in a democratic country.

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<sup>41</sup> Promoting enmity between different groups on ground of Religion, race, place of birth, residence, language etc., and doing act prejudicial to maintenance of harmony..... etc.

<sup>42</sup> Sedition-whoever by words either written or spoken, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excites disaffection towards the government established in law in India, shall be punished with imprisonment for life, to which fine may be added, or imprisonment which may extend to 3 years, to which fine may be added or with fine.

<sup>43</sup> Power to issue order in urgent cases of nuisance or apprehended danger.

<sup>44</sup> Supra note 34 at p. 983.

<sup>45</sup> 'Democracy in India and the Judicial Process'. Lajpat Rai memorial lectures , 1963, pp. 17-18.

### 4.3.1 Meaning

It is noteworthy that the expression 'Freedom of the Press' has been understood in various senses by different persons. It has not been defined or referred to in the Indian Constitution. Freedom of the Press, in particular of newspapers and periodicals, is a species of which the freedom of expression is a genus. In a broad sense, freedom of the press means all activities that are connected with press-specific dissemination of news and opinions.<sup>46</sup> Freedom of the press meant, traditionally, freedom of publication without any previous restraint. In other words, the freedom of the press is the right to publish with impunity truth with good motive for justifiable ends through reflecting on governmental magistracy or individual.

According to the Jowitt's Dictionary of English Law, the concept of 'liberty of the Press' simply means that such a thing as an *impersonator* is now well known to the law, and that every man may print and publish what one pleases although, of course, one will be liable to a prosecution if one prints everything which is a criminal libel, or which is obscene, blasphemous or seditious, and to civil proceedings of one prints defamatory matter.<sup>47</sup>

Professor Bounard Schwarty described that the concept of 'Freedom of the Press' means at least two things:

- (i) A constitutional interdiction against any system of licensing, and
- (ii) Freedom from prior restraints upon publication (other than that included in licensing), particularly those imposed by systems of censorship.<sup>48</sup>

The learned judges, Ray, in case of *Bennett Coleman, and Company Limited v. Union of India*<sup>49</sup> expressed that it was indisputable that by freedom of the Press is meant the right of all citizens to speak, publish and express their views. The freedom of the Press, Ray, J. further explained, embodies the right of the people to read and it is not antithetical to the right of the people to speak and express.<sup>50</sup>

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<sup>46</sup> V. Kanpen, 'Freedom of Expression As A Basic Right: A German View', American Journal of Comparative Law, Vol. 37, 1989, p. 400.

<sup>47</sup> J. Burke, 'Jowitt's Dictionary of English Law', Vol. 2, 1977, p. 1418.

<sup>48</sup> V. Sethi, 'Freedom of the Press', JCPS, Vol. 14 (3), 1980, p. 272.

<sup>49</sup> AIR 1973 SC 106; (1972) 2 SSC 788

<sup>50</sup> *Id.* at p. 121.

According to Lord Denning freedom of the press is of fundamental importance in the society and covers not only the right of the press to impart information of general interest or concern but also the right of the public to receive it. Lord Denning further expressed that freedom of the press is not to be restricted on the ground of breach of confidence unless there is a 'pressing social need for such restraint'.<sup>51</sup>

The Supreme Court of United States of America interprets 'freedom of the press' to mean that no law shall be passed that interferes with the communication of ideas in the printed word.<sup>52</sup>

Blackstone purported that the liberty of the press was essential to the nature of a free state and consisted in laying no previous restraints upon publications, and not in freedom from censure from criminal matter when published. It was further added that every freeman had an undoubted right to lay what sentiments he pleased before the public; to forbid this was to destroy the freedom of the press. However, these statements were made subject to a qualification that if a freeman published what was improper, mischievous or illegal than he must take the consequences of his own temerity.<sup>53</sup>

It is thus evidently clear that freedom of the press has both negative and affirmative content. In negative sense, it means absence of external interference whether to suppress or to constrain generally; it means the freedom of expression of opinion, idea, views, information through the printed material and published for circulation, and free from interference, presence restraint or compulsion. It is affirmative on the part of the individual so far as writing or publishing what he pleases. The editor of the newspaper has the right to gather the news, right to select the news for inclusion in the newspaper, the right to print the news so selected and then right to comment or express his views on all matters of public importance.<sup>54</sup>

#### **4.3.2 Concept and Scope of Freedom of the Press**

A free press is the *sine qua non* of any free country where dictatorship is absent, where there is no throttling of dissemination of news and views. A free press

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<sup>51</sup> Lord Denning, 'What next in the Law', 1982, p. 254.

<sup>52</sup> S. Cann, 'Drawing a Line on Freedom of the Press: The Burger Court Picks up the Chalk', *Judicature*, Vol. 66(7), 1983, p. 297.

<sup>53</sup> *Supra* note 2 at p. 46.

<sup>54</sup> Report of the Royal Commission on the Press, 1977, p. 288.

does not necessarily connote license without any restrictions whatsoever. It merely indicates that the press is allowed to function in the country under the minimum normal restriction conceived in the interest of the health, prosperity and stability of the very society which the press wants to safeguard. The importance of the freedom extended to the press can be well understood when Thomas Jefferson's statement<sup>55</sup> on that 'Reasoned Heritage' is read. He says:

"The people are the only censors of their Governors ... people should be given full information of their affairs through the channel of public papers and to contrive that these papers should penetrate the whole mass of the people. The basis of our Government being the opinion of the people, the very first object should be to keep that right; and where it left to me to decide whether we should have a Government without newspapers or newspapers without a Government, I should not hesitate a moment to prefer the latter... No Government ought to be without censors; and where the press is free, no one ever will."

It is worth while quoting have the Government of India Press Laws Enquiry Committee of 1948 says that:

"When great executive power is concentrated in the hands of the cabinet a lively instructed and critical public opinion is the only safeguard against the misuse of executive authority. Democracy can only survive in the atmosphere of constant controversy; it is essential Authority to it that any Government, however strongly entrenched and however well intentioned, shall be aware that its actions are under constant scrutiny and that there hangs always over its head the sword of public criticism. Some continuing power of influencing the Government is necessary if democracy is not to be ineffective between elections. The press lives by disclosures; whatever passes into its keeping become a part of the knowledge and a history of our times".<sup>56</sup>

The law of contempt of court as applied to the press was said to be a necessity according to Lord Denning. He stated:<sup>57</sup>

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<sup>55</sup> Thomas Jefferson III, Monticello Edition; Washington DC The Thomas Jefferson Memorial Association (1904), cited in North Dakota Law Review, Vol. 42, 1996, p. 186.

<sup>56</sup> 'Press Laws Enquiry Committee of Government of India', 1948, p. 22, Para 49.

<sup>57</sup> Lord Denning, 'The Road to Justice', 1995, p. 78.

“The press plays a vital part in the administration of Justice; it is the watchdog to see that every trial is conducted fairly, openly and above board. Any misconduct in a trial is sure to receive notice in the press and subsequent condemnation by public opinion. The press is itself liable to make mistakes. The watchdog may sometimes break loose and have to be punished for misbehavior.”

If newspapers publish scandalous news of men matters and things, society would soon become corrupt and morbid and get subjected to ‘coloured glasses’ tormented by what is termed ‘the yellow’ or the gutter’ press. In the sphere of court news they can descent to an attack on judge, impute dishonesty, bribery, favoritism and partisanship to them in the discharge of their duties, question their competence, indulge in siding with one of the parties to the case, deride one party, witness, or counsel, misrepresent court proceedings by screaming headlines with a view to prejudicing the court and the public, publish only one side of the case to the detriment of the opposite party, published pleadings, before the cause begun and without court permission, brings out articles on a matter pending in court and in diverse ways carry on what has been so aptly called a ‘a trial by newspaper’. If such things are allowed to pollute the air of the society, it may be said that the dignity and prestige of courts stand in great Jeopardy.<sup>58</sup>

To eradicate these evils the 1948 report suggested that the press must have its own ‘super body’ to control its working and set the standards for its benefit. A fivefold objective was suggested:<sup>59</sup>

- (1) The press must give a truthful, comprehensive and intelligent account of the day’s events in a context which gives them meaning.
- (2) It must provide a forum for the exchange of comment and criticism.
- (3) It must be a means of projecting the opinions and attitudes of the groups in society to one another.
- (4) It must have a method of presenting and clarifying the goal and values of society.
- (5) It should have a way of reaching every member of society by the currents of information, thought and feeling which the press supplies.

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<sup>58</sup> V.G. Ramachandran’s, ‘Contempt of Court’, 2002, p. 857.

<sup>59</sup> Ibid.

If freedom of the press is to achieve reality, the Government must set limits upon its capacity to interfere with, regulate control or suppress the voice of the press or to manipulate the data on which public judgment is formed.<sup>60</sup> The freedom of the press is not a static feature. It varies and adapts itself to the conditions of an ever changing society. It is not a fixed or isolated value, the same in every society and in all times. It is a function within a society and must vary with the social context. It must be different in times of general security and a times of crisis; it will be different under varying states of public emotion and belief.<sup>61</sup> The 1948 report of the press laws enquiry committee revealed that the accusation by the All India Newspaper Editor's conference (A.I.N.E.C) that the law of contempt of court had been used in the country to unjustly punish newspapers was without foundation.<sup>62</sup> Bonafide reports of court proceedings were adequately protected.

#### **4.3.2.1 Freedom of Speech and Expression vis-à-vis Freedom of the Press**

The question of whether or not to insert in the Indian constitution a separate right for the press as distinct from that of the ordinary citizen was extensively debated by members of the Constituent Assembly. The constituent Assembly came to the conclusion that such a provision was not necessary. Dr. B.R. Ambedkar, Chairman of the Constituent Assembly's Drafting Committee argued:

The press is another way of starting an individual or a citizen. The press has no special rights which are not to be given or which are not to be exercised by the citizen in his individual capacity. The editor of a press or the manager are all citizens and therefore when they chose to write in newspapers, they are merely exercising their right of expression and in judgment therefore no special mention is necessary of the freedom of the press at all.<sup>63</sup>

It can be observed that there is no mention of the freedom of the press in the Indian Constitution. However, the Supreme Court of India has interpreted many times that there is no need to mention freedom of the press separately, because it is already

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<sup>60</sup> Supra note 56 at p. 27. para 57.

<sup>61</sup> Ibid., para 58.

<sup>62</sup> Id. at p. 39. para 79.

<sup>63</sup> Constituent Assembly Debates, Vol. 7, 1948, p. 780.

included in the guarantee of freedom of expression.<sup>64</sup> Although no special provisions was made to safeguard the rights of the press, the courts have time to time confined that right of the press are implicit in the guarantee of freedom of speech and expression under Article 19(1)(a) of the Constitution.<sup>65</sup>

In *Express Newspapers (P) Ltd., v. Union of India*<sup>66</sup> arose out of a challenge to the working Journalists and other newspapers Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955, on the ground that its provisions violated Article 19(1)(a). In the facts of the case, the court held that the impact of the legislation on the freedom of speech was much too remote and no judicial interference was warranted. Moreover, the court did recognize an important principle which is as follows:

Laws which single out the press for laying upon it excessive and prohibitive burdens which would restrict the circulation, impose a penalty on its rights to choose the instrument for its exercise or to seek an alternative media, prevent newspapers from being started and ultimately drive the press to seek Government aid in order to survive, would be struck down as unconstitutional.<sup>67</sup>

In 1973, came the famous *Bennett Coleman case*.<sup>68</sup> This was a momentous judgment having a bearing on the freedom of the speech and expression generally, and or the freedom of the press, in particular. In this case Constitutional validity of the newsprint policy of 1972-73 passed by the Central Government was challenged as being violative of freedom of speech and expression guaranteed by Article 19(1)(a). The four main violative features of the policy were:<sup>69</sup>

- (1) No newspaper or edition could be started by a common ownership unit within the authorized quota of newsprint;
- (2) There was a limitation on the maximum number of pages to ten. No adjustment was permitted between the circulation and pages so as to increase the pages;

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<sup>64</sup> Romesh Thappar v. State of Madras, AIR 1950 SC 124 at p. 134.

<sup>65</sup> Brij Bhushan v. State of Delhi, AIR 1950 SC 129.

<sup>66</sup> AIR 1958 SC 578.

<sup>67</sup> Sakal Papers Pvt. Limited v. Union of India, AIR 1962 SC 305 at 617, (para 150).

<sup>68</sup> Supra note 49.

<sup>69</sup> Id. at p.111

- (3) No interchangeability was permitted between different newspapers of common ownership met or different edition of the same paper; and
- (4) Allowances of 20 percent increase in page level up to a maximum of ten had been given to newspapers with less than ten pages.

The petitioner contended<sup>70</sup> that the impugned policy had infringed his freedom of speech and expression conferred by Article 19(1)(a). The Union of India contended that the newsprint policy did not directly and immediately deal with the right of freedom of speech and expression conferred by Article 19(1)(a) and the right under Article 19(1)(a) was not violated though the freedom of speech and expression was incidentally or consequently abridged.<sup>71</sup>

Justice Ray speaking for the majority of the Supreme Court<sup>72</sup> set aside the impugned news print policy as unconstitutional. Justice Beg in a separate judgment, concurred with him.<sup>73</sup> In view of the law hitherto laid down, Ray J., observed that in effect the newsprint policy was 'Newspaper Control Policy'.<sup>74</sup> The learned judge cited with approval the law laid down in two earlier cases<sup>75</sup> and added.<sup>76</sup>

Freedom of the press is both qualitative and quantitative. Freedom lies both in circulation and in content.

The principle points made in this case (majority view) regarding freedom of Press are:<sup>77</sup>

- (1) Freedom of speech cannot be restricted for the purpose of regulating the commercial aspects of the activities of newspapers. A restraint on the circulation of newspaper and a restraint on the space permitted for advertisements would affect the Fundamental Rights under Article 19(1) (a) in respect of propagation, publication and circulation of news and views.

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<sup>70</sup> Id. at p. 114.

<sup>71</sup> Id., pp. 116-117.

<sup>72</sup> Three judgments were delivered. The majority judgment by Ray J., for himself, Sikri, C.J., and Reddy, J. held that the impugned policy violated Article 14 and 19(1)(a), in a separate judgment Beg. J., concurred in the result; and in a dissenting judgment, Mathew J., held the impugned policy was valid.

<sup>73</sup> Supra note 49, at p. 152.

<sup>74</sup> Id. at p. 117.

<sup>75</sup> Supra note 66 and 68.

<sup>76</sup> Supra note 49 at p. 130.

<sup>77</sup> Id., pp. 125-131.

- (2) Restrictions on page limit, prohibition against newspapers and new editions control the growth and circulation of newspapers, also depriving newspapers of their area of advertisement. The direct effect of such restraints is that newspapers are exposed to financial loss. The direct effect of which is that the freedom of speech and expression infringed.

The judgment given by the Supreme Court will go down as a landmark in the history of citizen civil rights in India.

It is submitted that in a free and democratic society there should be as few restrictions on the freedom of speech and expression as possible and this is the result which the Supreme Court's decision seeks to achieve.<sup>78</sup>

#### 4.3.2.2 Limitation to the Concept of Freedom of Press

Apart from constitutional restraints under various Articles, there are laws in India relating to the Press which seek to put statutory curbs on Freedom of the Press. Here, it must be noted that a distinction is necessary between Press laws which are special laws solely directed against a printing establishment or those who are concerned with the printing and publication of printed matter and laws on the press which are general laws applicable to all citizens including the press. The term 'General' signifies that the law must not be aimed at the ideas in or content of the expression and regulate matters that might be pertinent to freedom of the press but pertain as well to other rights and matters.<sup>79</sup>

Under the first category of "Press Law", there is no longer any repressive law directed against the Press. However, there are certain regulatory measures, such as the Press and Registration of Book Act, 1867 and even beneficial measures, such as the Working Journalist and other Newspaper Employees (Conditions of Service) and Miscellaneous Provisions Act, 1955.

In case of *State of Madras v. V.G. Rao*,<sup>80</sup> the Supreme Court observed that there was no infringement of freedom of speech and expression when a law required that the name of the printer and publisher and the subjects of printing and publication

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<sup>78</sup> M.P. Jain, 'Article 19(1(a): Freedom of the Press: Bennett Coleman & Co. v. Union of India', *Journal of Indian Law Institute*, Vol. 15, 1973, pp. 154-164 at 162.

<sup>79</sup> *Supra* note 46, at p. 398.

<sup>80</sup> AIR 1952 SC 196.

should be printed on every book or paper. Therefore, it was held that such type of law did not in any way restrict the freedom of speech and expression but rather prevented it from degenerating into a license.<sup>81</sup>

Under the second category of Law relating to the press are Indian Penal Code, 1860. The Dramatic Performances Act, 1876, The Indian Telegraph Act, 1885, The Indian Post Office Act, 1898, Official Secrets Act, 1923, The Young Persons (Harmful Publications) Act, 1956, The Copyright Act, 1957, Atomic Energy Act, 1962, The Criminal Procedure code, 1973 etc., etc.

#### 4.3.2.3 Elements of the Freedom of Press

Freedom of the press is a concept which itself is composed of certain basic freedoms. These basic freedoms are comprised of freedom to publish and circulate freedom against pre-censorship and freedom of information. All these freedoms are linked together and one is totally meaningless without the other. The Andhra Pradesh High Court in case of *Ushodaya Publications Private Limited v. Government of Andhra Pradesh*,<sup>82</sup> observed that freedom of circulation of newspapers is necessarily involved in freedom of speech and expression and is part of it and hence enjoys the protection of Article 19(1) (a).<sup>83</sup>

Further, information and communication are even more important needs of man in his conglomeration as social units. Thus, the press has the right to dispense information to the general public. This function is even more important from the view that a paucity of information will predictably preclude the public from making properly informed choices whenever it has to exercise its franchise and to select its government.<sup>84</sup> Therefore, freedom of information is the modern corollary to freedom of the press.

In case of *P.L. Lakhanpal v. Union of India*,<sup>85</sup> the Delhi High Court while dealing with the question whether the right of broadcasting included in Article 19(1)(a) observed that a closer examination of the concept of freedom of speech and expression would reveal that it is not merely the right to speak or the right to express

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<sup>81</sup> Id., pp. 199-200.

<sup>82</sup> AIR 1981 AP 109.

<sup>83</sup> Id. at p. 111.

<sup>84</sup> T.N. Chaturvedi, 'Secrecy in Government', Indian Institute of Public Administration, 1980, p. 51.

<sup>85</sup> AIR 1982 Delhi 167.

but also imposes the right of communicating that speech or expression to others by all available means which can be a broadcasting station, a newspaper, a loud speaker, a pamphlet, a book or other document. In this case right of communication was stressed which includes the right to inform, the right to receive information and the right to access to the resources required for communication.

As evident from the above discussion another important element of the freedom of press is the right to gather information. No doubt that the press has unbridled freedom in collecting news as there are certain areas of the press freedom which may not fall under any restriction under Article 19(2). The press can gate-crash into governmental offices, burst into hospital wards to interview the injured victims, or march into the police station to pry into crime secrets.<sup>86</sup>

In case of *Dainik Sambad v. State of Tripura*,<sup>87</sup> the Gauhati High Court expressed that the press had no privilege not to disclose the sources of its information in judicial proceedings or in statutory inquiry having the same status as a court. It was further stated that the court has discretion whether to require the information to be given and usually would not insist on an answer if it was not essential to the case.<sup>88</sup>

However, it is suggested that to make the position clear, the press should not be ordered to disclose the source of its information except in most exceptional circumstances. The underlying principle is that public has a right of access to information which is of public concern and which the public ought to know. The press being agent of public collects information, on behalf of public. If the press is compelled to disclose their sources, it will cause sources to dry up and impede the flow of information's. In other words, if the freedom of the press is to be meaningful, the source of information as well as its uninhibited dissemination must be protected subject to other legal requirements.<sup>89</sup>

The next element of the freedom of the press is the freedom against pre-censorship. It should be noted that censorship may be formal or informal, prospective or retroactive. Formal censorship depends on rules of conduct imposed by authority while informal regulations stems, from social taboos. Prospective censorship operates

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<sup>86</sup> V.K. Varadachari, 'Citizen and the Law', 1982, p. 20.

<sup>87</sup> AIR 1989 Gau. 30.

<sup>88</sup> Id. at p. 36

<sup>89</sup> B.C. Reid, 'Confidentiality and the Law', 1986, p. 247.

on material before it is publically available, so that the censor's decision may not become public knowledge; while retroactive censorship suppresses matter already published. Pre-publication control is more effective and convenient for a censor because the alternative invites undeserved comment on his occasions.<sup>90</sup>

Later, in case of *Virender v. State of Punjab*,<sup>91</sup> the broad approach relating to pre-censorship was questioned. In this case, the Supreme Court held that pre-censorship even in times of peace could be imposed in certain circumstances under Article 19(2), but pre-censorship being a restriction on the freedom of the press, would constitute a serious encroachment on the valuable and cherished right of freedom of expression of a newspaper is prevented from publishing its views or the views of its correspondent relating to or concerning what might a bearing topic of the day.<sup>92</sup> The Supreme Court further stated that each case had to be examined in the light of the circumstances in which pre-censorship was imposed and such a restriction could be reasonable only if it was imposed in emergent circumstances.

Therefore, the freedom against pre-censorship is one of the elements of the freedom of the press. However, it is submitted that power of pre-censorship under Article 19(2) should not be invoked by the government except in cases of extreme necessity in the national interest, when the situation cannot be saved without resort to this power.

#### **4.3.2.4 Freedom of Press v. Contempt**

Article 3 read with Article 19 of the Universal Declaration of Human Rights grants to everyone liberty and right to freedom of opinion and expression. Article 19 of the International Covenant on civil and Political Rights, 1966 to which India is a signatory and has notified and provides that everyone shall have the right to freedom of expression, to receive and impart information and ideas. In India, unlike USA, there is no separate provision guaranteeing the freedom of press, however, the Supreme Court has held in a number of cases that there was no need to mention freedom of the press separately, because it is already included in guarantee of

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<sup>90</sup> P.C. Richards, 'Parliament and Conscience', 1970, p. 113.

<sup>91</sup> AIR 1957 SC 896.

<sup>92</sup> Id., at p. 900.

'freedom of speech and expression 'provided under Article 19(1) (a) of the Constitution.<sup>93</sup>

Under Article 19(2) no specific immunity has been provided to the Press. Freedom of speech and expression is a general right which is available to every citizen. The media stands on no higher footing than any other citizen and cannot claim any special privilege other than what is available to common citizen. It has been held that freedom of the Journalist is an ordinary part of the freedom of expression subject to Constitutional limitations and apart from statute law, his privilege is no other and no higher. The basic objective of the Press is to give news, views, comments and information on matters of public interest in an accurate, fair and responsible manner. The freedom of Press under the Constitution is not higher than the freedom of a citizen and is subject to the restrictions proposed under Article 19(2) thereof.

The Constitutional freedom is nevertheless not absolute and there are limits to this freedom. Article 19(2)<sup>94</sup> of the Constitution makes this freedom subject to the existing law relating to libel, slander, defamation, and contempt of court. The state has also been empowered to impose reasonable restriction on this right in the interest of public order, security of State and the like.

#### **4.3.2.5 Media Trial**

Media trial means the pre-trial and in-trial reporting of the case, whether civil or criminal, which is likely to prejudice fair trial-the Constitutional right of every accused. Medial trial is a threat to the right of fair trial and a blow at the sanctity of the judicial system. Media by reporting full details of the case, confession of the accused, presenting biased view points during the pendency of the judicial proceeding is not only transgressing its limits but also making the inkberry of court proceedings. When there is trial by Media, there is always a conflict between two constitutional rights i.e. fair trial and freedom of the Press.<sup>95</sup>

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<sup>93</sup> Abhitosh Pratap Singh and Madan Mohan, 'Contempt of Court and the Media', Kashmir University Law Review, Vol. 13, 2006, p. 327.

<sup>94</sup> Article 19(2): Nothing in sub-clause (a) of clause(1) shall effect the operation of any existing law or prevent the state from making any law, in so far as such, law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interest of the sovereignty and integrity of India, and securing of the State, friendly relations with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

<sup>95</sup> Supra note 93 at p. 321.

'Trial by media' is a phrase popular to describe the impact of television and news paper coverage on the reputation of a person by creating a widespread perception of guilt regardless of any verdict in a court of law.<sup>96</sup> Media has a tremendous power to awaken the people. But that power has to be exercised with the precision and circumspection. Media can point out the lapses in the investigation and thus highlight is so as the plug and loopholes and set the system rights. Highlight the need to strengthening the Police Act, Evidence act, which is the dire need of the hour. That is constructive role of the media. Instead, what happens many a time is, in the garb of highlighting the system failures, more often it turns out to be trial by media.<sup>97</sup>

'Trial by newspaper' is a species of which 'trial by presses' is a genetic name. The expression 'trial by newspaper' implies pre-trial and in trial reporting of a case, whether civil or criminal with a view likely to prejudice the fair trial. A fair trial requires that the judges and jury makes their judgment solely on the basis of the evidence introduced in the court room, and of course they must be subjected to outside pressures in reaching their decisions.<sup>98</sup>

#### **4.3.2.5.1 Position in America**

In America the newspaper has been given complete freedom to report the facts of criminal investigations and prosecutions. From the time a crime is committed, newspaper undertake to publish very bit of information concerning the crime and the criminals, usually with the cooperation of the police and prosecution. They recount the evidence and the previous criminal record, if any, of the suspect. In particularly gruesome crime, the press may whip up feeling against the person charged. Trial by newspaper may be so complete and effective that the task of securing a jury, which has not pre-judged the case, become very difficult. Occasionally newspaper will go so far as to attempt to exert editorial pressure on the judge or jury while the case is still being tried. In such a situation there is a fundamental conflict between two constitutional rights- a fair trial and a free press. The basic justification for the freedom of the press is that untrammled public discussion and expression of all conceivable views offers the best chance of achieving truth and wisdom.<sup>99</sup>

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<sup>96</sup> Shojab Jacob, 'Trial by Media,' *Cri. L J*, May 2007, p. 106.

<sup>97</sup> *Id.*, at p. 111.

<sup>98</sup> Tej Bahadur Singh, 'Trial by Newspaper', *Cri. L J*, July 2002, p. 191.

<sup>99</sup> *Ibid.*

#### **4.3.2.5.2 Position in United Kingdom**

In English Law no newspaper has right to assume the role of an investigator and to suggest that accused person against whom a proceeding is pending was, or was not guilty of the offence charged. It is contempt of court to discuss the merits of a pending civil case. Publication of the Photograph of a person when a question of identity may arise at the trial is also a contempt of court. It also amounts to a contempt of court to publish inaccurate statement and misrepresent the proceeding of a court which might have prejudiced the mind of the public before the case is finally decided.<sup>100</sup>

#### **4.3.2.5.3 Position in India**

Publication of any matter which interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice cannot be justified in any way. It would amount to universal contempt within sub-clause (iii) of 2(c) of the contempt of courts Act, 1971.

No newspaper has a right to assume the role of an investigator and to suggest that the accused person against whom a proceeding is pending was or was not guilty of the offence. The reason why 'trial by media' is not allowed is manifold:

- (1) It may influence the persons who may appear as witness in the court.
- (2) It may compel the parties to discontinue the litigation.
- (3) It may prejudice the public as whole, by evoking adverse reaction and thereby impair the public confidence in the administration of justice.
- (4) It may inhibit other potential litigants from restarting to the law of court.<sup>101</sup>

One of the most common forms of prejudicing the due sense of justice in a pending case is the trial of the case by newspaper. Where a newspaper conduct a trial a party is deprived of the right to reply or cross-examine witness and there is no question of the rules of evidence being applied. The newspaper issued the function which properly belongs to the court and thus day the basic right of the individual to have a fair trial.<sup>102</sup>

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<sup>100</sup> Id. at p. 193.

<sup>101</sup> P.M. Bakshi, 'Press Law an Introduction', 1986, p. 36.

<sup>102</sup> Supra note 2, at p. 136.

The rationale behind raising the status of freedom of press to Fundamental Rights is that an action taken in the public gaze and scrutiny ensures the proper and fair exercise of power, and it rules out the possibility of abuse of power out of whims, fad and fancies of any individual. However, it is when the press begins to virtually conduct the trial that there is a real danger of violation of the fundamental right of fair trial of the accused. The immediate objection to media trial is the putting on risk the due administration of justice in the particular case. The long term fear, however, is that such trials could undergone confidence in the judicial system generally. In no democratic society trial by media is in vogue. Trial by televisions is not to be tolerated in a civilized society and the same holds free for any other publication through any medium newspaper or internet.<sup>103</sup>

Nowadays, the sensationalism involved in the cases of certain public profile criminal cases has become very common with the spread of mass communication. Example can be taken from Abu Salem case. This invariable leads to the issue of prejudicial publicity placing on or the other party involved in a disadvantaged position besides creating situations which tends to reduce legitimate space for dispassionate-assessment of truth by judicial officer. Moreover such media trials unnecessary draw the judiciary into the public scanner after making a mockery of justice delivery system.<sup>104</sup>

Having moved from news information to news as entertainment, the media has cast aside the once inviolable time between reality and drama. Now media offer gossip, titillation, speculation and trivia as news. Forget privacy, sensitivities, social concern, liberal values and justice, forget journalistic ethics. This is the race to be the hottest bare all show. So every newspaper and television channels have been offering us a mouth watering menu of depravity, clandestine, sex and violence.<sup>105</sup>

Two important core elements of investigative journalism envisaged that (a) the subject should be of public importance for the reader to know and; (b) an attempt is being made to make the truth from the people.<sup>106</sup> It must nevertheless be stated that sometimes accuracy of the news is sacrificed at the cost of providing more sensational

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<sup>103</sup> Supra note 93, pp. 321-322.

<sup>104</sup> Priya Bansal, 'Judicial Activism of Media', Lawyers Update, Vol. 13, Jan. 2007, p.5.

<sup>105</sup> Antara Dev Sen, 'Selling Murder', The week, Vol. 26, June 2008.

<sup>106</sup> G.N. Ray, 'Should there be a Lakshman Rekha for the Press', available [www.Presscouncil.nic.in](http://www.Presscouncil.nic.in)

news. The Indian media should be remained that while comment is free, facts are secured.<sup>107</sup>

In view of the foregoing considerations, it becomes imperative to consider the importance of the freedom of press and the media, its possible abuse and the required safeguards. It is well established that in a democracy, the freedom of speech and of the press is indispensable. The framers of our constitution recognized the importance of safeguarding this right since the free flow of opinions and ideas is essential to sustain the collective citizenry. In the political scenario, an informed citizenry is a precondition for meaningful governance, similarly in the societal attitudes; a culture of open dialogue must be promoted.<sup>108</sup>

Trial by media has assumed significant proportion. It has had both positive and negative result. Some famous criminal cases that would have gone unpunished but for at the intervention of media are Priyadarshani Matto case, Jessica Lal case, Nitish Katara, get justice.

#### **4.3.2.5.3.1 Subconscious Effect on Judges**

Another worrying factor and one of the major allegations upon media trial is prejudicing the judges presiding over a particular case. The media create an unconscious pressure on a judge in a high profile case. Judge knows that they are being watched by the people. There is always a chance that judges get influenced by the flowing air of remarks made upon a particular controversy. The media present the case in such a manner to the public that if judges passes an order against the media verdict, he or she is deemed either corrupt or biased.

The Indian free speech law is different and has been restricted by Article 19(2). Regarding media reporting the Supreme Court<sup>109</sup> has been reiterating view that the judges may be subconsciously affected in their judgments the fairly of the judicial system stems from the fact that judges are human beings and undue influence of irresponsible expression may taint the rational process of adjudication. This limitation has been admittedly the Supreme Court of India, wherein it ruled:

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<sup>107</sup> Justice H.R. Khanna, 'Freedom of Expression with Particular Reference to Freedom of Media', journal of SCC, Vol. 2, 1982, p. 47.

<sup>108</sup> Dr. B.S. Chauhan, J., in *S. Khushboo v. Kanniammal*, (2010) 5 SCC 600, para 45.

<sup>109</sup> *In re P.C. Sen*, AIR 1970 SC 1821.

Prejudice, a state of mind, cannot be proved by direct and positive evidence. Therefore, it cannot be judged on the basis of an objective standard.<sup>110</sup>

#### 4.3.2.5.3.2 Negative Effect of Media Covering Criminal Trial

When media covers a case and publicize lawyers, judges, witness's pretrial forms a kind of presumed mental set up on the judges who sit to adjudicate the criminal trial. In India there is no jury system and the judge who is sitting there is the sole authority. What he says is the final judgment and if has a preconceived notion about a case it is against the rule of natural justice. The presses to make things spicier makes comments on cases which are in trial, the judges came across these and unconsciously have a set of argument in their mind.<sup>111</sup>

Justice Katju and P. Sainath have attacked the media for focusing attention on 'non issues' and 'trying to divert attention of the people from the real issue to non issues'<sup>112</sup> and 'stifling of smaller voices'.<sup>113</sup> Who will watch the watchdog as it abdicates its role as an educator in favour of being an entertainment?<sup>114</sup> A line between information informing and entertaining must be drawn. One to extensive media propaganda, justice and rule of law are no longer about the process but the outcome. It is submitted that public opinion may exercise an indirect influence over the criminal justice system. Justice should not only be done, it should manifestly and undoubtedly be seen to be done. Psychological pressures storming from media scrutiny could possibly print verdicts to conform to public opinion rather than the evidence offered at trial. Further the credibility of a judge is at stake when a trial by media declares a person guilty but the judge gives a differing opinion based on facts.<sup>115</sup>

The most objectionable part and unfortunate too, incarnated role of media is that the coverage of a sensational crime and its adducing of 'evidence' begins very early, mostly even before the person who will eventually preside over the trial even

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<sup>110</sup> Bhajan Lal, Chief Minister, Haryana v. Jindal Strips Ltd., (1994) 6 SCC 19, para 17.

<sup>111</sup> Supra note 8 at p. 133.

<sup>112</sup> Markenday Katju, 'Ideal and reality: Media's role in India', available at [www.hinduonnet.com](http://www.hinduonnet.com)

<sup>113</sup> P. Sainath, 'Lost the Compass? Rural India is a giant canvas that is begging the media to do a portrait', available at [www.outlookmedia.com](http://www.outlookmedia.com).

<sup>114</sup> Ramachandra Guha, 'Watching the Watchdog: Time for the press to look within', The Telegraph, May 10, 2008. Available at [www.telegraphmedia.com](http://www.telegraphmedia.com)

<sup>115</sup> Navajyoti Samanta, 'Trial by Media-Jessica Lal Case', available at [www.ssrn.com](http://www.ssrn.com)

take cognizance of the offence, and secondly that the media is not bound by the traditional rules of evidence which regulate what material can and cannot be used to convict an accused. In fact, the Right to justice of a victim can often be compromised in other ways as well, especially in rape and sexual assault cases, in which often, the past sexual history of a prosecutrix may find its way into newspaper. Secondly, the media treats seasoned criminal and ordinary one, sometimes even the innocents, alike without any reasonable discrimination. They are treated as a 'television item' keeping at stake the reputation and image. Even if they are acquitted by the court on the grounds of proof beyond reasonable doubt, they cannot resurrect apart, even victims and witnesses suffer from excessive publicity and invasion of their private rights. Police are presented in poor light by the media and their movable too suffers. Such kind of exposure provided to them is likely to jeopardize all these cherished rights accompanying liberty.<sup>116</sup>

#### **4.3.2.5.3.3 Positive Effect of Media Covering Criminal Trial**

The effect of media following a criminal case has definitely good effects on the adjudication of trial. We get to judge for ourselves the truthfulness of leaders questioned by Journalist before the cameras. The net result is that governments have been forced to be more open and accountable. One of the positive by products spurred by the media and addressed by the courts is that the people are more aware of their Constitutional rights and the way the police and courts try cases to find a person guilty or innocent.<sup>117</sup>

Criticism of judicial decisions in a healthy manner, if used effectively, is a powerful weapon in the hands of the masses and can have far reaching consequences. The best example of this is the *Mathura Rape Case*.<sup>118</sup> The Supreme Court's decision in this case acquitting the accused policeman who allegedly raped a poor girl in the police station raised hue and cry. Public criticism provided an impetus for the law to be amended. Higher punishment for custodial rape was included in the Indian Penal Code and provisions in favour of the victim were added to the Indian Evidence Act.

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<sup>116</sup> Jagannadha Rao, 'Fair Trial and Free Press: Law's Response to Trial by Media', available at [www.unilawonline.com](http://www.unilawonline.com)

<sup>117</sup> Supra note 8, at p. 132.

<sup>118</sup> (1972) 2 SCC 143.

In *Ruchika Murder Case*,<sup>119</sup> the court got 400 hearings, 40 adjournments and the case continued for 9 long years. It was media's intervention which brought relief to the parents of the victim. Similarly in *Jessica Lall Case*,<sup>120</sup> the accused Manu Sharma was acquitted of all charges in 2006. However, he was sentenced to life imprisonment owing to intense media and public pressure. Further, in *Priyadarshini Matto Case*,<sup>121</sup> a 25 years old law student was found raped and murdered at her home in New Delhi in 1996. The accused was Santosh Singh, son of a police inspector General and was earlier acquitted by the trial court in 1999. This decision, however, led to a massive public outcry and the court sentenced Santosh Singh to death in 2006.

*Praful Kumar Sinha v. State of Orissa*,<sup>122</sup> a writ against sexual exploitation of blind girl in school was filed before the Supreme Court on the basis of an Article published in a newspaper. Even though sexual assault was difficult to prove, the Apex Court, on the basis report submitted, gave directions to the institution for proper management. In *Sheela Bause v. Union of India*<sup>123</sup> the Journalist, through a letter addressed to the Chief Justice of India, made the Apex Court take cognizance of the deplorable conditions of the mentally challenged woman looked up in the presidency jail, Calcutta. Due to this initiative, a commissioner was appointed to investigate and report on the conditions of prisons where women and children were detained.

In *D.K. Basu v. state of West Bengal*,<sup>124</sup> the Supreme Court took cognizance of the existence of custodial violence after a letter was sent to the Chief Justice of India drawing attention to newspaper reports regarding death in police lock-ups and custody.

There are though limits on the freedom of the press. In *Mother Dairy Foods and Processing Ltd. v. Zee Telefilms*.<sup>125</sup> It was recognized that while journalists and media are 'distinctive facilitators' and they must follow the virtues of accuracy, honesty, truth, objectivity and fairness. The court finally concluded that often the media conveys what the 'public is interested in' rather than what is in 'public

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<sup>119</sup> Cri. Rev. No. 1558 of 2010.

<sup>120</sup> (2001) Cri. L. J 2404 (Delhi).

<sup>121</sup> (2007) Cri. L. J 946.

<sup>122</sup> AIR 1989 SC 1783.

<sup>123</sup> (1987) 4 SCC 373.

<sup>124</sup> (1997) 1 SCC 416.

<sup>125</sup> AIR 2005 Delhi 195.

interest'. The freedom of the press should not degenerate into a license to attack litigants and close the door of justice nor can it include any unrestricted liberty to damage the reputation of respectable persons.<sup>126</sup>

#### 4.3.2.5.3.4 Law Commission's Report

The Law Commission in its 200<sup>th</sup> Report '*trial by media, free speech v. fair trial*' under criminal procedure code has made recommendation to enact a law to prevent the medial from reporting anything prejudicial to the rights of the accused in criminal cases from the time of arrest, during investigation and trial.<sup>127</sup> The commission has said, Today there is feeling that in view of the extensive use of the television and cable services, the whole pattern of publication of news has changed and several such publications are likely to have a prejudicial impact on the suspect, accused, witness and even judges and general on the administration of justice. This is criminal contempt of court according to the commission if any publications which interfered or tend to interfere with the administration of justice under the contempt of court Act, 1971. It has suggested an amendment to Section 3(2) of the contempt of court Act under the present provision. Such publication would come within definition of contempt. Only after the charge sheet is filed in a criminal case. The Commission has suggested that starting point of a criminal case should be from the time of arrest of an accused and not from the time of filing of the charge sheet. In another controversial recommendation, it has suggested that the High Court be empowered to direct a print or electronic media to postpone publication or telecast pertaining to a criminal case.<sup>128</sup>

To make accountable to the people, an independent autonomous public institution like the Media Council is, therefore, a constitutional need. In some countries, it is established by the various constituent of the media as a voluntary organization, while into other countries like ours it is constituted by the legislature under a statute.<sup>129</sup>

A logical interpretation of the contempt of courts Act read with the Article 19(2) limits the scope of contempt of courts to matters relating to the court much of

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<sup>126</sup> Bijoyananda Patnaik v. BalaKrishnakar, AIR 1953 Orissa 249.

<sup>127</sup> Sudhanshu Ranjan, 'Medial on Trial', The Times of India, 26 Jan. 2007.

<sup>128</sup> Ibid.

<sup>129</sup> Supra note 104. at p. 7.

pre-trial publicity which is not covered cannot under our current constitutional regime be restricted. In the grounds include in Article (19) (2) the grounds of 'Administration of Justice' is a notable absentee.<sup>130</sup>

Backbone legislation with a constitutional sanction will effectively deal with the menace of media trial. Besides the long term solution in this respect lies in self-regulation by both the media and the judiciary.<sup>131</sup>

In India, the entire mechanism is entrusted to the Press Council. The norms of Journalistic conduct formed by the press council require the journalist to abide by the norms and guidelines. For instance 12 (ii) of these norms says that 'Newspaper shall not as a matter of caution, publish or comment on evidence collected as a result of investigative journalism, when after the accused is arrested and charged. Nor should they reveal comment upon or evaluate a confession allegedly made by the accused.'<sup>132</sup>

It cannot be denied that in the present time news reporting has become a business and various industrial houses are entering into the field of electronic media in particular due to its high growth potentials. It is obvious that competition amongst news channel is also increasing, simultaneously since criminal cases or other involving high profile person attract more public attention, the press and electronic media give more publicity to such cases and sensationalism of news become inevitable. The police too become the culprit, so far as criminal cases are concerned police are presented in poor alight by the media. The day after the report of crime is published, media says, 'police gave no clue'. The pressure on the police from media day by day build up and reaches to a stage where police feel compelled to say something or other in public to protect their reputation.<sup>133</sup>

#### **4.3.2.5.3.5 Constitutional and Judicial Response of Trial by Media**

Like the freedom of speech, the media is also subjected to the restriction given under clause (2) of Article 19. Consequently 'contempt of court' as a reasonable restriction on the freedom of speech affects media also, both print and electronic, in a

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<sup>130</sup> Esha Goel & Ankan Ghosh, 'Trial by Media: A Threat to the Right to a Fair Trial', *New Mexico Law Review*, Vol. 2, 2011, p. 33.

<sup>131</sup> Upasana Das Gupta, 'Media and Public Opinion: Do they subconsciously affect the Judges?', *New Mexico Law Review*, Vol. 2, 2011, p. 95.

<sup>132</sup> *Supra* note 96, pp. 109-110.

<sup>133</sup> Nirmal Chopra, 'Freedom of Press and Court Proceeding', *Cri. L. J.*, May 2006, p. 107.

like manner. In relation to the freedom of speech and expression, there are three sorts of contempt of court: (a) one kind of contempt is scandalizing the court itself; (b) there may be likewise a contempt of court in abusing parties who are concerned in causes in the court; (c) there may also be a contempt in prejudicing mankind against persons before the cause is heard. But the above classification is by no means exhaustive.<sup>134</sup> Broadly speaking, it consists of any conduct that tends to bring the administration of justice into disrespect or to obstruct or interfere with the due course of justice.<sup>135</sup> However, there is another important proposition which has to be reconciled with the strict interpretation of contempt of court, which provides that 'Justice' and not judge should be the keynote and creative journalism and activist's statesmanship for judicial reform cannot be jeopardized by an undefined apprehension of contempt action.<sup>136</sup> Moreover, the positive aspect of reporting of judicial proceedings by the media cannot be overlooked completely. Therefore, in this regard, it is important that the motions of contempt of court, fair trial and media trial are well postulated.

In liability of the media for criminal contempt rests on the premise that where any communication is likely to interfere with the administration of justice, anybody who is responsible for publishing such matter will be liable for contempt of court unless it can come under any of the defences provided for in the Act.

In *Saibal Kumar Gupta and others v. B.K. Sen and Others*,<sup>137</sup> it was held by the Supreme Court that it would be mischief for a newspaper to systematically conduct an independent investigation into crime for which a man has been arrested and to publish the result of the investigation. This is because trial by newspaper when a trial by one of the regular tribunals of the country is going on must be prevented. The basis for this view is that such action on the part of the newspaper tends to interfere with the course of justice whether the investigation tends to prejudice the accused or the prosecution. There is no comparison between trial and newspaper and what has happened in this case.

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<sup>134</sup> K.G. Balakrishnan, 'Reporting of Court Proceedings by Media and the Administration of Justice', Public Law, July 2010, p. 14.

<sup>135</sup> The proposition is codified in Section 2(b) (iii) of Contempt of Courts Act, 1971.

<sup>136</sup> Justice Krishan Iyer, In re, Mulgaonkar. AIR 1978 SC 727.

<sup>137</sup> AIR 1961 SC 633; 1961 SCR (3) 460.

In *Shaji v. State of Kerala*,<sup>138</sup> the court held that curse day when a judicial functioning will have to render decisions with one eye on the headline in the media next morning. The day when such opinion makers can even indirectly influence the decision making process and the decision maker must be bound only to the law and his own conscience.

*Dr. M.P. Lohia v. State of West Bengal*,<sup>139</sup> the brief facts of the case were that a case was registered against the petitioner under Sections 304-B, 406 and 198 of Indian Penal Code. The death of Chandni took place on 23-10-2003 and complaint in this regard was registered and the investigation was in progress. Even then an article appeared in magazine called 'Saga' titled 'Doomed by Dowry' written by Kakoli Podar based on her interview of the family of the deceased and giving version of the tragedy and extensively quoting the father of the deceased as to his version of the case. The court held that these types of Articles appearing in the media would certainly interfere with the administration of justice. We deprecate this practice and caution the publisher, editor and journalist who were responsible for the said article against indulging in such trial by media when the issue is subjudice. The Apex Court observed in M.P, Lohia case that the press should refrain from publish any material which is the subject matter of a pending in permissible of any comment or opinion on the merit of a pending case. Though expressing any opinion on the merit of a pending case may not from the judicial mind, but one cannot forget that judges are also human beings and the possibility of their being affected by the emotional reporting done by the press cannot be completely ruled out. What all is requires is the self restrain by the press and such self restrain is the best restrain then any legislative control which may tend to interfere unnecessary with the freedom of press.

#### **4.4 Freedom of Speech and Expression under Indian Constitution**

Freedom of speech and expression is the foundation of any democracy besides being a valuable freedom in itself. The freedom of thought and expression is not only valuable freedom in itself, but is basic to a democratic form of government which proceeds on the theory that problems of government can be solved by the free exchange of thoughts and by public discussion. Almost all the constitutions whether

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<sup>138</sup> (2005) 4 Kerala Law Times 995.

<sup>139</sup> AIR 2005 SC 790; (2005) 2 SCC 686.

democratic or socialist ensure this freedom to their citizens. However, as per our constitutional scheme, this freedom, like any other freedom is not absolute and is subject to reasonable restrictions enshrined in the constitution. However, in a democratic society there are other values also to be attained as well, apart from the cherished freedom of speech and expression. At times these values may come in conflict, with the free speech. One such value is fair and impartial administration of justice. This social interest is sought to be protected by the inclusion of, what is called contempt of court, which, is one of the restrictions contained in Article 19(2) on the freedom of speech. It is the major problem of balancing these two competing social values that has enraged the attention of the courts while exercising this jurisdiction.<sup>140</sup>

Freedom of speech as granted by Article 19(1) (a) of the constitution is not absolute but is subject to the restriction of contempt as per Article 19(2) if, and only if, it is 'reasonable'.<sup>141</sup> The Constitution thus suggested that freedom of speech takes precedence over contempt of court which is in the nature of an exception to the former.<sup>142</sup> The task of balancing the freedom of speech with the right of an accused to a fair trial is a delicate one, dealing with the question as to side which side of the line the case would fall.<sup>143</sup>

"Contempt of Court" was suggested as a possible limitation of freedom of speech by T.T. Krishnamachari on 17 October, 1949 just a few months before the constitution was adopted.<sup>144</sup> Krishnamachari argued that in actual fact "Contempt of Court" was introduced to cover lacuna in that it was cognate to "libels, slander, defamation or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow the state"<sup>145</sup> which were already included as restriction on freedom of speech. It was considered a very necessary protection as far as the courts was concerned. T.D. Bhargava was willing to accept the amendment of provided that the law connoted with the restriction on the

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<sup>140</sup> K.D. Singh, 'Freedom of Speech and Contempt of Courts', National Capital Law Journal, Vol. 9, 2004, p.166.

<sup>141</sup> Article 19(2) of the Constitution states, 'Nothing in sub-clause (a) of clause(1) shall affect the operation of any existing law, or prevent the state from making any law, insofar as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause .... in relation to contempt of Court'.

<sup>142</sup> In re. Aurndhathi Roy, (2002) 3 SCC 343; AIR 2002 SC 1375.

<sup>143</sup> Jagdish Swarup and Vinod Swarup, 'The Contempt of Courts Act, 1971', 1990, p. 75, Madhya Pradesh.

<sup>144</sup> Constitutional Assembly Debates, Vol. 10, p. 394.

<sup>145</sup> Id. at 395.

fundamental rights was not just any law simplicities but as “reasonable law”. At that time freedom of speech and expression was not limited in the language of “reasonable restriction” or it now.<sup>146</sup> Indeed Bhargava’s amendment was negative<sup>147</sup> even though he (Bhargava), using the classic and graphic example that any law could mean “law that all blue eyed persons should be killed”, warned the Constituent Assembly that the Constitution as it then stood could not, and did not, provide adequate protection to freedom of speech. He went on to argue that contempt of court was not really germane to the subject of the freedom of speech and expression as it constituted “a wrong motion or wrong conduct or attitude”, and the courts were already empowered to deal with contempt.<sup>148</sup>

This approach contrasted sharply with that of R.K. Sidhva, who argued that the amendment raised “a fundamental proposition that is being brought before this House.”<sup>149</sup> He continued:

We know, Sir, about the contempt of court, how the judges have been exercising their powers in the past, as if they are infallible, as if they do not commit any mistakes. Even third class Magistrates, first’s class Magistrates and sub-judges have been passing such structures which even High Court Judges have condoned many a time. I would also like to state that the High Court Judges themselves sit as prosecutors. They themselves want the judiciary and executive functions to be separated. In cases of contempt of court, the High Court Judge is the prosecutor and he himself sits and decides cases in which he himself has felt that contempt of court has been committed. There are many cases before us. There are illustrations of two cases, Mr. B. G. Horniman, the editor of “Sentinel” and Mr. Devadas Gandhi, Editor of the “Hindustan Times”. The Allahabad High Court passed strictures against the very reasonable comments made by these two persons. They preferred to go to jail and went to jail rather than they submit to the ex-parte decision of the High Court. I cannot understand why my lawyer friends here are very lenient to the Judges. After all, Judges have not got two horns; they are also human beings. They are liable to commit mistakes, why should we show so which leniency to them? We must safeguard the interests of the public. If a citizen by way of making a speech condemns

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<sup>146</sup> Id. at p. 397.

<sup>147</sup> Id. at p. 403.

<sup>148</sup> Id. at p. 395.

<sup>149</sup> Id. at p. 398.

the action of a third class magistrate or a fourth class magistrate who has passed strictures upon the public, is he not entitled to make a speech and comment upon it. It is unfair that in the matter of contempt of court, this clause is to be added. I strongly resent it. It is very unfair that the citizen after having been given some rights, and having been restricted by so many clauses, you want to further restrict it by inserting "Contempt of Court". In contempt of court, we know when certain extraordinary things happen; High Court Judges have some sort of power. Here, you give the power right down from the magistrate up to the High Court Judges. Even there, I say the High Court Judges are not infallible; they have also committed so many mistakes. They do not want any comment to be made against a High Court Judge when comment was necessary in the interests of the public life.

Sidhva obviously felt that the judges should not be overprotected and asked: "why do you want to put the judge above everybody? You want to make him a Super God?"<sup>150</sup>

He also hinted that on the basis of his "past experience about contempt of court, from the lowest to the highest judges have not been impartial." While Naziruddin Ahmad argued that contempt laws ought to intrude on free speech because a "trial in a case must be conducted in an atmosphere of calm without prejudice". B. Das wondered why B.R. Ambedkar, who was described as Manu of this century, had not thought of this before.<sup>151</sup> In a flowery language he said that the judges used their powers to control the people and added:

I am not one who thinks very high of the judges particularly as they are trained under the British tradition and they have misapplied justice and kept us down. I have not read in any place of public utterances that the High Court judges or other court judges or Magistrate in India have changed since August 1947 and have a better realization of their functions and duties. If Dr. Ambedkar, ten years hence on his retirement, writes a book on the vagaries of courts, about contempt of court, he will see his particular partiality overnight to give certain more powers to these magistrates and judges were not called for. It will be a very wonderful book where many penniless lawyers became judges and

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<sup>150</sup> Id. at p. 399.

<sup>151</sup> Id. at p. 401.

regulated and controlled the affairs and rule of the alien Raj by the word 'contempt of court' and the chicken-hearted lawyers got frightened at then.<sup>152</sup>

"Contempt of Court" was seen as a judicial extension of British Imperialism. This provoked a stern rebuke from the President who said that "individual judge... May he err, but we should not cost aspersion on the judiciary as a whole".<sup>153</sup> This it demonstrated that no discussion was permitted on the frailties of the judicial system as a whole. In the end, the words "contempt of court" was accepted as a restriction on "freedom of speech".

#### 4.4.1 Free Speech, Judiciary and the Law of Contempt of Court

Judiciary which is the sentinel on the *qui vive* of the fundamental rights may at times have to restrict the same in order to maintain rule of law. Rule of law, being the fountain of democracy, depends upon the free and fair administration of justice and any undue interference whether verbal or non verbal is treated as contempt. Constitutional guarantee of freedom of speech and expression does not permit any one to commit contempt of court. Free and fair criticism of the judicial act motivated by bonafied reasons has to be permitted, but scurrilous attack on the judiciary motivated by malafides has to be viewed seriously and should be restricted.<sup>154</sup>

It is indeed a trite statement that free speech and independent judiciary are institutions that are sine qua non for the maintenance of the Rule of Law. Nay there is the very foundation of a democratic society. Both of these, therefore, need to be jealously preserved and protected. The Judiciary, undoubtedly, is the arbiter of the Rule of Law, because it is the courts that are constitutionally entrusted to decide disputes between opposing parties, and thereby maintain the Supremacy of law. Although the operational area of both are quite distinct and apart to a large extent, and yet at times, these run into each other on the issue of contempt giving rise to a situation of conflict and confusion. The requisite stimulus for this exercise has been provided by a recently delivered judgement of the Supreme Court in *Rajendra Sail v. Mahya Pradesh High Court Bar Association and others*.<sup>155</sup>

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<sup>152</sup> Id. at p. 400.

<sup>153</sup> Id. at p. 401.

<sup>154</sup> K. Balasankaran Nair, 'Contempt of Court as a Limitations on Individuals Freedom of Speech and Expression: A Study of Judicial Approach', Kerala University Journal of Legal Studies, 1998. p. 79.

<sup>155</sup> AIR 2005 SC 2473.

In *Rajendra Sail*, the editor, printer and publisher, and a reporter of a newspaper, along with the petitioner who was a labour union activist, were summarily punished and sent to suffer a six months imprisonment by the High Court. Their fault that on the basis of a report filed by a trainee correspondent, they published dramatically remarks against the Judges of a High Court made by a union activist at a rally of workers. The remarks to the effect, that the decision given by the High Court was rubbish and fit to be thrown into a dustbin'. Although the publication of a news item was a factually correct version of the speech delivered by the union activist, nevertheless the editor, printer and publisher, and the reporter were held liable for contempt of the High Court. Accordingly, all of them were convicted and sentenced to six months imprisonment. On appeal, the Supreme Court upheld the contempt against them, but dramatically modified and reduced the sentence. The Apex Court accepted the unconditional apology tendered by the editor, printer and publisher, and the reporter, and thereby discharged them of contempt of court; whereas the sentence of imprisonment awarded to the union activist was reduced to one week.

The interesting feature of the case is that though the Supreme Court rendered the decision in the light of the already 'well settled' principles relating to the law of contempt the principles that were already in the knowledge of the High Court, nevertheless, the eventual decision of the Supreme Court in terms of the punishment given is drastically different from the one given by the High Court. Does it mean that the well settled principles governing contempt of courts are not yet so settled? Or, is this an arena of absolute discretion, implying that the variation in eventual decision-making is the inherent weakness of the common law tradition where the living law emanates as a result of court decision? In an analysis of quite a few related judicial decisions it has been found that the various principles expounding the contempt law are found scattered in numerous judicial decisions with varying emphasis. And, a coherent text-book approach, giving a rounded view of the subject of contempt law with a thematic unity, is conspicuous by its absence.<sup>156</sup>

It is both legal and logical to state that the freedom of speech and expression is as wide as the freedom of individual citizens. However, in a civil society no right to freedom, howsoever invaluable it might be, can be always considered absolute,

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<sup>156</sup> Virender Kumar, 'Free Press and Independent Judiciary: Their Juxtaposition in the Law of Contempt of Courts', *Journal of the Indian Law Institute*, Vol. 47, 2005, p. 448.

unlimited, or unqualified in all circumstances. The sweep of all rights or freedoms is, therefore, always controlled and regulated so that the like rights or freedoms of others are not Jeopardized Realizing the truth of this fact of social life-the constitution of India-envisages the regulation of fundamental Rights to freedom of speech and expression of all citizens, including the press, under Article 19(1)(a) by imposing reasonable restrictions under clause (2) of the same Article vis-à-vis judiciary, the restrictive clause specifically states that such freedom is subject to the law made by the state “in relation to contempt of Court”.<sup>157</sup> A similar provision is found in Article 19 of the International covenant on Civil and Political Rights, 1966, to which India is a signatory and had ratified the same. It provides that every one shall have the right to freedom of expression, to receive and impart information and ideas of all kinds. However, clause (3) of the same article makes these rights subject to certain restrictions, which shall only be such as are provided by law and are necessary for the respect of life and reputation of others for the protection of national security or public order or of public health or morality.

A mere glance at this statutory exposition shows that the contempt law is a very powerful instrument in the hands of judiciary. Its singular purpose is to protect and preserve the majesty of law and the dignity and independence of judiciary, which is otherwise so expressly guaranteed by the Constitution itself. The founding fathers of the constitution engrafted Article 121 and 211 and thereby prohibited the Parliament and the legislature to discuss on the floor of the house the conduct of any judge of the Supreme Court or the High Court in the discharge of his duties. Any discussion on the aberration of conduct of a judge can be held only upon a motion for presenting an address to the President praying for remove of the Judge under Article 124(4) of the constitution in accordance with the procedure prescribed under the judges (inquiry) Act, 1968 and the rules made there under.<sup>158</sup> By implication, No one else has the power to accuse a judge of his misbehavior, partiality or incapacity.<sup>159</sup> The purpose of such a protection is to ensure independence of judiciary so that the Judges could decide cases without fear or favour. If any person dares to discuss the conduct of a judge in a manner that brings the administration of justice into disrepute, he would be liable for contempt of court under the law.

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<sup>157</sup> Id. at p. 449.

<sup>158</sup> Supra note 136.

<sup>159</sup> Dr. D.C. Saxena v. Hon'ble the Chief Justice of India, AIR 1996 SC 2481 at 2501.

The Parliament, while enacting the Contempt of Courts Act, 1971, has clearly carved out certain exceptions to the exercise of the power of contempt. Section 3 of the Act takes a person out of the purview of contempt law if he has published any matter which interferes or tends to interfere the course of justice in connection with any civil or criminal proceedings provided at the time of publication he had no reasonable grounds for believing that proceedings are pending. In other words, want of knowledge of criminal whether pending or imminent would be complete defense to a person accused of contempt on the ground that he has published any matter calculated to interfere with the course of justice in connection with such proceedings. Under Section 4, fair and accurate reporting of judicial proceedings is not contempt. Similarly, by virtue of section 5, even fair criticism of judicial act is not to be considered contempt.<sup>160</sup>

Carrying out exceptions to contempt law shows the clear legislature intent: the prime purpose of enactment is to limit the scope and sweep of the contempt law rather than enlarging it. In fact, the principal objective of the parliament in enacting the Act of 1971 is to “define and limit the power of certain courts, in punishing contempt of courts and to regulate their procedure in relation thereto.”<sup>161</sup> The Apex Court has captured this objective spirit of the enactment, when Sabharwal J. (as he then was) issued a call to the judges.<sup>162</sup>

“A question whether there is contempt of court or not is a serious one. The court is both the accuser as well as the judge of the accusation. The court has to act therefore with a great circumspection. It is only when a clear case of contemptuous conducts not explainable otherwise arises then the contemnor must be punished.”

The analysis of the decision of the Apex Court reveals that the rigor of contempt law has been remarkably reduced by developing certain juristic principles and practices. In this respect, there are at least three sets of principles and practices that are in consonance with the legislature intent.

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<sup>160</sup> Supra note 156, pp. 454-455.

<sup>161</sup> The Act of 1971 replaces and repeals the Contempt of Courts Act, 1952.

<sup>162</sup> Supra note 155 at 2480 (para 25).

The first set of juristic principles and practices revolves around the holding of the apex court to the effect that the jurisdiction of the court for initiating contempt proceedings in terms of the procession of the contempt of courts Act is quasi-criminal. As such the standard of proof required is that of a criminal proceedings and the breach shall have to be established 'beyond reasonable doubt'. In this respect, the Supreme Court in *Mrityunjoy Das*<sup>163</sup> cited the observation of Lord Denning:

“While expand reasonable doubt’: It is not proved by showing that, when the man was asked about it, he told lies. There must be some further evidence to incriminate him. Once some evidence is given, then his lies can be thrown into the scale against him. But there must be some other evidence ... where there are two equally consistent possibilities open to the court, it is not right to hold that the offence is proved beyond reasonable doubt”.

The first judicial strategy is to distinguish ‘contempt’ from ‘libel’. Contempt is a public wrong, having ‘an adverse effect on the due administration of justice by ‘undermining the confidence of the public in judiciary’,<sup>164</sup> whereas, ‘libel’, which is an illegal act of writings things about someone that are not true, is a personal injury. The test, if an act of criticism is simply ‘libel’ or constitutes ‘contempt’ is, “whether the impugned publication is a mere defamatory attack on the judge or whether it is calculated to interfere with the due course of justice or the proper administration of law by his court”.<sup>165</sup> “It is only the latter case that will be punishable as contempt”. In other words, that is ‘alternatively’, the test will be whether the wrong is done to the judge personally or it is done to the public. In case of ‘libel’, one has to bring a suit and prove the charge, whereas in the case of contempt, it is the public institution, namely the court, that initiates proceedings and the contemnor is punished summarily even without proof of the actual injury, if the disparaging remarks are likely to interfere with the due administration of law.

The second judicial strategy for restricting court form holding people for its contempt is by differentiating the judge from his judgment. The judgments, and not

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<sup>163</sup> *Mrityunjoy Das and another v. Sayed Hasibur Rahman and Others*, AIR 2001 SC 1293.

<sup>164</sup> *Supra* note 155 at 2448 (para 16) citing *Shri C.K. Daphtary and Others v. Shri O.P. Gupta and Others*, AIR 1971 SC 1132.

<sup>165</sup> *Id.*, at p. 2478 (para 9) citing *perspective Publications Pvt. Ltd. and another v. The State of Maharashtra*, AIR 1971 SC 2211.

the judges, are subject to public criticism. It is always open to public scrutiny and criticism, Sabharwal J. (as he then was) unequivocally states:<sup>166</sup>

Undoubtedly, the judgments are open to criticism. No criticism of a judgment, however rigorous, can amount to contempt of court, provided it is kept within the limits of reasonable courtesy and good faith. Fair and reasonable criticism of a judgment which is a public document or which is a public act of a judge concerned with administration of justice would not constitute contempt. Such a criticism may fairly assert that the judgment is incorrect or an error has been committed both with regard to law or established facts.

The third judicial strategy to reduce the rigor of the contempt proceedings is by holding that the criticism made in ‘good faith’ and ‘public good’, that is without malice or ill-will does not amount to contempt of court. For this proposition, Sabharwal J. (as he then was) cites the authority of a three judge bench of the Supreme Court in *re. Roshan Lal Ahuja*,<sup>167</sup> which holds that fair comments, even if outspoken, but made without any malice or attempting to impair the administration of justice and made in good faith in proper language do not attract any punishment for contempt of court. The ambit of the contempt law further limited by the observation of the apex court in the *Arundhati Roy*<sup>168</sup> to the effect that the criticism of the conduct of a judge, the institution of judiciary, and its functioning may not amount to contempt of it is made in ‘good faith’ and in ‘public interest’. However, for deciphering the presence of these two doctrines, the apex court has suggested that the courts dealing with the issue of contempt should consider “all the surrounding circumstances”, including (a) the person responsible for comments; (b) his knowledge in the field regarding which the comments are made; and (c ) the intended purpose sought to be achieved. This implies that all the persons cannot be permitted to comment upon the conduct of the courts in the name of fair criticism...” holds the Supreme Court assertively.<sup>169</sup> The reason for this assertion is: “if criticism is permitted to everybody I the name of fair criticism, it would destroy the institution of courts itself”. This reality is instanced by the Supreme Court: Litigants losing in the court would be the first to impute motives to the judges and the institution in the name

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<sup>166</sup> *Id.* at p. 2484 (para 43).

<sup>167</sup> *Re, Roshan Lal Ahuja*, 1993 Supp. (4) SCC 446.

<sup>168</sup> *Supra* note 142.

<sup>169</sup> *Ibid.*

of fair criticism, which cannot be allowing for preserving the public faith in an important pillar of democratic set up, that is judiciary.

The second set of juristic principles and practices that has the effect of cutting down the contempt proceedings relates, not to the construction of 'contempt' but, to the consequences of contempt in terms of punishment. On this court Section 12 of the Act of 1971 specifically provides that "a contempt of court may be punished with simple imprisonment for a term which may extend to six months, or with fine which may extend to two thousand rupees, or with both". To this procession is engrafted a proviso, which entitles the contempt court either to discharge the accused by cancelling the court's order for initiating contempt proceedings, or "the punishment awarded may be remitted on apology being made to the satisfaction of the court". On the basis of simple construction of this provision, it is evident that the court's decision is holding a person guilty of contempt may be reviewed in the light of the justification offered by the accused. If the court is satisfied, it may instantly cancel its order, discharging the accused.<sup>170</sup>

#### **4.4.2 Freedom of Speech and Contempt of Court**

It is, however, quite clear, that the exercise of such a power by the courts comes in conflict with the citizens fundamental right to freedom of speech and expression. This freedom is not only the basis of a democratic form of Government but is also essential for a complete and meaningful development of human mind. But the great social interest that lies in the unobstructed and un-interfered administration of justice provides justification for the restriction that this branches of the law of contempt imposes on the freedom of speech and expression, subject, of course, to meeting the express constitutional requirement of reasonableness of any such restriction. Both the values of freedom of speech and expression and fair and impartial administration of justice are, thus, held very high by our constitution and neither is permitted to be sacrificed for the other. In all cases of conflict between the two, a proper balance has, therefore, to be struck by the courts.<sup>171</sup>

It is of great significance to mention that the Supreme Court, revising a High Court decision in which a magistrate had been held guilty of contempt, has held that

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<sup>170</sup> Supra note 156 at p. 459

<sup>171</sup> I.S. Ishar, 'Freedom of Speech and Contempt by Interfering with the due Administration of Justice', Journal of the Bar Council of India, Vol. 8, 1981 p. 330.

in the absence of mens rea the contemnor was at the most guilty of a technical contempt not calling for a penal action.<sup>172</sup> The Supreme Court rule that so long as a judicial officer, in the discharge of his official duties, acts in good faith and without any motive to defeat, obstruct, or interfere with the due course of justice, the courts will not as a rule punish him for contempt. In arriving at this decision Sarkaria J., who spoke for the bench, relied on an earlier Supreme Court Judgment<sup>173</sup> in which the court had refused to uphold an action for contempt for the delay in the transmission of the order of the court of Sessions, which in a way had defeated the order. There was no intention to so frustrate the orders of the session's court and the Supreme Court held that the punishment under the law of contempt was called for when the lapse was deliberate and in disregard of one's duty and in defiance of authority.

To curb, in the name of the contempt of court, such publications which legitimately discuss matters of general public interest and only incidentally and unintentionally create a risk of prejudice to particular proceedings, does appear to be an unwarranted and unreasonable restriction on the freedom of speech and expression.<sup>174</sup> There are cases in which the possibility of prejudice to a litigant may be required to yield to other and superior considerations of freedom to discuss matters of general public concern. One such example, it is submitted, was the case<sup>175</sup> in which Mr. P.C. Sen, the then Chief Minister of West Bengal, was held guilty of contempt of court. When the petitions challenging the constitutional validity of the West Bengal Milk Products control order were pending before the Calcutta High Court, the Chief Minister gave a broadcast talk in which he discussed the implications of the impugned control order and its impact on sweetshops. He extolled the virtues of that legislation as a sort of boon to the public and as putting down adulteration and anti social elements. The Chief Minister was held guilty of contempt of court on the ground that his speech was calculated to interfere with the due course of justice as it was likely to create atmosphere of prejudice against the petitioner and also deter other persons from making similar claims before the court. It is important to note that certain persons had started a public propaganda with the object of criticizing and ridiculing the policy of

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<sup>172</sup> Abdul Karim v. M.P. Prakash, AIR 1976, SC 859.

<sup>173</sup> Debabrata Bandopadhyay v. State, AIR 1969, SC 189.

<sup>174</sup> Phillimore Committee Report on Contempt of Court, 1974.

<sup>175</sup> Supra note 109.

the State Government in promulgating the control order. As a result of this, certain sections of the public were misled about the object, purpose and nature of the order and the consequences thereof. Taking advantage of the situation attempts were made by some political parties to commence a political agitation against the state government for having promulgated the order. It was contended on behalf of the Chief Minister that his sole and only intention and purpose in making the speech was to remove the confusion and to allay the fears aroused in the minds of the people. The Chief Minister, it was argued, had no intention whatsoever of either showing any disrespect to the court or interfering in any manner with the due course of justice, nor did he anticipate that his speech could have any such effect. But all this did not find any weight with the court as it was of the view that in such cases 'the question is not so much of the intention of the contemnor as whether it (the speech) is calculated to interfere with the administration of justice.'<sup>176</sup>

A very forceful exposition of this view is found in a unanimous full bench decision of the Delhi High Court,<sup>177</sup> where it was observed that the right to discuss being inalienable and the very essence of a free and democratic society, a matter of great national importance which agitates vast sections of the population was bound to be discussed in press and on other platforms. The public discussion of that matter cannot necessarily be stifled because of the filing of a suit by an individual in a court of law about the matter of national importance. To hold otherwise would, according to the High Court,<sup>178</sup> allowed full freedom to a commentator to comment on a matter of national importance, notwithstanding that a suit involving that matter is pending in a court of law.

In this context, a matter important change introduced in the Indian contempt law is the provisions<sup>179</sup> that no publisher of an alleged contumacious matter shall be guilty of contempt, if, at the time of publication of that matter he had no reasonable grounds for believing that the proceedings were pending. In a vast country like India, where people in one part of the country are not likely to be aware of the proceedings pending in another part of the country, it would completely stifle the freedom of speech if want

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<sup>176</sup> *Supra* note 171, pp. 332-333.

<sup>177</sup> *D.N. Singh v. A.K. Sen*, (1971) (1) 11 L.R. Delhi, 14.

<sup>178</sup> *Id.*, at p. 24.

<sup>179</sup> Section 3(1) of the Contempt of Courts Act, 1971.

of knowledge of pending proceeding were not to afford a complete defiance to a person accused of contempt of court. But once there was as of fact a pending proceeding, the burden is on the alleged contemnor to show that he had good reasons for believing that there was no pending proceeding. He must put forward such reasonable grounds as would satisfy reasonable man as to his belief.

This explanation to Section 3, however, needs to be reconsidered at least on one count. It lays down that a proceeding shall be deemed to be pending “until it is heard and finally decided, that is to say, in a case where an appeal or revision is competent, until the appeal or revision is heard or finally decided or, where no appeal or revision is preferred, until the period of limitation prescribed for such appeal or revision has expired.” This in the present, Indian conditions where there are enormous delays involved in the disposal of cases in the courts, at all levels, original or appellate, may amount to restraining comment for too long at time. At times when matters of general concern and interest are involved in the litigation, it may not do good to the public interest if there is no public discussion of these matters till appeals in that case are decided by the highest appellate court in the country. It could be very well argued in such cases that freedom of speech is being reasonably curtailed.<sup>180</sup>

It is no doubt essential to the preservation of the rights of every individual that administration of justice is not destroyed or prevented. Any abuse, interference or obstruction of the administration of justice has therefore, to be necessarily checked. But in the enthusiasm to strive, through the exercise of the contempt jurisdiction, for a fair and impractical administration of justice, it is not to be lost right of the contempt law affects, sometimes very seriously, the citizens fundamental rights to freedom of speech. This freedom is a necessary pre-requisite for the democratic way of life envisaged under the Indian Constitution and should always prevail except where interference with justice is substantial and mischievous.<sup>181</sup>

#### **4.4.3 Freedom of Expression and Contempt of Court**

All citizens have the right to freedom of speech and expression with reasonable restrictions. It is, Governor, not absolute, but is subject to the power of the state to impose reasonable restrictions in the interest of the sovereignty and integrity

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<sup>180</sup> Supra note 171 at p. 335.

<sup>181</sup> Id. at p. 336.

of India, the security of the state, friendly relation with foreign states, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence. Thus a restriction can be imposed on this freedom in relation to contempt of court, but such restriction has to be reasonable.

The need to impose restrictions on the freedom of speech and expression in relation contempt of court arises from the following interests that have to be subserved.<sup>182</sup>

- (a) The judiciary should not be designated because people will lose faith in it and ultimately this will erode its social legitimacy;
- (b) Judicial decision must not be allowed to be flouted, because it will weaken the credibility of the judiciary; and
- (c) Judges must be protected from blackmail, personal character assassination or ridicule which is arising out of their judicial office. If this is allowed, the judges will get demoralized.

As Against this, there are the following Interests subserved by the criticism by the judicial process:<sup>183</sup>

- (a) Judicial process is a decision making process and in democratic society, it is the part of the political process. The courts are entrusted with the power of making decision on matters of policy, such as what is the basic structure of the constitution or what are reasonable restrictions on freedoms guaranteed by bills of rights and, therefore, there should be free discussion about judicial policy and Judicial procedures, public faith in the judicial process will argument and not dimsh by such de-mystification of the judicial process. Judicial decisions and procedures as well as the institutional role of judiciary must be continuously under public gaze and subject to social audit;
- (b) Judges cannot invoke the law of contempt for their own personal protection. The law of contempt must protect only the institution. But criticism or allegations against judges with a view to bullying them or intimidating than could prove disastrous to the independence of the judiciary. Therefore, a judge ought not to be

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<sup>182</sup> S.P. Sathe. 'Freedom of Speech and Contempt of Court', The Lawyers, Nov. 1988, p. 17.

<sup>183</sup> Ibid.

criticized for his judicial decision. His decisions could be criticized, but not his motives. Such protection however remains confined strictly to his judicial work.

The power of the courts to punish for contempt is an essential judicial weapon to prevent interference with the administration of justice. However, it may at times conflict with freedom of speech which is a coveted fundamental right. This conflict has to be resolved in such a way as to protect administration of justice at minimum sacrifice of freedom of speech. But in *E.M.S Namboodiripad v. T.N. Nambiar*<sup>184</sup> the Supreme Court of India has failed to strike a balance between the competing demands of freedom of speech and fair administration of justice.<sup>185</sup>

Mr. Namboodiripad, while he was Chief Minister of Kerala, has said in a press conference was a mere criticism of the institution of judiciary from the standpoint of the class theory of Marx. He had described the judiciary as “an instrument of oppression” and the judges as “dominated by class hatred, class prejudices, instinctively favoring the rich against the poor”. The Judiciary, in his opinion, worked against workers, peasants and other sections of the working class. The Kerala High Court held him guilty of contempt of court and sentenced a fine of Rs. 1000/- or simple imprisonment for one month in default.<sup>186</sup>

The criticism by the contemnor was not of any individual judge. It was directed against the judiciary as a whole. Further the object of the petitioner was to educate the masses in the tenets of Marx and Engels and not to scandalize judges and he is doing so in pursuance of the guaranteed right of freedom of speech under Article 19 of the Constitution of India.<sup>187</sup>

When Namboodiripad appealed against this decision to the Supreme Court, the Supreme Court upheld the decision against him then it reduced the sentence. The arguments in his defense were that:<sup>188</sup>

- (i) his observations did no more than give expression to the Marxist philosophy and what was contained in the programme of his party, i.e. the CPI(M) programme adopted in Nov., 1964;

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<sup>184</sup> (1970) 2 SCC 325.

<sup>185</sup> S.P. Sathe, 'Freedom of Speech and Contempt of Court', Economic and Political Weekly, Vol. 5, Oct. 1970, p. 1741.

<sup>186</sup> Supra note 182, at p. 18.

<sup>187</sup> G.C. V. Subba Rao, 'Contempt of Court Act 1971', 1974, p. 232.

<sup>188</sup> Supra note 185.

- (ii) they contained a fair criticism of the system of judicial administration;
- (iii) they did not contain criticism of any particular judge or his judgement or conduct;
- (iv) he had always enforced the judgments of the courts, and had never shown disrespect to the judiciary, but had in fact advocated the independence of the judiciary;
- (v) the laws of contempt ought to be interpreted so as to cause no encroachment upon the freedom of speech guaranteed by Article 19(1)(a) of the Constitution;
- (vi) the alleged harm done to the courts by his utterances was not apparent.

This decision, in our submission, was wrong. No attempt was made in the judgment to show the reasonable of such a draconian scope of the contempt power. The judgment merely mentions that restriction could be imposed on freedom of speech and expression in relation to contempt of court. But if Article 19(2) is read carefully, it is not enough that such a restriction should be in relation to contempt of court. It is also necessary that such a restriction should be a reasonable restriction.

Later in *M.R. Parashar v. Farooq Abdullah*,<sup>189</sup> the Supreme Court dealt with a contempt complaint against the Chief Minister of Jammu and Kashmir, Mr. Farooq Abdullah. Dr. Farooq Abdullah had made a speech containing allegations against the judiciary. He had been reported to have said that justice was being bought in courts. He further said that he would not accept any stay orders. The Chief Minister was acquitted, but on the ground that the charge was not proved.

It is submitted that of such criticism of the judicial system were to constitute the offence of contempt, many eminent judges themselves would have to be convicted. Did Chief Justice Bhagwati not say that our system of justice was on the verge of collapse? Can we suppress the expression of truth in the name of contempt of court? Is it on the interest of the judiciary to suppress such expression but allow them to simmer in the minds of the people? Will open expression and its investigation or rebuttal not enhance the image of the judiciary? Chief Justice Chandrachud was not oblivious to such considerations when he observed:<sup>190</sup>

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<sup>189</sup> AIR 1984 SC 615.

<sup>190</sup> Supra note 182. pp 18-19.

“The reluctance of courts to resort to the provisions of the contempt of courts Act springs from their regard for the rule of law.... True, that it acts in order to uphold the authority of law and not defense of this or that particular judge. But an order punishing a person for such contempt is likely to create the impression more so in the mind of lay observers that the judges have acted in defense of themselves Courts do not like to create such an impression even unwillingly. Secondly, the right of free speech is an important right of the citizen, in the exercise of which he is entitled to bring to the notice of the public at large the infirmities from which any, institution suffers, including, institutions which administer justice. Justice, indeed, the right to offer healthy and constructive criticism which is fair in spirit must be left unimpaired in the interest of public institutions themselves.... Course does not like to assure the positive that they are above criticism and that their functioning needs no improvement.”

This passage clearly makes a departure from the view held in *Namboodripad*. In *P.N. Duda v. P. Shiv Shankar*,<sup>191</sup> the Supreme Court acquitted Mr. P. Shiv Shankar, who was minister for law and justice in the cabinet at the time of his prosecution for the offence of contempt of court. The speech for which Shiv Shankar had been prosecuted was very much similar to that for which *Namboodripad* had been convicted. But in the judgement of Justice Sabyasachi Mukherji, the following points emerge:<sup>192</sup>

- (i) Administration of Justice and Judges are open to public criticism and public scrutiny. Judges have their accountability to the society;
- (ii) any criticism about the Judicial system of the Judges which hampers the administration of justice or which erodes the faith in the objective approach of judges and brings administration of justice into ridicule must be prevented;
- (iii) judgments can be criticized. The motives of the judges need not be attributed; and
- (iv) in the free market place of ideas, criticism about the judicial system of judges should be welcomed so long as such criticisms do not impair or hamper the administration of justice.”

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<sup>191</sup> AIR 1988 SC 1208.

<sup>192</sup> *Supra* note 182 at p. 19.

It is submitted that the Supreme Court should have clearly overruled the *Namboodiripad* decision. The learned Sabyasachi Mukherji J. was right in saying that:<sup>193</sup>

“Such fair and reasonable criticism must be encouraged because after all no one, much less Judges, can claim infallibility. Such a criticism may fairly assert that the judgment is incorrect or an error has been committed both with regard to law or established facts.”

Well-known writer and activist Arundhati Roy was given a token punishment for a day for contempt of court, because she wrote against the Judgment in the Sardar Sarover Dam case by the Supreme Court. The court declared that the punishment was of one day because Roy is a woman. The sentence is reminiscent of a rap on the Knuckles of a writer for daring to speak her mind. It is though the court wanted to say, “Let all writers! The court is above any criticisms”. One wonders what the punishment would have been if the writer had been a male.<sup>194</sup>

Arundhati Roy was not a party to the case in question; she merely exercised her right as a citizen of a democracy to voice her opinion of the judgment. The issue is not about the Sardar Sarover Project. Discerning individuals would already have formed their own conclusion about the rightness of the project, based on mounting evidence that large dams do not automatically imply prosperity. The issue is about freedom of speech and the spirit of tolerance. Vast number of people including this writer, led in protest when the Supreme Court passed a judgment in favour of the Sardar Sarover Project. The judgment was seen to be a victory for the privileged and a future setback for the poor villagers living on bud submerged by the Sardar Sarover lake.<sup>195</sup>

Arundhati appeared and defended what she said in her affidavit. She asserted that as a citizen of India she had a right to criticize the decision of the Supreme Court, this being part of her fundamental right to freedom of speech. She had absolutely no intention to commit contempt of the court and what she said did not amount to contempt. The court held her guilty of contempt and sentenced her to one day’s

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<sup>193</sup> Ibid.

<sup>194</sup> Sangeeta Mall, ‘Judgement Day’, *Mainstream*, June 2002, p. 24.

<sup>195</sup> Ibid.

imprisonment and a fine of Rs. 2,000 failing to pay which she would have to undergo three months imprisonment. Arundhati Roy was sent to Tihar Jail. She spent a day there and came out after paying Rs, 2,000.<sup>196</sup>

Arundhati Roy's conviction and punishment for contempt shows that despite its doctrinal activism on human rights, the Supreme Court of India is still way behind the times in balancing freedom of speech and contempt of court. Action against Arundhati must be seen in the context of the decision of the Supreme Court in *Narmada Bachaol Andolan v. Union of India*,<sup>197</sup> (Hereinafter we shall call this case the NBA contempt case) in which the court permitted the concerned state governments to raise the heights of the Sardar Sarovar Dam. That decision came in 1998 after the work on the dam had remained stayed on the court's order since 1994. It came as a great disappointment to NBA and its sympathizers because a rise in the height of the dam meant submergence of more villages and displacement of thousands of more people from their homes, since even these displaced earlier had not been adequately rehabilitated. Medha Patekar, the leader and Arundhati Roy, a Booker award winner and sympathizer of NBA, criticized the judgment. They were served a notice for contempt. The judges were doubtless offended by Roy's sarcastic references to them in her Article in a news magazine but decided to drop the matter after giving an admission.<sup>198</sup>

NBA organized a 'dharna' in front of the Supreme Court and in a meeting held there the decision of the court was severely criticized. A complaint was made against Medha Patekar, advocate Prashant Bhushan and Arundhati Roy by some lawyers alleging contempt of court and the court issued a notice asking why they should not be punished. All these respondents denied that they had committed any contempt and asserted that they had a right to criticize the judiciary and its decision in exercise of their freedom of speech guaranteed by the constitution. When that matter was heard it was revealed that the petitions were frivolous, they suffered from various procedural flaws, and more of the charges made against any of the three respondents could be proved. The three persons were therefore acquitted.<sup>199</sup>

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<sup>196</sup> S.P. Sathe, 'Accountability of the Supreme Court: Arundhati Roy case', *Economic and Political Weekly*, Vol. 37, April 2002, p. 1383.

<sup>197</sup> (2000) 10 SCC 664.

<sup>198</sup> *Supra* note 196 at p. 1383.

<sup>199</sup> *Ibid.*

The entire proceedings show how embarrassed the court was in dealing with this matter, particularly when the persons accused of contempt refused to admit that they had committed any contempt but visited that they had a right to criticize and show their disapproval of a decision given by the court. This was their fundamental right under Article 19(1)(a) of the Constitution. They further said that they would accept any punishment rather than apologies. It was a moral challenge to the court by a person (Medha Parkar) for whom punishment for imprisonment for a few months would have made no difference. Similarly, for the other respondent too, the punishment would have caused physical suffering but they were ready to bear it. Where fear of punishment goes and one is willing to suffer, the deterrence of the punishment vanishes. If the court had punished them, they would have gone up in public esteem and to that extent the court would have suffered so erosion of its public esteem.<sup>200</sup>

Enthusiastic use of the power to punish for contempt, conflicts with two vitals principles which are universally recognized in international human rights instruments the right to fair trial and the right to freedom of speech and expression. Article 14(1) of the international covenant on Civil and Political Rights, 1966 guarantees a fair and public hearing by competent, independent and impartial tribunals and reminds that a criminal defendant has an express right to defend himself through a legal representative of choice. But there can be no fair hearing and legal representation cannot be effective unless a party's advocate is free to advance all arguments and lead admissible evidence that can reasonably be said to support the client's case, lawyers are often put in a situation where they feel that unless they give away their rights to free speech they would not be heard. It is recognized that lawyers must have this freedom.<sup>201</sup>

The Government of India has been struggling to strike a balance between the Constitutional rights of its citizens and the enactments of laws restricting these rights. The problem faced in achieving this balance is that the Constitution has various built-in-paradoxes. On one hand the Constitution guarantees the right of freedom of speech

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<sup>200</sup> S.P. Sathe, 'NBA Contempt of Court Case', Economic and Political Weekly, Vol. 36, Nov. 2001, p. 4339.

<sup>201</sup> Smriti Mehta, 'Equilibrate: Contempt Law and Freedom of Speech', Cri. L.J. 2007, p. 119.

and on the other hand it allows the parliament to pass any law against subversion, actions prejudicial to public order etc.<sup>202</sup>

#### **4.5 Constitutional Provisions Relating to the Contempt of Court**

##### **4.5.1 Contempt is an Inherent Power of Every Court of Record**

The power to punish for contempt is an inherent power of court of record. It has been described as “a necessary incident to every court of Justice”. This power is recognized and has been given a fundamental status by the Constitution of India. Certain tribunals, which do not enjoy the status of courts or record, have also statutorily been conferred this jurisdiction.

In the early case of *Sukhdev Singh Sodhi*,<sup>203</sup> Justice Vivian Bose had tried to trace the history of the contempt jurisprudence in India, locating the earliest statutory provision in clause 4 of the Charter of 1774 which stated that the Supreme Court of Bengal would have the same jurisdiction as the court of King’s Bench in England, accompanied by a power to punish for contempt. At common law, the position was clear that a Superior Court of Record had the inherent power to punish for contempt and this was the consistent position of the policy council as well.<sup>204</sup> Justice Bose observed:<sup>205</sup>

“This recognizes and existing jurisdiction in all letters Patent High Courts to punish for contempt’s of themselves, and the only limitation placed on those powers is the amount of punishment which they could thereafter inflict. It is to be noted that the Act draws no distinction between one Letters Patent High Court and another though it does distinguish between letters patent High Court and Chief Courts also, as the Act is intended to remove doubts about the High court’s power it is evident that it would have conferred those powers had here been any doubt about the High Court’s power to commit for contempt of themselves. The only doubt with which the act deals is the doubt whether a High Court could punish for contempt of a court subordinate to it. That

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<sup>202</sup> Ibid.

<sup>203</sup> *Sukhdev Singh Sodhi v. The Chief Justice and Judges of the Pepsu High Court*, (1954) SCR 454.

<sup>204</sup> Justice Bose traces the genesis of the principle by relying on the principles of British Common Law as enunciated in Belchamber’s practice of the civil court (1884) and the Hailsham Edition of Halbury’s Law of England.

<sup>205</sup> Supra note 203.

doubts the act Removed. It also limited the amount of punishment which a High Court could inflict”.

This recognizes an existing power in all Letters Patent High Courts other than the chartered High Courts other than chartered High Courts could not have derived this power from the common law, it is evident, that the power must have been inherent in them because they were court of record.<sup>206</sup>

This power that was considered intrinsic in these courts was continued by virtue of Section 106 of the Government of India Act, 1915, until the Government of India Act, 1935 which referred to the High Court’s as courts of Record in Section 220 and created the Federal Court with similar powers in Section 203. With the coming of the Constitution, Articles 129 and 215 continued the declaration of the superior Courts as courts of Record with the power to punish for contempt.<sup>207</sup>

Articles 129 and 215 of the Constitution provider that the Supreme Court and each of the High Court shall be a “Court of record and shall have all the powers of such a court including the power to punish for contempt of itself.” Additionally, Article 142((2) provides that the Supreme Court shall have the power to make orders for the investigation or punishment of any contempt of itself. While Article 142(2) is expressly made subject t the provisions of any law that may be made by parliament in this behalf, Articles 129 and 215 are not. In addition, article 19(2) allows contempt to be a ground on which the state may reasonably restrict the exercise of the freedom of speech and expression under Article 19(1) (a).<sup>208</sup>

The expression “court of record” is not defined in the Constitution or in any law. The historical meaning of a court of record is a court where acts and judicial proceedings are preserved for perpetual memorial and testimony. In *Delhi Judicial Service Association*,<sup>209</sup> the Supreme Court observed:

“Article 129 provides that the Supreme Court shall be a court of record and shall have all the powers of such a court including the power to punish for

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<sup>206</sup> Id., pp. 459-460.

<sup>207</sup> However, both Articles 19(2) and 142(2) recognized the fact that free speech and the powers of the Supreme Court to make orders in relation to investigation or punishment of contempt would be subject to law that was enacted.

<sup>208</sup> ‘Restatement of Indian Law, Contempt of Court’, Supreme Court Project Committee on Restatement of Indian Law, Indian Law Institute, New Delhi, 2011, p. 6.

<sup>209</sup> *Delhi Judicial Service Association v. State of Gujarat* ,( 1991) 4 SSC 406 (Para 19-21).

contempt of itself. Article 215 contains similar provisions in respect of High Court. Both the Supreme Court as well as High Court is court of record having powers to punish for contempt including the power to punish for contempt of itself. The constitution does not define "Court of Record". This expression is well recognized in judicial world. In England a superior court of record has been exercising power to indict a person for the contempt of its authority and also for the contempt of its subordinate and inferior courts in a summary manner without the aid and assistance of jury. This power was considered as a necessary attribute of a superior court of record under Anglo-Saxon system of Jurisprudence..... In India, the courts have followed the English practice in holding that a court of record has power of summarily punishing contempt of it as well as of subordinate courts. *In Surendranath Banerjee v. Chief Justice and Judges of High Court*,<sup>210</sup> at the Fort Willian in Bengal, the High Court of Calcutta in 1883 convicted Surendranath Banerjee, who was editor and proprietor of weekly newspaper for contempt of court and sentence him to imprisonment for two months for publishing libel reflection upon a judge in his judicial capacity. On appeal the Privy Council upheld the order of the High Court and observed that High Courts in Indian Presidencies were superior courts of record, and the powers of the High Court as Superior Courts in India are the same as in England. The Privy Council further held that by common law every court of record was the sole and exclusive judge of what amounts to a contempt of court. In *Sukhdev Singh Sodhi case*<sup>211</sup> this court considered the origin, history and development of the concept of inherent jurisdiction of a court of record in India. The court after considering Privy Council and High Court's decision held that the High Court being a court of record has inherent power to punish for contempt of subordinate courts. The court further held that even after the codification of the law of contempt in India the High Court's Jurisdiction as a court of record to initiate proceedings and take *seisin* of the matter remained in effected by the contempt of courts Act, 1926.

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<sup>210</sup> (1882-83) 10 Ind. App. 171 (PC).

<sup>211</sup> Supra note 203.

Similarly, in *Supreme Court Bar Association*,<sup>212</sup> the Supreme Court observed:

The expression court of record has not been defined in the constitution of India. Article 129 however, declares the Supreme Court to be a court of record, while Art. 215 declare a High Court also to be a court of record.

A court of record is a court, the records of which are admitted to be of evidentiary value and is not to be questioned when produced before any court. The power that courts of record enjoy to punish for contempt is a part of their inherent jurisdiction and is essential to enable the courts to administer justice according to law in a regular, orderly and effective manner and to uphold the majority of law and prevent interference in the due administration of justice. Every court of record has certain inherent powers including the power to punish for contempt of itself.

Thus, even in the absence of the constitutional provisions referred to above, the High Courts and the Supreme Court would possess the power to punish for contempt. This was well known to the Constituent Assembly and the language of Article 129 and 215 is an attempt to put matters beyond doubt.<sup>213</sup> During the Constituent Assembly debates, in relation to the present article 129, Dr. Ambedkar explained that the words “court of record” was used to define status of the court and as to the additional words he observed thus:

“As a matter of fact, once you make a court a court of record by statute, the power to punish for contempt necessarily follows from that position. But, it was felt that in England this power is largely derived from common law and as we have no such thing as common law in this country, we felt it better to state the whole position in the statute itself.”<sup>214</sup>

#### **4.5.2 Parliament’s Legislative Competency Regarding Contempt**

The following are the provisions of the constitution having a bearing on contempt of courts.<sup>215</sup>

- (i) Article 19 (1) (a) and 19(2);

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<sup>212</sup> *Supreme Court Bar Association v. Union of India* (1998) 4 SCC 409.

<sup>213</sup> Constituent Assembly Debates, Vol. 8, at 378-383.

<sup>214</sup> *Id.* at 382.

<sup>215</sup> Articles 105(2) and 194(2) which afford complete immunity to members of the legislature in respect of anything said therein are not being referred to in this context.

- (ii) Article 129 and entry 77 List I of the Seventh Schedule;
- (iii) Article 215 and entry 14 of List III of the Seventh Schedule; and
- (iv) Article 142(2).

Article 19(1) (a) guarantees to all citizens the right to freedom of speech and expression and Article 19(2) provides *inter alia* that this right is subject to any law imposing reasonable restrictions in relation to contempt of court. Article 129, 142(2) and entry 77 List I of the Seventh Schedule pertain to contempt of the Supreme Court, while article 215 pertains to contempt of High Courts. Entry 14 of List III of the Seventh Schedule covers contempt of courts other than the Supreme Court.<sup>216</sup>

Article 246(1) read with Entry 77 of List I of the Seventh Schedule to the Constitution Confers on the parliament exclusive power to make laws with respect to ‘constitution, organization, jurisdiction and powers of the Supreme Court (including contempt of such court);. Further in terms of Article 246(2) read with Entry 14 of List of the Seventh Schedule, the Parliament as well as the legislature of the States enjoy the powers to make laws on ‘contempt of court’ but not including contempt of the Supreme Court’. The power conferred on the legislature, therefore, extends to enacting a law on the entire subject of ‘contempt of court’. Even the Constitutional guarantee of freedom of speech and expression under Article 19(1)(a) is expressly made subject to the right of the legislature to impose ‘reasonable restrictions’ on the exercise of that right by making any law *inter alia* on contempt of court.<sup>217</sup>

The elaborate phraseology of articles 129 and 215 would reveal itself more as the consequence of a practical difficulty in using more concise and less misleading language to describe the powers of the courts rather than as an attempt to freeze for all times to come the substantive law of contempt. The wide and unqualified language of entry 77 of List I and entry 14 of List III of the Seventh Schedule shows that the Legislature has full powers to legislate with respect to contempt of court subject only to the qualification that the Legislature cannot take away the power of the Supreme Court or the High Court to punish for contempt or vest that power in some other court, for example, a magistrate’s court. Further the provisions of Article 142(2) to the effect that the Supreme Court shall have ‘all and every power’ to make any order for

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<sup>216</sup> Sanyal Committee Report on Contempt of Court 1963. Ch. III, Para 2.

<sup>217</sup> *Supra* note 208, pp. 12-13.

the investigation or punishment of any contempt of itself, “subject to the provisions of any law made in this behalf by Parliament” clearly assume that Parliament has full powers to legislate in relation to contempt of the Supreme Court. In other hands, even if article 129 were interpreted as ‘conferring’ on the Supreme Court the power to punish for contempt of itself, another article, namely, article 142(2) expressly makes ‘all and every power’ of the court to make any order for the punishment of any such contempt subject to any law made in this behalf by Parliament. Further legislation in relation to contempt, as contemplated and saved by article 19(2), must necessarily be in relation to the substantive law of contempt and such legislation would not be possible in relation to the Supreme Court and High Court if article 129 and 215 were construed to prohibit it.<sup>218</sup> It would, therefore, seem to us to be sufficiently clear that having regard to the relevant provisions, Parliament has the power to legislate in relation to the substantive law of contempt of the Supreme Court or the High Court.<sup>219</sup>

### **4.5.3 Parliamentary Privileges and Free Speech**

#### **4.5.3.1 Terms Privilege and Parliamentary Privilege**

First it is necessary to know what is meant by the term ‘privilege’. The term privilege connotes the rights and immunities enjoyed by each house of Parliament and its committees collectively and by the members of each House individually, without which they cannot discharge their functions efficiently and effectively.<sup>220</sup> These privileges, therefore, are certain Fundamental Rights of each House which are generally accepted as necessary for the exercise of its constitutional functions. Hence, in general terms, privilege means a right, advantage or immunity granted to or enjoyed by, a person or class of persons beyond the common advantages of others.<sup>221</sup>

Parliamentary privilege has been defined as, “the sum of peculiar rights enjoyed by each house collectively as a constituent part of High Court of Parliament, and the members, of each house individually, without which they could not discharge

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<sup>218</sup> *Bijoyananda Patnaik v. Balkrishna Kar*, ILR 1953 Cutt. 283, (293) the Orissa High Court came to the conclusion that article 19 does not curtail the right of the High Court to deal with contempt of court. The High Court in that case was considering whether there was any existing law curtailing that power within the meaning of Art. 19(2) and it is therefore not clear whether the court would have come to the same conclusion if there was some expression of law on the subject.

<sup>219</sup> *Supra* note 216, Ch. III, para 4(2).

<sup>220</sup> V.S. Maniam, ‘Parliament and Press’, *Vidura*, Vol. 25(2), 1988, p. 13.

<sup>221</sup> V.S. Pekhi, ‘Law of Privileges’, *Vidura*, Vol. 26(5), 1989, p. 34.

their functions and which exceed those possessed by others bodies or individual”.<sup>222</sup> Any act or omission which obstructs or impedes any member or officer of the House in the discharge of their duties, or which has a tendency to produce such a result would constitute contempt of the legislature.

#### 4.5.3.2 Privileges of the Parliament and State Legislature

The privileges, immunities etc of the members of Parliament and of the Parliament itself are set out in Article 105 of the Constitution of India. Clause (1) of that Article says that subject to the provisions of the constitution and the rules and standing orders regulating the procedure of Parliament, there shall be freedom of speech in Parliament. These immunities are conferred on members for anything said in the House and no person can be made liable in respect of publication by or under the authority of either House of Parliament of any report, paper, votes, proceedings of the Parliament or any committee thereof. Similar provisions exist in Article 194 which is applicable to House of state legislatures. Reading clause (1) and (2) of Article 105 and 194 together, it is plain that freedom of speech in Parliament and state Legislature is absolute and unfettered. This view has been upheld in the case of *Shri. M.S. M. Sharma v. M. Krishna Sinha*<sup>223</sup> and later confined in the case of Special Reference No. 1 of 1964 by the Supreme Court of India.<sup>224</sup>

In *M.S.M. Sharma v. Krishna Sinha*<sup>225</sup> the court made it clear that if the Parliament or State Legislature enacted a law under Article 105(3) or 194(3) respectively to define its privileges, then such a law would be subject to Article 19(1)(a) and a competent court could strike down that law under Article 13 of the Constitution if it violated, or abridged any of the fundamental rights.<sup>226</sup> It is this part of the judgment which has led to the general impression that neither the House of Parliament nor the State Legislature would be interested in codifying Legislative privileges as then they would be liable to challenge under the various Articles containing fundamental rights. This case has imposed a judicial gloss on the freedom of the press.<sup>227</sup>

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<sup>222</sup> R.C. Sarkar, 'The Press and Privileges as of Parliament', *Journal of Constitutional Parliamentary Studies*, Vol. 15, 1981, p. 80.

<sup>223</sup> AIR 1959 SC 395.

<sup>224</sup> AIR 1965 SC 745.

<sup>225</sup> *Supra* note 223.

<sup>226</sup> *Id.* at p. 410.

<sup>227</sup> A.N. Grover, 'Press and Parliament', *Journal of Constitutional Parliamentary Studies*, Vol. 18, 1984, p. 135.

The provisions of the constitution dealing with Parliamentary privileges and immunities bear special marks of indebtedness to the centuries-old conventions established and maintained in this regard by the British parliament. Article 105 deals with the powers, privileges and immunities of the Houses of parliament, their members and committees. It guarantees to every member freedom of speech in Parliament and grants immunity from proceedings in any court of law in respect of anything said or any vote given by him in Parliament or in any of its committees. A similar immunity is granted in respect to the publication, under the authority of either house of parliament, of any reports, papers, votes or proceedings. All these privileges are equally applicable to the various state legislatures, their members and committees under Article 194.<sup>228</sup>

In 1959, the Supreme Court was called upon to deal with the subject of parliamentary privilege in a comprehensive manner when the famous *search light case*<sup>229</sup> came before it. In that case the editor of Search Light, a Patna Daily Newspaper, came to the court contending that he had the absolute right, subject of course to any law that may be protected by Article 19(2) of the Constitution (restrictions to the freedom of speech and expression), to publish a true and faithful report of the publically heard and seen proceedings of parliament or any state legislature including portions of speeches directed to be expunged. The matter arose as a result of his publishing a report of some proceedings of Bihar State Assembly which the speaker had ordered to be expunged. A show-cause notice was issued against the editor by the Secretary of the assembly for breach of privilege. He challenged the notice and moved the court for an appropriate writ or order in his favour claiming that the notice sought to violate his fundamental rights to freedom of speech and expression and to personal liberty under Article 21<sup>230</sup> guaranteed under the Constitution.<sup>231</sup>

By a four-to-one majority headed by the Chief Justice the court held that the Legislature had the power of privilege of prohibiting the publication of even a true and faithful report of the debates or proceedings that took place in the House. They

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<sup>228</sup> M.Y. Pylee, 'Full Speech and Parliamentary Privileges in India', Pacific Affairs, Vol. 35, 1962, p. 12.

<sup>229</sup> Supra note 223.

<sup>230</sup> Article 21 'No person shall be deprived of his life or personal liberty except according to procedure established by law'.

<sup>231</sup> Supra note 228 at p. 14.

further held that the only way of reconciling the two provisions of the Constitution, namely, Article 19(1)(a) freedom of speech and expression and Article 105(3) or 194(3) legislature privileged was by allowing the former which is 'general' to yield to the latter which is 'special'. However, if Parliament or the State Legislature were to make a law, as contemplated by Articles 105 or 194, defining their privilege, such law as an ordinary law would be subject to the fundamental rights.<sup>232</sup>

The dissenting Judge (Justice Subha Rao) agreed with the majority that Article 105(3) and 194(3) were not expressly made subject to the other provisions to the Constitution. But he disagreed with their reconciliation of the two by way of the doctrine of the general and the special. With clear and compelling logic he said: "There is no inherent inconsistency between the two provisions. Article 19(1)(a) gives freedom of speech and expression to a citizen while Article 194 (3) or 105 (3) deals with powers, privileges and immunities of the legislature. The legislatures and its members have certainly a wide range of powers and privileges, and the said privileges can be exercised without infringing the fundamental rights of a citizen. When there is conflict, the privilege should yield to the extent it affects the fundamental rights. Thus construction gives full effect to both Articles."<sup>233</sup>

There was a case, perhaps unparalleled in the annals of parliamentary privileges, relates to a conflict between the Legislative Assembly and the High Court of the State of Madras which took place during 1960. The facts of the case are as follows:<sup>234</sup>

The Government of Madras had appointed one Mr. Alagirisami as government pleader after his retirement from Judicial Services in the State. The appointment was challenged through a writ petition in the High Court by an Advocate of the Court. The court however dismissed the petition saying that from a strict 'legal point of view' the government could make the appointment and the court could not interfere.<sup>235</sup> But one of the Judges who heard the petition made stringent remarks by way of *obiter dicta* imputing motive to the minister in charge of law who has happened to be the reader of the House in the assembly. A member of the Government party (the congress party)

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<sup>232</sup> Id., pp. 14-15.

<sup>233</sup> Ibid.

<sup>234</sup> Id. at p. 17.

<sup>235</sup> 'Judiciary v. Speaker', The Current, September 21, 1960.

during the next session of the Assembly moved a privilege motion in the House alleging that the court had in some of its observations in the division of the above case “usurped the powers and privileges at the legislature”. He said that a matter was a fit case to be referred to the committee of privileges, as, in the court’s order “strong observation have been made affecting the conduct, character, prestige and privilege of a member and leader of this House and powers which essentially belong to the legislature have been assumed by the high Court, thereby affecting the powers and privileges of this House”. The speaker announced the views of the leaders of parties in the House would be elicited on the privilege motion two days later when the motion would be considered by the House.

The day after the motion was moved in the Assembly, the same Advocate who had moved the High Court earlier filed a petition before the court praying that action might be taken against the member who would the privilege motion for contempt of court. He pointed out that no member of the Legislature had any right to discuss the conduct of any High Court Judge and anything in regard to pronouncements made by him in the discharge of his official duties (Article 211).<sup>236</sup> This provision was embodied in the constitution to ensure that judges could administer justice without fear or favour. The privilege motion, be alleged, had cast aspersions on a judge of the High Court. The two judges who heard the petition admitted it and ordered issue of notice to the member. The court also issued notice to the speaker of the Assembly to show cause why a writ of mandamus directing the speaker to forbear from allowing consideration or discussion of a certain privilege motion tabled in the assembly should not be issued against him. On the following day the speaker made a rather dramatic announcement of the notice in the Assembly and added that he did not propose to subject himself to the authority of any court in the exercise of his powers (in accordance with Article 212 of the Constitution).<sup>237</sup> The court regretted the uncooperative attitude of the speaker in helping it to clear up the conflict between Article 211 and 212 but proceeded to examine the issue of privilege involved in the case. The Chief justice, who went into this aspect in considerable detail, pointed out

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<sup>236</sup> Article 211. ‘No discussion shall take place in the Legislature of a state with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties.’

<sup>237</sup> Article 212: “(1) The validity of any proceedings in the Legislature of a state shall not be called in question on the ground of any alleged irregularity of procedures; (2) No officer or member of the Legislature of a state in whom powers are vested by or under this constitution for regulating procedure or the conduct of business, or for maintaining order, in the legislature shall be subject to the jurisdiction of any court in respect to the exercise of these powers.”

that the criticism leveled against the minister in the court order was in relation to a member of the Executive Government and not to a member of the Legislature. The functions of the Legislature and the Executive were different. The Executive were not protected by privileges in that actions and therefore he could not understand whether there was *prima facie* any privilege involved in the orders of the court. As regards the stand of the Speaker that the court could not issue notice to him relating to his duties in the Assembly, the Chief Justice observed that notice could be issued anybody in the land except foreign dignitaries. It was a different question whether the court had any jurisdiction to pass an order of injunction. This unfortunate episode of a Constitutional clash between the High Court and the Speaker, arising out of an undue emphasis on Parliamentary Privilege, came to a happy end, however, by the adjournment of the House *sine die* without discussing the privilege motion and by the subsequent decision of the speaker not to proceed with the matter.<sup>238</sup>

Houses of Parliament in India also have the power to punish a person, whether its member or outsider, for its 'contempt' or 'breach of privilege'. A House can impose the punishment of administration, reprimand, suspension from the services of the House for the session, fine or imprisonment.<sup>239</sup>

Raveendran J. in his dissenting judgement in *Raja Ram Pal v. The Hon'ble Speaker, Lok Sabha*<sup>240</sup> has rightly held: "The enumeration of disqualification is exhaustive and specifies all grounds for debarring a person from continuing as a member. The British parliament devised expulsion as a part of its power to control its constitution, (and may be as a part of its right of self-protection and self-preservation) to get rid of those who were unfit to continue as members, in the absence of a written constitutional or statutory provisions for disqualification. Historically, therefore, in England, 'expulsion' has been used in cases where there ought to be a standing statutory disqualification from being a member. Where provision is made in the constitution for disqualification and vacancy, there is no question of exercising any inherent or implied or unwritten power of 'expulsion'.<sup>241</sup> However, if a member commits a crime, for example accepts a bribe to vote or ask questions in the house, it

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<sup>238</sup> *Supra* note 228, at p. 18.

<sup>239</sup> *Hardwari Lal v. Election Commission of India*, ILR (1977) 2 P&H 269.

<sup>240</sup> (2007) 3 SCC 184.

<sup>241</sup> Shruiti Bedi, 'The Power to Punish for Contempt under Parliamentary Privileges: An analysis of the inherent limitations', *Journal of the Indian Law Institute*, Vol. 51, 2009, p. 88.

is a matter wherein the guilt of the accused needs to be established. This obviously can only be done by the judiciary and not the Legislature. The right forum to decide the issue of expulsion of members especially for crimes committed by them would be the judiciary which possesses the means and power to try such cases.<sup>242</sup>

The cash-for-question scam decided by the Supreme Court<sup>243</sup> gave rise to the question as to whether the House can expel a member for accepting bribes. The case was decided in favour of the house. It is apparent that accepting bribe is not a legislature act. Accepting bribes seriously subverts the legislature process. Such cases need to be dealt with under the ordinary criminal law since the legislature is not capable of dealing with it.<sup>244</sup>

The most outstanding and most controversial case in the area of legislature privileges, however, was the *Keshav Singh case*.<sup>245</sup> In this case, the Supreme Court gave an advisory opinion under Article 143 on certain issues arising out of the claims for privileges by the Legislative Assembly of the State of Uttar Pradesh, Keshav Singh printed and published with others, pamphlets against a member of the House and was reprimanded at the bar of the House. During the course of the administration of the reprimand, Keshav Singh behaved in an objectionable manner in the House. Consequently, the speaker directed that Keshav Singh be imprisoned for seven days in Jail for committing contempt of the House. This decision led to a number of events which brought the judiciary and legislature into direct conflict. This was challenged by a writ of *Habeas-Corpus*, upon which a rule *nisi* was issued by the Allahabad High Court and Keshav Singh was admitted to bail pending final hearing of the petition on merits. The house regarded this as contempt and issued writs for the arrest and production of the judges who then moved the High Court to get the warrants quashed. At this stage, the President of India referred the matter to the Supreme Court for its advisory opinion under Article 143 of the Constitution.

The court gave its opinion by a majority of six to one. The majority opinion was delivered by the Chief Justice Gajendragadkar, who pointed out the main controversy lay in a narrow compass, viz:

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<sup>242</sup> Id., at p. 90.

<sup>243</sup> Supra note 240.

<sup>244</sup> Supra note 241, at p. 90.

<sup>245</sup> Supra note 224. In re under Article 143 of the Constitution.

Is the House the sole and exclusive judge of the issue as to whether its contempt has been committed where the illegal contempt has taken place outside the four-walls of the House? Is the House sole or exclusive judge of the punishment which should be imposed on the party whom it has found to be guilty of its contempt? And, if in enforcement of its decision the House issues a general or unspeaking warrant, is the High Court entitled to entertain a *Habeas Corpus* petition challenging the validity of the detention of the person sentenced by the House.<sup>246</sup>

The majority opinion was that legislature in India are not superior courts of Record and can exercise only those powers of the House of commons which are integral part of its privileges and which are incidental legislature function, but not those powers which are exercised by the House of commons as a superior court of Record or as a result of convention or comity. The Supreme Court was, therefore, of the opinion that the courts in India cannot only examine the existence or extent of privilege but can also examine the validity of an order of commitment made by the Legislature, whether the warrant issued is a speaking or general warrant. The Legislature cannot question the conduct of, or take action against the judges on the pleas of contempt for anything done in their official capacity. The Legislature has the power to punish anyone for its contempt but it cannot be said that the order of the Legislature will be totally non-justifiable. Coming to the question of judicial review, the majority laid down a general proposition that Article 19(1)(a) did not control legislative privileges, but it is mainly under Article 21, which relates to personal liberty of an individual that the courts can review the order of committed for contempt.<sup>247</sup>

Again by a long chalk the majority avoided the difficulty between Article 194(1)(a) by giving a reasoning that the Article 194(1) makes it clear that the freedom of speech in the Legislature of every state which is prescribe, is subject to the provision of the Constitution, and to the rules and standing orders, regulating the procedure of the Legislature while interpreting this clause, it is necessary to emphasize that the provisions of the constitution subject to which freedom of speech has been conferred on legislatures, are not the general provisions of the constitution, but only such of them as relate to the regulation of the procedure of the Legislature.

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<sup>246</sup> Id. at p. 759.

<sup>247</sup> Id., pp. 765, 770.

The rules and standing orders may regulate the procedure of the Legislature and some of the provisions of the Constitution may also purport to regulate it; for instance, Article 208.<sup>248</sup>

As to the applicability of all the Fundamental Rights to the cases where legislative powers and privileges could be exercised against any individual citizen of the country, the Supreme Court noticed that Article 19(1)(a) did not apply but Article 21 did.

The majority further commented that if a citizen moved the Supreme Court and complained that his fundamental rights under Article 21 had been contravened, it would plainly be the duty of the court to examine the merits of the said contention, and that inevitably raised the question as to whether the personal liberty of the citizen had been taken away according to the procedure established by law. If in a given case, the allegation made by the citizen was that he had been deprived of his liberty not in accordance with law, but for capricious or malafide reasons the Supreme Court will have to examine the validity of the said contention, and it would be no answer in such a case to say that the warrant issued against the citizen was a general warrant and a general warrant must stop all further judicial inquiry and scrutiny. Therefore, the impact of the fundamental constitutional right conferred on Indian citizens by Article 32 on the construction of the latter part of Article 194(3) was decisively against the view that a power or privilege could be claimed by the House, though it might be inconsistent with Article 21.<sup>249</sup>

Sarkar, J. in his dissenting opinion took a view that there was no conflict between Articles 194(3) and 19(1)(a), for they dealt with different matters. The founder says that the state legislatures shall have the powers and privileges of the English House of commons while Article 19(1)(a) states that every citizen shall have full freedom of speech. The conflict, however, comes to the surface when the particular privileges claimed under Article 194(3) are concerned. When Article 194(3) says that the state legislature shall have certain privileges, it really incorporates those privileges in itself. Therefore, the proper reading of Article 194(3) is that it provides that the state legislatures have, amongst other privileges, the privilege to

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<sup>248</sup> Article 208(1) provides that a House of the Legislature of a state may make rules for regulating, subject to the provisions of this constitution, its procedure and the conduct of its business.

<sup>249</sup> Supra note 224 at p. 786.

prohibit publication of any of its proceedings. It is only then that the conflict between Article 194(3) and 19(1)(a) can be seen; one restrictive a right to publish something while the other says all things may be published. It was further commented that to allow article 32 and 226 to prevail over legislative privilege under Article 105(3) of Article 194(3) did not amount to harmonization of two independent provisions, but was to destroy one of them.<sup>250</sup>

#### **4.6 Sum up**

In conclusion, it may be submitted that the law relating to contempt o courts has been designed to protect the functional independence of the courts, so that they are able to maintain the rule of law, which is the very basis of the democratic system of government. However, this does not make the judges and their course absolute, arbitrary, or completely immune from criticism. Their doings and their decisions are admittedly open to public scrutiny through the powerful medium of press. The press is the watch dog to see that every trial is conducted fairly, openly and above board. But the watch dog may sometimes break loose and has to be punished for misbehavior. The interference in the judicial process even though an indirect one by a paroled trial in the media is against the Constitutional right of fair trial of the accused. The courts have always zealously guarded the freedom of the press, it put media under the obligation to abstain itself from trespassing in the judicial sphere. Though, both the press and the judiciary are independent and have their respective function and both are required to fulfill the same constitutional objective; namely to secure to all its citizens 'justice' in its full comprehensive sense, including social, economic, and political.

Criticism of the conduct of judges counteracts the contribution of the courts. Such a conflict is sought to be resolved by emphasizing that so long as the criticism is constructive; directed to protect the public interest, the same criticism, should not be construed as contempt of courts, or destructive the institution of judiciary. Sometimes contempt power places unnecessary curb on the valuable right of an individual freedom of speech and expression. It must be remembered that the judiciary, like any other institution of the state, belongs to and derives its authority from the public people and should, therefore, be accountable to the people.

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<sup>250</sup> *Id.* at p. 808.

## **Section 2. Managing the Media and the Public**

The role of the media in forming public opinion on terrorism should not be underestimated. Media coverage can delegitimize and isolate terrorists and communicate reassurance to the public. Trials involving the prosecution of terrorism offences are generally high profile by their nature, inviting scrutiny from the general public and the media. These cases not only bring with them increased national and international scrutiny, but also present unique challenges to those tasked with adjudicating them. A trial for a terrorism-related offence must strike the delicate balance between the right of the accused to a fair trial, the right of the public to be informed of the proceedings and the right of victims and witnesses to maintain privacy. Additionally, the media may have a right to cover the proceedings and in this situation, the court may have to take special steps to protect the safety and privacy of victims and witnesses.

### **I. Public v. Private Trial**

#### **A. Public Trial**

The Universal Declaration of Human Rights contains the right to a fair and public hearing by an independent and impartial tribunal (Article 10) and the right of the accused to be presumed innocent until proved guilty according to law in a public trial at which the accused has had all the guarantees necessary for his or her defense (Article 11).<sup>10</sup>

Similarly, Article 14, Paragraph 1 of the International Covenant on Civil and Political Rights states the following:

The press and the public may be excluded from all or part of a trial for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.<sup>11</sup>

The balance between the much-needed protection of the rights of the accused—including the presumption of innocence, equality of arms and access to good quality defense services—and the rights of victims must be given special attention in order to ensure a fair trial. It is also necessary to prevent secondary victimization, which ‘occurs not as a direct result of the criminal act but through the response of institutions and individuals to the victims.’<sup>12</sup> Survivors of terrorist acts and family members suffer losses and become more vulnerable as a consequence of the criminal act. Therefore, the state’s institutional framework, including its criminal justice system and its administrative organs tasked with assisting victims, must protect those victims from unnecessary additional burdens.

### B. Private Trial

Upon the formal request of either party, the court may also adopt special measures to ameliorate any specific threat or general threat that is identified, if it supports a secure trial environment and does not unduly infringe on the fair trial rights of the parties. One of these measures may include imposing a ban on the publication of the name and address of the witness/victim in connection with the proceedings or in the alternative closing the courtrooms to the public for portions of the hearings or trial proceedings.

In Canada, for example, while the general rule is that all criminal proceedings shall be held in open court, the Criminal Code sets out several exceptions to facilitate the victims’ or witnesses’ participation and to protect privacy. Complainants of sexual offences and young victims and witnesses are the primary beneficiaries of these special provisions (*e.g.*, Section 486.4 provides a mandatory ban on publishing the identity of a victim or witness).

### C. International Good Practices

The Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Offenses contains Good Practice 8: Develop and Articulate Media Guidelines for the Court and Parties.<sup>13</sup> The good practice is copied here for ease of reference.

<sup>11</sup> ICCPR (n 1) art 14

<sup>12</sup> U.N. Office on Drugs and Crime ‘Handbook on Justice for Victims’ (1999) 9, *available at* [https://www.unodc.org/pdf/criminal\\_justice/UNODC\\_Handbook\\_on\\_Justice\\_for\\_victims.pdf](https://www.unodc.org/pdf/criminal_justice/UNODC_Handbook_on_Justice_for_victims.pdf).

<sup>13</sup> Hague Memorandum (n 9)

The Hague Memorandum on Good Practices for the Judiciary in Adjudicating Terrorism Offences<sup>14</sup>, Good Practice 8

Trials involving the prosecution of terrorism offences are generally high profile by their nature, inviting scrutiny from the general public and the media. As a general rule, timely access to accurate information of court proceedings increases transparency and public confidence in the fairness of the justice system. The judiciary should develop rules and procedures for media coverage of public judicial proceedings, with good practices including the following:

*f*. Providing the trial judge with latitude to control the conduct of the proceedings to: (i) maintain decorum and prevent distractions; (ii) guarantee the safety of any court official, party, witness, or juror (where applicable); and (iii) ensure the fair and impartial administration of justice in the pending case.

*f*. Where the media is seeking special or additional coverage of the case, the court should establish a consistent policy that requests by representatives of the media for such coverage are made in writing to the trial judge, prior to the scheduled trial date or specific trial event.

Written requests for specific or enhanced coverage may be supported by affidavits as appropriate. Notification that the media has requested such coverage should be provided by the court to the lawyers of record in the case, with the parties provided an opportunity to object.

*f*. Before denying, limiting, suspending, or terminating media coverage, the trial judge may hold a hearing, if such a hearing will not delay or disrupt the judicial proceeding or receive affidavits to consider the positions of the parties.

*f*. Any finding that media coverage should be denied, limited, suspended, or terminated should be supported by a finding of the court that outlines the underlying justifications for its actions.

*f*. The court may prohibit the use of any audio pickup, recording, broadcast, or video close up of conferences, which occur in a court facility, between lawyers and their clients, between co-counsel of a client, and between counsel and the presiding judge held at the trial.

*f*. When more than one request for media coverage is made and the trial judge has granted permission, the court may request that the media select a representative to serve as a liaison and be responsible for arranging “pooling” among the media if such is required by limitations

on equipment and personnel as a result of courtroom space limitations or as directed by the court.

*f* . Where non-print media is covering a trial, the judge may impose additional guidelines that limit the use of photographic and audio equipment to that which does not produce distracting sound or light and may limit or prohibit the use of moving lights or flash attachments.

*Abstract from Article South Asia Regional Toolkit for Judges .*

# Terrorism, Media Trials and the Right to Fair Trial

Lawrence Liang and Smarika Kumar<sup>1</sup>

## Introduction

In Greek tragedy it is often difficult to distinguish the experience of time from the experience of justice. This maxim seems to play itself out in our contemporary post mediatized world where we see a set off between media trials and the right to a fair trial. Our media landscape is one in which breaking news necessarily breaks twenty four by seven with a premium placed on velocity and this often translates- in the case of criminal trials -into a media circus that conducts its own investigation, parrots prosecution accounts or in some cases creates speculative conspiracy theories of its own. The demand for immediate news and analysis also conflicts with the comparatively slow process of law in which trials could go on for years. In the post 9/11 world where terrorist attacks have morphed into media events we have seen the news channels become instant experts analyzing events even as they unfold, identifying perpetrators within hours of the events and in some cases creating dramatized reenactments even as the trial is underway.

A classic case in point is Zee television's tacky reconstruction of the parliament attack case which would embarrass even a B grade Hindi film (the program even had a voice over by B grade film star Raza Murad) speculated on the role of S.A.R. Geelani casting him as the mastermind behind the attack with reconstructed 'factual' scenes showing his role in plotting the attack. Nandita Haksar notes that the film, which was allegedly based on the charge sheet, went well beyond the prosecution's case in the court and it portrayed Geelani as the mastermind and showed scenes of him talking to the five dead attackers and planning the attack. She adds "The film was shown to the Prime Minister and then the Home Minister, and the media recorded their approval of the film. Geelani's lawyers moved the court and the High Court did stay the broadcast. Zee TV moved the Supreme Court. The corporation was less concerned with the protection of the freedom of speech and expression than with the possibility of losing money. The Supreme Court vacated the stay and the entire nation watched the film a few days before the Designated Court sentenced Geelani to death".<sup>2</sup> Zee TV was not alone in playing sleuth and most of the newspapers as well as channels had similarly pronounced him guilty even though the Supreme Court subsequently acquitted him.<sup>3</sup>

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<sup>1</sup> The authors are lawyers and researchers at the Alternative Law Forum. The views expressed in this paper are those of the author in their independent capacities and do not reflect any institutional position or perspective.

<sup>2</sup> Nandita Haksar, *Tried by the Media: The SAR Geelani Trial*, Sarai Reader 04: Crisis Media, 159. See also Syed Bismillah Geelani. *Manufacturing Terrorism: Kashmiri Encounters with Media and the Law*. Bibliophile South Asia, 2006

<sup>3</sup> For a detailed analysis of the role of the media see Nandita Haksar, *Framing Geelani, Hanging Afzal: Patriotism in the Time of Terror*. New Delhi: Promilla & Co., Publishers, 2007.

This story has been repeated ad nauseam and remains fairly consistent: this remarkable ability of the media to solve cases even before the police begin their investigation would have been almost entertaining were it not for the fatal consequences that this can have for the rights of the accused.<sup>4</sup> In their perceptive introduction to the Crisis Media anthology the Sarai editorial collective suggests that the rise of new information technologies has ensured that crises are reported and commented upon even as they unfold on our television screens, radio programmes, newspaper pages and computer monitors. They say “trailers advertising news programmes have made images of war, violence, terrorism and disaster the staple diet of the twenty-first century's quotidian sense of the world. Each bulletin anticipates tomorrow's, or the next bulletin's crisis, the very next crisis. So that the breaking news may break even, all day, everyday. And yet, often, they are relinquished to the oblivion from which they emerged, as rapidly as they emerged” (Crisis/Media).

While the principle of ‘innocent until proven guilty’ is assumed to be one of the bedrocks of a democratic legal system, the fact of the matter is that this is a truism that exists only on paper and in reality the criminal justice system is often heavily loaded against people who are accused of crimes. In their book on fair trials and free speech, Brusckke and Loges argue that the presumption of innocence in the legal system ironically represents our collective awareness of our bias against defendants. They assert “The defendant's height and weight don't depend on the attitude of the jury, but the defendant's presumption of innocence does. We put this presumption in our legal code to remind ourselves, as jurors and even as victims, that we must withhold judgment until evidence is presented because we are tempted to indulge a bias against people accused of crimes. We know ourselves too well” (Brusckke and Loges xiii). This is particularly true in the era of ‘crisis media’ where the rush to confirm our unverifiable fears by the media results in an embedded journalism in which the only version that it endlessly relayed are the ones produced by the prosecution<sup>5</sup>. In his reading of the media coverage of the parliament attack case, Shuddhabrata Sengupta argues that the ‘creation’ of terrorism requires a calibrated media strategy. Describing the media coverage of the attack as involving an overproduction of enthusiastic and detailed reports on the supposed backgrounds, past lives and actions of the primary accused in the 13th December case, Sengupta sees a close link between the need for convincing ‘evidence’ on the part of the security and intelligence community and the media's thirst for a

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<sup>4</sup> See for instance the consistent work done by Ajit Sahi in uncovering the ways in which young Muslim men have been framed over and over again in cases related to the banned organization SIMI

<sup>5</sup> Anuj Bhuwania writing on the context of the Black Friday case says that “It is in the very nature of their job that such reporters rely on the police as their primary informants and a symbiotic working relationship of these crime journalists with the police personnel is hardly surprising. As Thomas Hansen says in his study of the communal violence in Bombay in the 90s, “The allegations of police officers are readily accepted and reported by journalists as sufficient proof of the guilt of those killed or held by the police.” Black Friday, Mediation and the impossibility of justice, p.13. <http://www.jnu.ac.in/cslg/workingPaper/17-Black%20%28Anuj%29.pdf>

meaty story. He claims that this has led to a situation in which television channels and newspapers routinely project the accused and arrested as 'terrorist masterminds and co-conspirators' without even the caveat that this was as alleged by their captors.<sup>6</sup>

In this paper we examine the tensions and fault lines that exist between the right to fair trial and trial by media.<sup>7</sup> The paper has two segments: the first segment outlines the existing legal position on the right to fair trial v. trials by media and examines principles that have informed the Indian position on the balance between free speech and right to fair trial. The second segment of the paper then examines the Supreme court's decision in the parliament attack case to see how images of the terrorist constructed in media creep into judicial decisions.

### **The Right to Fair Trial in a post mediatized landscape**

Bronwyn Naylor suggests that the coverage of criminal trials involving violence poses a serious challenge to the administration of justice by the virtue of the kind of narratives that are deployed (in media and in law) when it comes to criminal trials. Violent acts demand a narrative explanation and the modern press has thrived on its coverage of violence since it "incorporates the drama, the human emotion, the shattering of "normal" expectations, which are required for a story to be newsworthy".<sup>8</sup> And yet at the same time given the paucity of facts, the contradictory nature of legal evidence the process of the trial in fact hinges on competing narratives and the question is whether the media chooses to privilege the narrative of the prosecution or the defence.

The right to fair trial has a long and rich history which can be traced all the way back to the Magna Carta as the story of a hard won right that serves as the only guarantee against the impunity of state violence (Linebaugh; Banaszak). In India the right to fair trial has been recognized as being an integral part of the right to life in Art. 21 as well as the right against self incrimination in Art 20 of the constitution. Any proceeding which interferes with the 'administration of justice' is actionable under the Contempt of Courts Act. The Supreme Court has been unequivocal in its recognition of the fact that a trial by press, electronic media or by way of a public agitation is the very anti-thesis of rule of law and can lead to miscarriage of justice<sup>9</sup> and have urged that media coverage of ongoing trials should at no cost interfere with the essentials of a fair trial including the

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<sup>6</sup> Shuddhabrata Sengupta, *Media Trials and Courtroom Tribulations : A Battle of Images, Words and Shadows* in Arundati Roy, Ed., 13 December, a Reader: The Strange Case of the Attack on the Indian Parliament. New Delhi: 2006.

<sup>7</sup> The issue has clearly been cause for concern prompting even a law commission report on the same. See 200<sup>th</sup> Law Commission Report on Trial by Media, available at <http://lawcommissionofindia.nic.in/reports/rep200.pdf> (Last visited on 9th July 2013)

<sup>8</sup> Bronwyn Naylor, FAIR TRIAL OR FREE PRESS: LEGAL RESPONSES TO MEDIA REPORTS OF CRIMINAL TRIALS, 53 Cambridge L.J. 492 1994

<sup>9</sup> State of Maharashtra v. Rajendra Jawanmal Gandhi : 1997 (8) SCC 386.

presumption of innocence of the accused unless found guilty at the end of the trial.<sup>10</sup>

The idea of a media trial does not begin with broadcast media and has been around from the time of the press but the problem of the interference by the press with the process of criminal justice takes on an accelerated dimension in the era of broadcast media and the internet. The Supreme Court recognized the dangers of newspapers running parallel investigations as early as 1961 when it referred to 'trial by press' even before the enactment of the Contempt of Court of 1971. In *Saibal v. B.K. Sen*<sup>11</sup> it said:

*"It would be mischievous for a newspaper to systematically conduct an independent investigation into a crime for which a man has been arrested and to publish the results of the investigation. This is because, trial by newspapers, when a trial by one of the regular tribunal is going on, must be prevented. The basis for this view is that such action on the part of the newspaper tends to interfere with the course of justice".*

In 1961 the government constituted the Sanyal Committee which brought out its report on contempt of court and its report had underplayed the role of publication in a newspaper prejudicing the administration of justice stating that since India was a vast country and what is published in one part is not accessible to people in another part of the country. The committee's understanding of media arose at a time when the newspaper revolution had not taken place much less the electronic media boom that we have witnessed in the last two decades. One can contrast the perception of the power of the media as imagined by the Sanyal committee with an account of media in the early 2000's by the Delhi high court.

In *Surya Prakash Khatri v. Smt. Madhu Trehan*<sup>12</sup>, the court described the power of the press using various metaphors of weapons including 'nuclear power', 'loaded gun' etc. arguing that the media had a much greater duty of care and caution in publishing a potentially damaging piece. Acknowledging the transformed media landscape, the court stated

*The editor of a newspaper or a journal has a greater responsibility to guard against untruthful news and publications for the simple reason that his utterances have a far greater circulation and impact than the utterances of an individual and by reason of their appearing in print, they are likely to be is to every nook and corner of the world, particularly these days when we have 24-hour news channels and webcasts on the Internet.*

Similarly in *D.N. Prasad v. Principal Secretary*<sup>13</sup>, the court argued that the nature of electronic media was such that there was very little filtering that takes place and news reaches persons regardless of their age and capacity of

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<sup>10</sup> Anukul Chandra Pradhan vs. Union of India, 1996(6) SCC 354

<sup>11</sup> AIR 1961 SC 633

<sup>12</sup> 92 (2001) DLT 665 (FB)

<sup>13</sup> 2005 Cri LJ 1901

comprehension. One of the clear turning points in the way that we think about the relationship between electronic media and the coverage of trials occurred with the O.J. Simpson trial which was telecast live accompanied with expert commentary on the trial process.<sup>14</sup> Scholars have argued that what distinguished the Simpson trial from previous media forms was its simultaneity and this is a crucial aspect of thinking about what 'trial by media' in our times implies. HHA Cooper says

*We saw, and heard, virtually all the evidence as it was being forensically presented. Somewhat incongruously, one might have thought, the jury of the accused's peers was denied that to which the rest of us had access. Sound law, no doubt, but lacking, unquestionably, in a certain understanding of the stark realities of the modern, media age. ....*

*What is stated, now, as an indisputable fact is that this publicity, and the way in which it was developed and purveyed, was contemporaneous with the actual legal proceeding itself. Had there been no more than this instantaneous reportage, it would have been difficult to argue that it had no effect upon the fostering of opinions about the guilt or innocence of the accused. It was like watching a televised tennis match, stroke by stroke, where, though the end was yet to be made known, we might still root for the players. Such exercises promote partisanship, and when there is added to this, the ardent commentary of the "elucidators," the paid entertainers, however they might, themselves, have conceived of their role, one had to wonder whatever happened to the presumption of innocence.<sup>15</sup>*

It is in light of the pervasive nature of electronic media that the courts have evolved various principles and criteria by which they evaluate whether the media has the potential of violating a person's right to a fair trial. In a number of cases on the relationship between media publicity and the trial process the courts have evolved a set of normative grounds based on which they display a healthy suspicion of media.

#### **A. Public mind influenced by media trial: public prejudging issue**

One of the first principles developed by the court is the adverse influence that media representations have in prejudicing the mind of the public. This was

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<sup>14</sup> For a detailed analysis of the trial in media see Toni Morrison and Claudia Brodsky. *Birth of a Nationhood: Gaze, Script, and Spectacle in the O.J. Simpson Case*. New York: Pantheon Books, 1997

<sup>15</sup> HHA Cooper, *California v. Orenthal James Simpson: Fair Trial Or Media Circus?* 47 Chitty's L.J. & Fam. L. Rev. 48 (1999). See also, Robert S. Stephen, *Prejudicia IPublicity Surroundinga CriminalTrial: What a Trial Court Can Do to Ensure a Fair Trial in the Face of a "MediaCircus"*, 26 SUFFOLK U. L. REV. 1063, 1103 (1992).

strongly stated by the Delhi high court in the context of the Nitesh Katara murder case which had received a lot of media publicity. The court argued

*The kind of media trial which is going on in this country creates bias not only in the minds of the general public but also vitiates the atmosphere and this certainly has the tendency to put pressure on the Magistrate or the Sessions Judge or on the court, while taking decisions, which is not a healthy sign for development of criminal jurisprudence. Media does not know what harm the media is doing by having a parallel trial and reporting the proceedings in a manner by giving the news which are detrimental sometimes to the accused who is facing trial and sometimes even to the prosecution. Judges are also human beings and when hue and cry is made by the media it is possible that the equilibrium of a Judge is also disturbed. It is high time that under the garb of freedom of press the parallel proceedings of media people in criminal trial should stop immediately. We also want to emphasize the need of maintaining journalistic discipline in reporting cases. The freedom of press does not lay in highlighting a news of commercial value or which is of sensational value. Media has a national duty to highlight news which are for developmental work and issues which concerns our people and the society at large. 'No news' is a news for media and 'the news' is no news for the media. The founding fathers of our Constitution have not thought of the freedom of press in this context.<sup>16</sup>*

In a rather candid moment the courts acknowledge their own susceptibility to the influences of media reportage. This is in sharp contrast with earlier positions in which the judiciary has tended to describe itself in transcendental terms claiming that unlike laymen who are influenced by what they see in media, it is inconceivable for judges to be influenced either consciously by what they read or see<sup>17</sup>. In England the courts have drawn a distinction between the possibilities of influence when it comes to questions of law against cases where questions of facts or evidence is at play and have held that it is more likely for a judge to be influenced at the trial stage than at an appeal stage.<sup>18</sup>

## **B. Prejudicing the presumption of Innocence**

The presumption of innocence is one of those ironical rights which has passed into cliché even as it remains one of the most difficult rights to substantively achieve. The Supreme court in *Ranjitsing Brahmajeetsing Sharma v. State of*

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<sup>16</sup> Indian Council Of Legal Aid And ... vs State (Govt. Of Nct Of Delhi), <http://indiankanoon.org/doc/1802633/> (Last accessed on 10<sup>th</sup> July 2013)

<sup>17</sup> In the P.C. Sen case for instance the courts held that *The learned Judge observed that he was not prejudiced by the speech against the petitioners before him, since he was only "concerned with the constitutional and legal validity of the Control Order, and incidentally only with its socio-economic justification", but it could' not be said that the speech did not or could not or was not likely to prejudice the public against the cause of the petitioners."*

<sup>18</sup> *Regina v. Duffey and others Ex Parte Nash*[[1960] 2 Q.B.D. 188

Maharashtra<sup>19</sup> has considered it to be a human right holding that if in a given case any appropriate Court finds infringement of such presumption by excessive prejudicial publicity by the newspapers (in general), then under inherent powers, can pass orders of postponement of publication for a limited period if the applicant is able to demonstrate substantial risk of prejudice to the pending trial and provided he is able to displace the presumption of open justice and to that extent the burden will be on the applicant who seeks such postponement of offending publication. At the international level the European court of human rights has ruled that the presumption of innocence should be employed as a normative parameter in the matter of balancing the right to a fair trial against claims of freedom of speech and expression. Article 6(2) of the European Convention of Human Rights imposes a positive obligation on the State to take action to protect the presumption of innocence from interference by non-State actors. However, in a catena of decisions, the ECHR has applied the principle of proportionality to prevent imposition of overreaching restrictions on the media.”

The media reportage of terrorism cases do not just prejudice the presumption of innocence but often actively creates a presumption of absolute guilt. When investigative journalism is replaced by the media parroting police briefs there is very little hope for the presumption of innocence to survive. Terming the targeting of groups like SIMI as the Kafka project, Ajit Sahi provides us with a chilling narrative of the compromise of the legal process.<sup>20</sup> The story in brief is a familiar one: SIMI is banned for its alleged involvement in anti national activities, the Union Home Secretary claimed that SIMI had links with Osama bin Laden/Al Qaeda, and that Palestine’s guerrilla militia Hamas was its close ideological partner. The police claimed in raids they had seized anti-national video and audio cassettes and other propaganda materials. During the course of the four bans hundreds of criminal cases were slapped on alleged SIMI activists across the country, and hundreds of young Muslim men were arrested. Most did not get bail and spent up to a year and more in jail on the flimsiest of evidence<sup>21</sup>. Those who secured bail after repeated efforts often succeeded only because the police failed to file charge sheets within the legal deadline of 90 days from arrest (the deadline is 60 days in minor cases). Hundreds out on bail are still embroiled in cases dragging on for years. In many cases the trials haven’t even begun. Case after case, the pattern is the same: The police receive “secret information” from an unnamed informer about a meeting or a suspicious character at a certain location. They reach the spot, search the premises, find “unlawful material” such as pamphlets and CDs on the person or persons present there, and arrest him/them. Once the arrested person is in police custody, he is miraculously struck by remorse a few days later and volunteers a “confession”. The SIMI tribunal accepted the “secret material” as evidence: evidence which was read by the presiding judge alone and returned to the government, with no one else

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<sup>19</sup> (2005) 5 SCC 294]. See also *Ram Autar Shukla v. Arvind Shukla*, 1995 Supp (20 SCC 130

<sup>20</sup> Ajit Sahi, *The Kafka Project*, *Tehelka Magazine*, Vol 5, Issue 32, Dated Aug 16, 2008, also Ajit Sahi, *The Cry Of The Beloved Country*, *Tehelka Magazine*, Vol 5, Issue 32, Dated Aug 16, 2008. (Last accessed on 10<sup>th</sup> July 2013)

<sup>21</sup> In some cases the incriminating evidence included a copy of Kahil Gibran’s *The Prophet*

knowing what it contained. The law allows the government to claim privilege if divulging such information would imperil public interest. But it also says that the Centre must share the secret material with the party contesting the ban but in a 1995 judgment the Supreme Court held that the government may share it with only the presiding judge and not the contesting party. Thus when a judge rules that the secret information from the Centre is good enough to uphold a ban, the banned organisation does not even know what that secret information is. With a few exceptions like Ajit Sahi most of the media coverage of the SIMI ban as well as the legal proceedings have often felt like the press has collectively decided to act as spokespersons for the police and the home ministry.<sup>22</sup>

The embedded journalism in terror cases opens out the question on how we draw the line between the public interest function of the media and the interests of publicity which fuels much of what they do (Kaur and Mazzarella). The slightly perverse interest that the media has in perpetuating 'profitable provocations' has also been acknowledged by the courts and in a case involving Zee telefilms<sup>23</sup>, the court concluded that often the media conveys what the 'public is interested in' rather than what is in 'public interest'. They held that freedom of the press should not degenerate into a licence to attack litigants and close the door of justice nor can it include any unrestricted liberty to damage the reputation of respectable persons." The court in this case also cited Andrew Belsey's opinion decrying the state of affairs where the pressures associated with a business whose main job is to be the latest story in which the 'temptation to print trivial stories salaciously presented' is very high.

### **Striking a balance between free speech and the right to fair Trial**

The right to privacy and the right to fair trial constitute one of the faultlines that divides liberal activists who demand greater freedom of speech and expression. Unlike traditional censorship cases which pits the question of freedom against restraints the battle between free speech and the right to a fair trial becomes a question of two competing rights and the adjudication of the balance between the two can be a tricky one. In our opinion one of the determining principle should be the relative position of strength or disadvantage of each of the parties. If freedom of speech has been premised on protecting the rights of individuals against the power of the state it is important to remember that most accused persons are up against a hostile criminal justice system and an extremely powerful actor in the form of media and if there is a direct conflict between the rights of the accused and the right to free speech of media, it should be the right to fair trial that prevails. This is of course not an easy solution as the principles of a fair trial also include accurate reportage and the media can play an important watchdog function in ensuring that there is no violation of any due process of law.

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<sup>22</sup> For the latest critique of the media in the Ishrat Jahan case see Prashant Jha, When facts are least sacred, <http://www.thehindu.com/todays-paper/tp-opinion/when-facts-are-least-sacred/article4907038.ece>. See also <http://kafila.org/2013/07/08/hindustan-times-continues-ibs-campaign-to-vilify-ishrat-jahan-justice-for-ishrat-jahan-campaign/> (Last accessed on 10<sup>th</sup> July 2013)

<sup>23</sup> Mother Dairy Foods & Processing Ltd v. Zee Telefilms, AIR 2005 Delhi 195

In an old constitutional commentary, Cooley argues that the requirement of a public trial is for the benefit of the accused; it is in order to ensure that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions; and the requirement is fairly observed if, without partiality or favoritism, a reasonable proportion of the public is suffered to attend, notwithstanding that those persons whose presence could be of no service to the accused, and who would only be drawn thither by a prurient curiosity, are excluded altogether.<sup>24</sup> The idea of an open trial which is also one of the basis of the claims of free speech and reportage is grounded on the rights of the accused and not a right that is inherent in and of itself.

A constitutional bench in *Sahara India Real Estate v. SEBI*<sup>25</sup> had the opportunity to consider the approach of different jurisdictions to the question of balance between these competing claims. Examining different approaches to the question of whether there can be any prior restraints imposed on the coverage of a judicial process the court observed that in the US speech is privileged over any other right and as a rule there are no prior restraints that are imposed. But in the context of the hyped media attention on cases like the O J Simpson trial, courts have evolved procedural devices aimed at neutralizing the effect of prejudicial publicity like change of venue, ordering re-trial, reversal of conviction on appeal etc. In contrast to the US, the UK approach privileges the administration of justice over the right to free speech. In their summary, the Supreme Court describes the English approach as the 'Protecting Justice' approach, arguing that fair trials and public confidence in the courts as the proper forum for settlement of disputes as part of the administration of justice, under the common law are given greater weight than the goals served by unrestrained freedom of the press. The European model is governed by a personality approach wherein the concern is less to do with the issue of fair trial than with the need for safeguarding privacy, personal dignity and presumption of innocence of trial participants. The underlying assumption of this model is that the media coverage of pending trials might be at odds not only with fairness and impartiality of the proceedings but also with other individual and societal interests. Thus, narrowly focussed prior restraints are provided for, on either a statutory or judicial basis. Finally they examine the Canadian position which earlier tilted towards the right to fair trial over the right to free speech saw a shift with the introduction of the Canadian charter of rights which explicitly guaranteed 'freedom of the press and other media of communication' and the Canadian courts now have to strive for a balance between the two rights.

Summarizing the Indian position the courts state that restrictions places on free speech in the interests of the administration of justice are reasonable under Art.

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<sup>24</sup> Cooley, CONSTITUTIONAL LIMITATIONS 380-81 (5th ed. 1883).

<sup>25</sup> <http://indiankanoon.org/doc/182016928/>

19(2) and that it also satisfies the test laid down by the court in the R.Rajagopal case<sup>26</sup>. According to the court

*“.....in most common law jurisdictions, discretion is given to the courts to evolve neutralizing devices under contempt jurisdiction such as postponement of the trial, re-trials, change of venue and in appropriate cases even to grant acquittals in cases of excessive media prejudicial publicity. The very object behind empowering the courts to devise such methods is to see that the administration of justice is not perverted, prejudiced, obstructed or interfered with. At the same time, there is a presumption of Open Justice under the common law. Therefore, courts have evolved mechanisms such as postponement of publicity to balance presumption of innocence, which is now recognized as a human right in Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra (supra) vis-a-vis presumption of Open Justice. Such an order of postponement has to be passed only when other alternative measures such as change of venue or postponement of trial are not available. In passing such orders of postponement, courts have to keep in mind the principle of proportionality and the test of necessity. The applicant who seeks order of postponement of publicity must displace the presumption of Open Justice and only in such cases the higher courts shall pass the orders of postponement under Article 129/Article 215 of the Constitution. Such orders of postponement of publicity shall be passed for a limited period and subject to the courts evaluating in each case the necessity to pass such orders not only in the context of administration of justice but also in the context of the rights of the individuals to be protected from prejudicial publicity or mis-information, in other words, where the court is satisfied that Article 21 rights of a person are offended”*

While the courts have sought to evolve principles that balances between the right to free speech and the right to fair trial, they have been a lot more wary of arguments based on the right to know when it competes with fair trial. In the R K Anand case<sup>27</sup> the Delhi high court sought to lay down a set of principles that should govern the relationship between media reportage and fair trial. A few of the key principles include:

2. Most people tend to believe what is published in the mass media making it necessary for the media to ensure that what is being published is accurate. In respect of a potentially damaging publication, the media cannot feign ignorance or plead that it did not know that it had a ‘loaded gun’

3. The concept of self-regulation of the media appears to be a myth. There will always be a debate about whether, in a given case, the media has

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<sup>26</sup> (1994) 6 SCC 632

<sup>27</sup> <http://indiankanoon.org/doc/1728112/>

transgressed its limits so as to invite an injunction or later an action for contempt of Court. The less frequently this happens, the better it is for an ordered society.

4. Once proceedings have begun in a court of law or are otherwise imminent, the media has no role to play in the form of 'investigative journalism' or as a fact finder. The matter then rests entirely within the domain of the Court, litigants and their lawyers no matter how long the litigation lasts. The media ought to keep its hands off an active case.

5. It follows from the above that before a cause is instituted in a Court of law, or is otherwise not imminent, the media has full play in the matter of legitimate investigative journalism. This is in accord with our Constitutional principle of freedom of speech and expression and is in consonance with the right and duty of the media to raise issues of public concern and interest. This is also in harmony with a citizen's right to know particularly about events relating to the investigation in a case, or delay in investigation or soft-pedaling on investigations pertaining to matters of public concern and importance.

6. When a cause is pending in Court, the media may only report fairly, truly, faithfully and accurately the proceedings in the Court, without any semblance of bias towards one or the other party. The media may also make a fair comment in a pending cause without violating the sub-judice rule.

9. In the administration of justice, no balancing act is permissible. It is not permissible to contend that the public interest or the right to know outweighs the administration of justice. Such a view may shake the very structural foundations of an impartial justice delivery system.

The usual story of terrorism as it plays out in the media replays the familiar faceoff between absolute good and evil, where the State is the good that prevails over the evil of terrorists. These narrative tend to ignore the complexities which underlie the phenomenon of terror. In the post 9/11 context the spectre of Islamic terrorism as 'an irrational desire to initiate jihad by certain Muslim fundamentalists' has been a dominant narratives that plays out in the 'clash of civilizations'<sup>28</sup> between modern liberal democratic states and Islamic fundamentalism. The narrative of good versus evil has flattened out any complexity of accounting for the phenomena of terrorist violence and the 'truth effect' of terrorism created by the media now percolates almost as innate truths held as popular opinion.<sup>29</sup> What is perhaps even more worrying is how these

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<sup>28</sup> See Huntington's infamous thesis in Samuel P Huntington, *The Clash of Civilizations and the Remaking of World Order*. New York: Simon & Schuster, 2011.

<sup>29</sup> Edward Said, *Covering Islam: How the Media and the Experts Determine How We See the Rest of the World*. New York: Vintage Books, 1997

media truths also percolate into juridical discourse reminding us that judicial decisions do not emerge in a vacuum but from within a discursive apparatus that clearly includes media rhetoric. To do this, we focus specifically on the judgment rendered by the Supreme Court in *State v. Navjot Sandhu*<sup>30</sup>, concerning the attack on the Parliament on 13th December 2001. The facts briefly stated involve an attack by five armed men on the Indian Parliament while it was in session. All five were gunned down after a gun fight with the security personnel. Subsequently, the four accused in this case: Afzal Guru, Shaukat Hussain, Afsan Guru and S.A.R. Gilani, were alleged to have conspired with the deceased persons to mount this attack on the Parliament. The trial court found them guilty and pronounced death sentence for Afzal Guru and Shaukat Hussain. The Delhi high court eventually acquitted Geelani and Afsan but upheld Afzal Guru and Shaukat's death sentence. The Supreme court confirmed Afzal Guru's sentence but reduced Shaukat's sentence to ten years imprisonment. The media coverage of the attack, the investigation and the trial after the arrest of the S A R Geelani have been severely criticized for its absence of balance, its presumption of guilt and the media's wildly speculative theories about his role in masterminding the trial. But beyond the role of the media in the depiction of Geelani's guilt lies a more mundane but equally pernicious manner in which the figure of the Muslim terrorist overlaps in media and judicial discourse. We need to understand the overlapping worlds of publicity as it is mediated by media and the judiciary as a porous boundary in which images and discursive figures flow between the two. Shuddbarata Sengupta suggests 'the production of terrorism is not something that happens sui generis. The production of terrorism is almost always, in every society, also a production of images of terror. In fact the fear that terrorism induces in general terms is not so much by way of the actual impact of explosives, gun shots and incendiary or lethal materials but by way of a circulation and amplification of images and their effects'.<sup>31</sup> The question for us to examine would be how do these images flow between the worlds of media and juridical effects?

Nandita Haksar who led the legal defence and public campaign to defend Geelani notes that the media went into overdrive to implicate Geelani in the conspiracy. She writes

From the time of his arrest, the investigating agencies planted a series of stories designed to portray Geelani as a mastermind of the conspiracy. Newspapers across the country, even respectable conservative dailies, carried tabloid-style headings and sensational confessions by Geelani. The Hindustan Times carried a report entitled "Case Cracked: Jaish Behind Attack", which stated, "A Delhi lecturer, who spoke to militants, also called up Jaish militants in Pakistan" (December 16, 2001). The staid Hindu carried a story the next day entitled "Varsity Don Guided 'Fidayeen'..... These newspapers carried such reports without thought to basic journalistic ethics. The usual healthy scepticism about police stories disappeared as patriotism took over, and patriotism excluded the

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<sup>30</sup> State (N.C.T. Of Delhi) vs Navjot Sandhu@ Afsan Guru

<sup>31</sup> Supra n.2 at

possibility of raising some basic questions about the truth of the police stories supposedly based on confessions made by Geelani while in custody. Even when the court records clearly showed that Geelani had refused to implicate himself by giving a false confession, the newspapers did not relent.<sup>32</sup>

In the Delhi High Court judgment which acquitted Geelani, the court agreed with the arguments of the defence that media trials were an antithesis to the rule of law and pre-trial publicity is sufficient to cause prejudice and hatred against the accused. The High Court endorsed the concerns of the Defence Counsel by holding that media trials are a disturbing feature and the police are misusing custody, but strangely came to the conclusion that judges do not get influenced by propaganda or adverse publicity.

Lets turn now to a newspaper report followed by the judgment. In his story in The Hindu on 17 December 2001, Devesh K. Pandey writes

“Three of the four persons who supplied logistic support and provided a safe haven to the five ‘fidayeen’ to mount a daring attack on parliament here on December 13, studied at the prestigious Delhi University, one even turned out to be a highly qualified lecturer. Sayed Abdul Rehman Geelani, an Arabic lecturer at the Zakir Hussain College (Evening) was arrested by the special cell of the Delhi Police for his role in the conspiracy hatched by Pakistan-based terrorist outfits, Jaish-e-Mohammad and Lashkar-e-Taiba. Born in Baramulla in Kashmir, Geelani came to Delhi after completing his graduation from Lucknow. He did Master’s and M. Phil in Arabic from Delhi University. He had his primary education and studied the Koran and Arabic from a ‘madrasa’ at Muzzafarnagar, Uttar Pradesh. Later he joined the Zakir Hussain College here in 1997. During interrogation Geelani disclosed that he was in the know of the conspiracy since the day the ‘Fidayeen’ attack was planned. Sources said, intelligence agencies had been tapping Geelani’s phone for some time as he had contacts in Pakistan. Geelani revealed that he became part of the conspiracy due to his ideological leanings. He was closely related to the main Jaish-e-Mohammad co-ordinator in Delhi, Mohammad Afzal, and his cousin, Shaukat Hussain Guru, who have also been arrested. He also knew the terrorists who came to the capital to execute the plan.

Syed Bismillah Geelani in his reading of the article shows us how Pandey’s news article fits S.A.R. Geelani into the image of an “Indian Muslim.” He says

*“We can see how the police are now slowly constructing Geelani’s image. In this item he has become a ‘highly-qualified’ lecturer who has a background in a madrasa and studied the Quran. A little later the journalist states that Geelani has ‘ideological leanings’. Here are the bricks with which the image of a Kashmiri terrorist is constructed: ‘madrasa’, ‘Koran’, ‘teaches Arabic’ and, finally, ‘ideological leanings’.”*

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<sup>32</sup> Nandita Haksar, Tried by the Media: The SAR Geelani Trial, Sarai Reader 04: Crisis Media, 159

The attribute of “ideological leanings”, and more specifically “Jihad”, associated with the Indian Muslim which the story reinforces is notable. Another notable point is the association with Pakistan which is highlighted with regard to the accused. These points are interesting because even though they have no strict validity with regard to legal arguments for the court to indict the accused in the charges put forth against them, these points do manage to find a place in the court’s judgment, thus giving one an insight into the contents of the judge’s mind even as he decides the case “objectively”.

For instance the court reproduces the confessions of the accused in its judgment for actions which are motivated by jihad:

*“Shaukat spoke about his graduation in 1992 in Delhi, his acquaintance with SAR Gilani of Baramulla who was doing his post-graduation in Arabic language, starting fruit business in 1997 and disbanding the same, his marriage with a Sikh girl named Navjot Sandhu @ Afsan Guru (A4) in the year 2000, purchase of truck in her name in June, 2000 and starting transport business, his cousin Afzal of Sopore studying in Delhi University in 1990 and his friendship with Gilani at that time. Then he stated about Afzal motivating him to join the jihad in Kashmir and in October, 2001, Afzal calling him from Kashmir and asking him to arrange a rented house for himself and another militant, accordingly arranging rented accommodation in Boys' Hostel at Christian Colony and Afzal accompanied by the militant Mohammed coming to Delhi and meeting him at his house in Mukherji Nagar and Afzal disclosing to him that he was a Pak national of Jaish-e-Mohammad militant outfit and had come to Delhi for carrying out a 'fidayeen' attack. He then stated that during that period, he discussed about jihad with SAR Gilani who also offered help in carrying out the attack and Afzal thereafter going to Srinagar and bringing some other militants who were Pak nationals and who brought with them arms and explosives and they being accommodated at A-97, Gandhi Vihar and Afzal and Mohammed making preparations for the attacks.”*

What is interesting is that by the use of the attributes of “jihad” and “ideological leanings” on the accused here, both the media and the court seem to explain away every action of the accused with relative ease. He unstated premise appears to be that even though Muslims may be highly educated and qualified, he cannot break the shackles of ideology which his religion bestows upon him. No rational motive for the radical alleged actions of the accused is sought, no effort made by either the court or the media to seek an explanation for why such radical ideological leanings had to be resorted to. It is simply assumed to be one of the many aspects of what Amin calls the “innate differences” of Muslims: “we” can think rationally, but “their” thinking will always be mired in fundamentalist ideology.

While the Geelani case stands out because of its high profile nature the fact of the matter is that there are many other cases which have slipped beyond the radar of civil society or media attention. In a time marked by an Islamophobia that

pervades through the world and particularly through institutions of the administration of justice and media, we have to be constantly alert to the possibility that the administration of justice can be deeply compromised through trials by media. The role and power of the media in our times is not merely one that promotes freedom of expression but through its sovereignty also regularly violates human rights and the need of the hour without reverting to a call for censorship is to ensure that the media is held as accountable as any other powerful institution which impacts our lives.

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## Open Justice v/s In Camera Indian Scenario

Dr. M.P.Chandrika\*

*'The law belongs to the people. Access to the legal system is a basic right and a public good'*

*Chief Justice of Canada, The Rt Hon Beverley McLachlin*

### Abstract

Open justice is a justice delivering system in public after hearing both the parties of the suit and after adducing evidence. The system ensures fairness in trial. This system protects the principles of a democratic government which rests on the Constitution. Indian Constitution talks about fundamental rights which are the backbone of the socialistic pattern of society. Under this system ensuring fair and non biased trial is a must. The fundamental right of freedom of speech and expression gives right to people who are citizens of India to express their opinion. This is also freedom of press to publish reports on matters concerned with state and people. But every rule as an exception and to the rule of open justice, is conducting proceedings of the court 'in-camera'. This exception should be used sparingly and judiciously. The author in this article has tried to put light on the matter to acknowledge the two different aspect of justice that is open justice and the in-camera.

### Key Words

Open Justice, In-Camera, Natural Justice, Constitution, Rights.

### I Introduction

It is evident that justice should not only be done, but seem to be done. Open Justice enables the public to see how justice is administered and by subjecting it to public and press scrutiny, safeguards the fairness of the trial. The rule is that the trial should be conducted in open court where the public can view, media can report to the world or people who could not make it and the parties and witnesses to the suit shall watch the justice done. The imperative need for public justice was emphatically stressed by Jeremy

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Bentham when he said, ‘Publicity is the very soul of justice. It keeps the judge, while trying, under trial.’<sup>1</sup>

Under common law greater weight is given to the trial to be conducted in open court to ensure fair trial and build public confidence. Long before in *Scott v. Scott*,<sup>2</sup> Lord Shaw said that publicity in the administration of justice was “one of the surest guarantees of our liberties.” It is necessary because the public nature of proceedings deters inappropriate behaviour on the part of the court. It also maintains the public's confidence in the administration of justice. It enables the public to know that justice is being administered impartially.<sup>3</sup> This rule equally applied to all courts, tribunals and boards.<sup>4</sup> It is immaterial whether the public were present at the hearing or not but the trial should be conducted in open court.<sup>5</sup>

As stated by the U.S. Supreme Court in *Offutt v. United States*,<sup>6</sup> “to work effectively, it is important that society’s criminal process satisfy the appearance of justice.” To put in the words of J. William Brennan “Open trials are bulwarks of our free and democratic government. Public access to court proceedings is one of the numerous ‘checks and balances’ of our system, because contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.”<sup>7</sup> Closed trials have serious costs. They breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law.<sup>8</sup> People will also know how the system works. The judgment can be reported by print media and internet, but visual cameras are still not allowed.

Indian constitution guarantees freedom of speech and expression with certain restriction.<sup>9</sup> Freedom of speech includes freedom of press. Also that the trial should be heard by the public, the accused has the right to know for what he is tried for. It should be in the language known and understood by the public and the accused. It ensures that the trial was conducted by judge is fair and the judge is not biased.

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<sup>1</sup> J. Bentham, ‘*Rationale of Judicial Evidence*’, in J Bowring (ed.), ‘*The Works of Jeremy Bentham*’, vol. VI, (1843), p. 355.

<sup>2</sup> [1913] AC 476.

<sup>3</sup> *Terry v Persons Unknown* [2010] EWHC 119 (QB).

<sup>4</sup> *Storer v. British Gas Plc* [2000] 2 All ER 440.

<sup>5</sup> *McPherson v. McPherson* [1936] AC 177.

<sup>6</sup> 1954,348 U.S. 11.

<sup>7</sup> *Richmond Newspapers v. Virginia*, 1980, 448 U.S. 555

<sup>8</sup> *Ibid.*

<sup>9</sup> *Romesh Thapar v. State of Madras*, AIR 1950 SC 124.

Every rule as an exception and to the principle of open court also the exception is conducting trial in-camera. At times, the trial cannot be conducted in open court or in public. In case of criminal trial except in exceptional situations the trial is conducted in open court but in civil cases the matters is always decided in the open court.

## II Open Justice

Open justice works with its own ideals such as adequate facility for public and press to sit, report the proceedings to the public, for the public to inspect the pleadings, for the accused to know the trial and to be tried before him and the last the accused to confront his accuser. Openness, while being of general importance to the conduct of trials, takes on heightened importance in the case of criminal proceedings.<sup>10</sup> This is based on natural justice principles and doctrines such as *audi alteram partem*<sup>11</sup> and *nemo judex in causa sua*.<sup>12</sup> There is one more reason why the trial should be conducted in open court is that the public shall either criticize that the law has been misapplied or that the law itself needs amendment.

Open justice also ensures that public may produce additional witness. The repercussion may also be that the public criticism shall send a message to the courts that the justice was not properly delivered.<sup>13</sup> In case of criminal trial human rights is the highest order that needs to be followed. The commission of crime is against whole community, which therefore has a legitimate interest in observing the event at which the question whether a transgression has taken place is determined authoritatively. The guilty should be 'publicly condemned', the innocent 'publicly acquitted' and 'freed from suspicion'.<sup>14</sup> In the words of Jeremy Bentham, 'by publicity, the temple of justice is converted into a school of the first order, where the most important branches of morality are enforced, the most

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<sup>10</sup> Joseph Jaconelli, 'Open Justice', Oxford University Press, New York, 2002, p. 5.

<sup>11</sup> Right to hearing.

<sup>12</sup> Rule against bias.

<sup>13</sup> See in *Tukaram vs. State of Maharashtra*, AIR 1979 SC 185, (popularly known as Mathura's case), where the character of the victim was questioned public raised their eyebrow to criticize that the trial was of rape and character of the accused was not to be questioned. Only matter to be decided was the rape was committed in police station by public servants and in the said matter, to decide the responsibility of the government servants.

<sup>14</sup> *Supra* note 11 at 46.

impressive means...'<sup>15</sup> In essence, then, the open conduct of trials furnishes a means of instruction as are embodied in the criminal law.

As J. Woolf wrote, an open justice means 'A principle of the common law that proceedings ought to be open to the public, including the contents of court files and public viewing of trials'.<sup>16</sup> A trial is required to be held in 'open court'. The words open court means, 'a court which the public have a right to be admitted'.<sup>17</sup> Article 6(1) of the European Convention on Human Rights provides that:

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.

Open justice is delivered in a 'court'<sup>18</sup>. It is at this juncture very difficult to state what court is. Reason is at times cases are conducted by tribunals designated by the law, by boards having a chairperson and members and at times the witness is taken at the place where the witness is residing.<sup>19</sup> The time of open trial is also fixed. Where the matter is of public importance the matter shall be tried in open court and at the time designated.

Indian Constitution 'that the judgments of the Supreme Court of India shall be delivered only in open court'.<sup>20</sup> The stress to open justice can be seen in order 18 Rule 4 of *Civil Procedure Code*,<sup>21</sup> 1908 which proves thus, "The evidence of the witnesses in attendance shall be taken orally in open court in the presence and under the personal

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<sup>15</sup> J. Bentham, 'Draught of a Code for the Organization of the Judicial Establishment in France', in John. Bowring (ed.), *The Works of Jeremy Bentham*, Edinburgh, U.K. vol. IV, 1843, p. 317.

<sup>16</sup> In *R v Legal Aid*, [1999], QB 966.

<sup>17</sup> *R v. Lewes Prison (Governor), ex p Doyle*, [1917]2 KB 254.

<sup>18</sup> *Brajnandan Sinha v. Jyoti Narain*, AIR 1956 SC 66, in which it was held that 'a body or forum must have power to give a decision or a definitive judgment which has finality and authoritativeness which are essential tests of a judicial pronouncement, if it has to be treated as a 'Court'.

<sup>19</sup> Under this situation, a person is temporarily disabled or if the person cannot come to court to give evidence. This is done with the permission of the court and before the competent magistrate who shall record the same.

<sup>20</sup> Article 143(4), Constitution of India, 1950.

<sup>21</sup> Act No. 5 of 1908.

direction and superintendence of the judge." Section 153B of *Civil Procedure Code*<sup>22</sup>, 1976, 'The place in which any Civil Court is held for the purpose of trying any suit shall be deemed to be an open Court, to which the public generally may have access so far as the same can conveniently contain them.'<sup>23</sup> The same principle stressed in criminal law also.<sup>24</sup>

In *Naresh vs. State of Maharashtra*,<sup>25</sup> J. Bachawat elaborated on open justice as follows-

Long ago Plato observed in his laws that the citizen should attend and listen attentively to the trials. Hegel in his Philosophy of Right maintained that judicial proceedings must be public since the aim of the Court is justice, which is a universal belonging to all save in exceptional cases, the proceedings of a Court of justice should be opened to the public.

The object behind the hearing in open court has been to provide legal assistance readily available to a person facing trial and it is in consonance with Article 21 of the Constitution.

### **III Exception to the Rule of Open Justice**

The first challenge to the open court principle in the 21st century has been an increasing emphasis on privacy rights. The right to privacy is the handmaid to several interests worth protecting. In certain criminal cases it is worth protection the right to privacy especially in sexual abuse case and case where a child is a victim or accused. Right to privacy is also emphasized in Convention on Human Rights, which states, everyone has the right to respect for his private and family life, his home and his correspondence. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others. When courts recognize

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<sup>22</sup> Act No. 104 of 1976.

<sup>23</sup> Section 153B of Civil Procedure Code, 1908.

<sup>24</sup> Section 327, Code of Criminal Procedure, 1973.

<sup>25</sup> AIR 1967 SC 1.

reporters' rights to attend proceedings or review court documents, the rights are rarely absolute. Instead, the courts usually apply a balancing test to determine whether the interest in disclosure outweighs any asserted counterbalancing interest in confidentiality. The standard the courts use in striking that balance depends on the source of the right.

The general principle is that an exception can only be justified if it is necessary in the interests of the proper administration of justice. In exceptional situations the proceedings are carried in-camera. In the words of House of Lords<sup>26</sup> –

the exceptions are themselves the outcome of a yet more fundamental principle that the chief objective of courts of justice must be to secure that justice is done...As the paramount object must always be to do justice, the general rule as to publicity, after all only the means to an end, must accordingly yield. But the burden lies on those seeking to displace this application in the particular case to make out that the ordinary rule must as of necessity be superseded by this paramount consideration...I think that to justify an order for a hearing in camera it must be shown that the paramount object of securing that justice is done would really be rendered doubtful of attainment if the order were not made.

Sir Jack Jacob recognized two prevailing exceptions to the open public system of conducting civil proceedings, namely, (1) the hearing of pre-trial proceedings “in chambers”, at which only the parties and their advisers are entitled to be present and from which the public and the press are excluded, and (2) the hearing of proceedings or the trial or part thereof “in camera”, where the court or the trial judge orders that the court should be closed be cleared and the public and press excluded.<sup>27</sup>

At times the presence of the public and the press at the trial will often result in increased stress for the accused, the invasion of his privacy, and damage to his reputation. The accused under such circumstances does not wish the trial to be conducted in open court. And among the exception to open justice, a witness may be ordered to withdraw lest he may trim the evidence by hearing the evidence of others.

Sarkar J. speaking about the power of High Court to conduct the trial in camera stated, “The High Court has inherent power to prevent publication of the proceedings of a trial. The power to prevent publication of proceedings is a facet of the power to hold,

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<sup>26</sup> *Supra* note 2 at pp. 437-439.

<sup>27</sup> Sir Jack I. H. Jacob, *The Fabric of English Civil Justice*, Eastern Law House Private Ltd., New Delhi, 1987, p. 22.

a trial in camera The Code of Civil Procedure contains no express provision authorizing the to hold its proceedings in camera, but if 745 excessive publicity itself operates as an instrument of injustice, the Court has inherent jurisdiction to pass an order excluding the public when the nature of the case necessitates such a course to be adopted An order made by a court in the course of a proceeding which it has jurisdiction to entertain- whether the order relates to the substance of the dispute between the parties or to the procedure, or to the rights of other persons, is not without jurisdiction, merely because it is erroneous.”<sup>28</sup>

Substantiating in-camera proceedings, it was held in *Ujjam Bai v. State of U.P.*<sup>29</sup> that ‘The power to prohibit publication of proceedings is essentially the same as the power to hold a trial in camera and the law empowering a trial in camera is a valid law and does not violate the fundamental right in regard to liberty of speech.’ Further, it was held that, Cases may occur where the requirement of the administration of justice itself may make it necessary for the court to hold a trial in camera. While emphasizing the importance of public trial, we cannot overlook the fact that the primary function of the Judiciary is to do justice between the parties who bring their causes before it.<sup>30</sup>

In cases where young offenders are involved, in-camera proceedings are common. Under Juvenile Justice (Care and Protection) Act<sup>31</sup>, 2000 young offenders are tried in before Juvenile Board.<sup>32</sup> It cannot be tried before normal courts. The Board consists of a chairperson who is designated Chief Judicial Magistrate of the normal courts and two social workers are members. Hence, though the law does not state the proceedings are to be in-camera, the gist of the law suggests that it should not be tried in normal courts. When we watch the proceedings, the board rooms are small and cannot accommodate people from public.

Secondly, in matters concerning Arbitration and Conciliation escapes the norm of open court and publication. The matter is settled through Arbitration and Conciliation is a

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<sup>28</sup> *Naresh Shridhar Mirajkar And Ors v. State Of Maharashtra And Anr*, AIR 1967 SC 1.

<sup>29</sup> [1963] 1 S.C.R. 778.

<sup>30</sup> *Superintendent & Remembrancer Of ... v. Satyen Bhowmick And Ors*, AIR1981 SC 917.

<sup>31</sup> No. 56 of 2000.

<sup>32</sup> Section 4 of Juvenile Justice (Care and Protection) Act.

civil matter and is based on contract between the disputing parties. However, on certain matters the reference can be made to court.<sup>33</sup>

In matrimonial cases there are instances where the trial is carried in-camera as the matters that are referred concern judicial separation, restitution of conjugal rights and divorce. The common grounds pleaded are cruelty, desertion, impotency, adultery, virulent and incurable form of leprosy, communicable form of venereal disease etc. Section 2 of *Dissolution of Muslim Marriages Act*<sup>34</sup> 1939 and other like Acts recognize the said grounds in matrimonial disputes. They are directly linked with the reputation of the party in proceeding. In such cases evidence is likely to be of revolting character and may injure the finer instinct of the party and may affect such reputation directly in the eye of general public. It may deter the aggrieved to seek relief in courts.<sup>35</sup> And also that it exposes the secrets of marital life. It also discourages the weaker section to tell the truth for fear of being propagated and misunderstood in society.

Section 11 of the *Family Courts Act*<sup>36</sup>, 1984, states "In every suit or proceedings to which this Act applies the proceedings may be held in-camera<sup>37</sup> if the family court so desires and shall be so held if either party so desires." So also giving exception to section 153B of *Civil Procedure Code*<sup>38</sup>, 1976 which states, 'Provided that the presiding Judge may, if he thinks fit, order at any stage of any inquiry into or trial of any particular case, that the public generally or any particular person, shall not have access to, or be or remain in, the room or building used by Court.' The exception by its very nature requires exercise of due care and caution before the court directs trial of a suit out of the public gaze.<sup>39</sup>

The exercise to conduct or not to conduct the matrimonial cases in-camera continued for a long time till the *Marriage Laws Amendment Act*<sup>40</sup>, 1976 was introduced. Section

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<sup>33</sup> On the matters concerning interim orders, arbitrators fees, etc.

<sup>34</sup> Act No. 8 of 1939.

<sup>35</sup> Azizur Rahman, "Proceedings-in-Camera", *Judicial Training & Research Institute Journal*, December 2012.

<sup>36</sup> Act No. 66 of 1984.

<sup>37</sup> In camera proceedings means the public is not allowed to view the proceedings. In legal term it means 'in private.'

<sup>38</sup> *Supra* note 22.

<sup>39</sup> *Janaki Ballav v. Bennet Coleman and Co. Ltd*, AIR 1989 Orissa 225.

<sup>40</sup> Act 68 of 1976.

22(1) of the legislation states, "Every proceeding under this Act shall be conducted in-camera and it shall not be lawful for any person to print or publish any matter in relation to any such proceeding except a judgment of the High Court or of the Supreme Court printed or published with the previous permission of the Court." The law provides sanction to enforce its implementation.<sup>41</sup>

In case of criminal cases the rule is the trial should be conducted in open court, but at times it is excused. Under Indian law Section 327(3) *Criminal Procedure Code*,<sup>42</sup> 1973 provides as follows, 'Where any proceedings are held under Sub-section (2) it shall not be lawful for any person to print or publish any matter in relation to any such proceedings, except with the previous permission of the court.'<sup>43</sup> The breach of the provision in criminal cases has been made punishable U/S-228 of the *Indian Penal Code*<sup>44</sup>, 1860 which states, 'disclosure of identity of the victim of certain offences viz; rape, or printing or publication of a proceeding without prior permission of the Court has been made punishable with Imprisonment for two years and fine U/S-228- A of the Indian Penal Code.

This is true where the trial is conducted in rape cases. In a case involving rape, trial "shall" be held in camera.<sup>45</sup> Simultaneously, it confers jurisdiction on the Court to either, on its own, or on an application of parties, allow access to any particular person of their choice. In *Estate Corporation Limited and Ors. v. Securities and Exchange Board of India and Anr*,<sup>46</sup> the Court was required to balance the two competing rights, that is, the right of the public to know and have access to Court trials as against right of the victim's family and that of the accused to confidentiality. In the instant case, neither the family of the victim nor the accused had sought in-camera trial, instead, in camera trial, was sought

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<sup>41</sup> Section 22(2) of the Marriage Laws Amendment Act, 1976, which states that if a person violates courts order and publish any proceeding held in-camera than he shall be punishable with fine which may extend to one thousand rupees."

<sup>42</sup> Act No. 2 of 1974.

<sup>43</sup> Section 327 (2) states 'Notwithstanding anything contained in sub- section (1), the inquiry into and trial of rape or an offence under section 376, section 376A, section 376B, section 376C or section 376D of the Indian Penal Code shall be conducted in camera: Provided that the presiding judge may, if he thinks fit, or on an application made by either of the parties, allow any particular person to have access to, or be or remain in, the room or building used by the court.'

<sup>44</sup> Act No 45 of 1860.

<sup>45</sup> Section 327 of the Criminal Procedure Code.

<sup>46</sup> (2012) 10 SCC 603.

by the State. And this was confirmed and an order was issued to the same stating the name of the accused should not be published by any media as well as by the parties.<sup>47</sup>

The need for in-camera trial can also be seen in *Unlawful Activities (Prevention) Act*,<sup>48</sup> 1967. Section 44 of the Act states, ‘This section, ostensibly for the purpose of protecting witnesses, permits the court to hold proceedings in camera and take any other measures for keeping the identity and address of the witness secret, including passing an order that “all or any of the proceedings pending before such a court shall not be published in any manner”. It also makes violation of such measures or orders a criminal offence.’

## **VI Conclusion**

Proponents of open justice assert numerous benefits. An overarching benefit is that it keeps courts behaving properly. Still, practical considerations often mean that the ideal of open justice must be weighed against other values such as privacy and cost and national security. Open justice is important for three reasons: First, it assisted in the search for truth and played an important role in informing and educating the public. Second, it enhanced accountability and deterred misconduct. Third, it had a therapeutic function, offering an assurance that justice had been done. There are other factors which sometimes must be balanced against the need for open justice especially in criminal matters and family matters.

One may naturally inquire whether the publication of proceeding may permanently be suppressed. English Courts and our Supreme Court in *Naresh v. State of Maharashtra*<sup>49</sup> have held that prohibition to publication of such proceeding cannot be in perpetuity. If it is so, it is violative of Article 19 (1) of the Constitution of India. A few comments about a case which has been heard and finally decided are protected U/S-5 of the Contempt of Courts Act. All the said provisions provide that the court may hold the trial behind closed doors or may forbid publication of the proceedings during the pendency of litigation but certainly not after the conclusion of the proceedings.<sup>50</sup> However, Section 22 of the *Hindu*

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<sup>47</sup> This Ratio was also confirmed in *Sakshi v. Union of India and Ors*, 2004 (5) SCC 518.

<sup>48</sup> Act No. 37 of 1967.

<sup>49</sup> *Supra* note 24.

<sup>50</sup> As stated in *Scott v. Scott*.

*Marriage Act*<sup>51</sup>, 1955 registered a departure from the existing law; it not only prohibits the publication of the proceedings but also prohibits it in perpetuity. The provision itself is violative of Fundamental Rights and how the said provision shall claim justification has yet to be explained.

## **V Suggestions**

1. Balance of convenience should be more towards providing justice in open court so that the accused as well as the public are aware of the facts, circumstances, evidences, etc. about the case.
2. Open justice ensures that the act is not repeated specially in criminal matters and deters the public against the punishment.
3. The court should be specific to say why it departed from the justice being given in the open court.

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<sup>51</sup> Act No. 25 of 1955.

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# Foreword

**It should be clear to everyone why a publication such as this, on the coverage of terrorism and violent extremism in the media, is urgently needed.**

Around the world we see various actors staging violence against civilians to foster fear and suspicion of others. We see populations in many countries convinced that terrorism represents the most significant threat to their daily lives. We see political movements that take advantage of tragedy and pit citizens against each other in order to gain greater support. It is critical to reflect on how the media may be inadvertently contributing to this tense climate, and what steps should be taken to address this.

It is important to remember that terrorism is not a new phenomenon. Many countries have suffered for decades from groups, both internal and external and including both State and non-State actors, wielding violence against civilians as political strategy. In many cases, the local population emerged stronger and more resilient, proving that brutality is no match in the long term for the progress of unity and shared values.

In this context, the media are critical in providing verifiable information and informed opinion. During the tense environment of a crisis, with populations on edge and tempers flared, this becomes all the more important. The relationship between terrorism and media is complex and fraught. At its worst, it is a perverse symbiotic relationship – terrorist groups devising spectacles of violence to continue drawing the world's attention, and the media incentivised to provide wall-to-wall coverage due to huge audience interest.

Of course, this is not to minimise the real human suffering that terrorism causes. Far too many lives have been cut short by it. These acts must always be deplored, and those accountable brought to justice.

It is important to remember that the goal of these violent actors is not to bring terror for terror's sake. They do not wish to create fear in the minds of men and women simply because of their interests, hatred or ideology. Their real objective is to cleave society down the centre, turning people against each other by provoking repression, discrimination and discord. They aim to simultaneously prove themselves correct in their predictions of widespread persecution and to attract new followers to their violent cause. They seek to create a mood of

defeatism in the face of attacks and polarised reactions.

The real risk of terrorism is that fear and suspicion will drive a new wave of nationalism and populism, and that the freedoms we have all worked so hard to achieve will be sacrificed on the altar of retribution. These are not attacks on one nation or people, but attacks on all of us as global citizens. We should be especially critical of any response that plays wilfully into the hands of violent actors, and which generates its own victims who become martyrs for further terrorist recruitment.

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In these difficult times, with fragmented audiences and many media organizations undergoing severe financial challenges, journalists must resist the urge to sensationalise matters in the interest of attracting eyeballs, ears or clicks.

They must keep a global perspective, and pay attention to the words they use, the examples they cite, and the images they display.

They must avoid speculation and finger-pointing in the immediate confusion following an attack when nothing is known, yet the demand for information is perhaps the strongest of all.

They must consider carefully the fact that there is something inherent in terrorism as a violent act that provokes a fear in many that is far disproportionate to the actual level of risk.

They must do all of this while ensuring they not put themselves or their staff in harm's way in the pursuit of a story.

And most of all, they must avoid fostering division and hatred and radicalisation at both margins of society.

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During times of crisis, from natural disasters and famine to conflict and, in this case, terrorism, UNESCO works actively through its specialised sectors to monitor the situation, evaluate needs and respond in an appropriate and efficient manner.

We are contributing our experience and expertise to the implementation of the UN Secretary-General's Plan of Action to Prevent Violent Extremism, through education, youth participation and empowerment, promoting freedom of expression, and safeguarding and celebrating cultural diversity all over the world.

We are working with our partners to fight the illicit trafficking of cultural objects that can provide a source of financing for extremist groups, and continuing to promote our core values of tolerance, understanding and peace at a time when they are being challenged.

It is hoped that the contribution of this guidebook, developed with the inputs of journalists, editors and media producers, will act as a critical resource for those covering terrorist events. Not every question posed has a clear and incontestable answer, but will at least encourage self-reflection on the part of media professionals as to how they can avoid contributing to stigmatisation and division. It may also provide a basis for the creation and revision of codes of practice to ensure the above values are enshrined in the daily operations of media organizations.

This guidebook is also just one step in a concerted UNESCO response to the issue of how the media covers terrorism and violent extremism. The advice and suggestions contained within will be developed into training materials to help journalists around the world become more aware of the various dimensions of these issues.

Terrorism and violent extremism are likely problems that will be with us for some time. Yet if we can work together to reduce the explosive rhetoric, overblown coverage and stigmatisation of minority groups, perhaps some of the incentive to commit violence against civilians will disappear along with it.

A handwritten signature in black ink, appearing to read 'Frank La Rue', with a long horizontal line extending to the left.

**Frank La Rue**

UNESCO Assistant Director-General  
for Communication and Information

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**Terrorism and the fight against terrorism have become major elements of domestic and international politics, with the media firmly on the front lines, especially when attacks target civilian populations.**

The dilemmas and challenges that result are immediately clear. Citizens expect the media to inform them as completely as possible without going overboard or resorting to sensationalism. The authorities call for restraint by evoking the risks of excessive coverage for the integrity of operations or the calm of the population. Accusations of being the megaphone of terrorism to attract audiences weigh constantly on media, who are often operating on over-drive.

Despite the significance and recurrence of terrorist acts, the media often struggles to find its footing. “Often questions are asked and matters settled only in an emergency, at the risk of incoherence and blunder,” says Christophe Ayad, a Middle East specialist at *Le Monde*. “Everyone fumbles around, advancing on a case-by-case basis.”<sup>1</sup>

The quality of terrorism coverage obviously depends on many factors. It is determined, among other things, by the degree of freedom of the press in each country, the economic resources available to the media, cultural factors and singular conceptions of ethics and the social role of the media, notes Shyam Tekwani, regarding the situation in Asia.<sup>2</sup>

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1 [http://www.lemonde.fr/actualite-medias/article/2014/09/25/les-medias-face-a-l-etat-islamique\\_4494681\\_3236.html](http://www.lemonde.fr/actualite-medias/article/2014/09/25/les-medias-face-a-l-etat-islamique_4494681_3236.html)

2 Shyam Tekwani (Ed.), *Media & Conflict Reporting in Asia*, Asian Media Information & Communication Centre (AMIC), 2008, p. 2.

The issue is crucial because this coverage of terrorism reveals the position of the media within society. “A reporter’s ability to practice responsible reporting and due-diligence with the speed needed in our digital age is critical to fulfilling the civic duty that journalists maintain in our world,” said Somali-American journalist Mukhtar Ibrahim following the 2013 attack on the Westgate Mall in Nairobi.<sup>3</sup>

Their reactions also determine the impact of terrorism on society. “The media are caught in an infernal dilemma,” writes French lawyer Antoine Garapon. “On the one hand, the media echo is likely to make victims the unintentional messengers of their executioners’ search for glory; on the other, self-censorship could be interpreted as a capitulation. Fear can lead to the reclamation of hard-won freedoms and eventually reduce the difference between democratic states and authoritarian regimes — precisely what terrorists seek.”<sup>4</sup>

After each attack, experts question the extent and tone of media coverage. They compare the deaths due to terrorism to the number of victims of natural disasters, wars or road accidents, calling for more restraint on the media. But the comparison is most often specious because of the eminently political and societal nature of the attacks: “In 2014, the average rate of homicide worldwide was 6.24 deaths per 100,000 inhabitants, while the number killed by Terrorism was only 0.47 per 100,000, but if these figures are relatively low compared to other causes of death, the consequences of terrorism are beyond measure”, writes the Venezuelan political scientist Moises Naim. “Terrorism is not the deadliest threat of the 21st century, but it has undeniably changed the world.” Yet despite this, is the amount of terrorism coverage in the media not disproportionate?

The purpose of this manual is to review these considerations and challenges. It is based on essential and universal principles: the search for truth, independence and a sense of responsibility, by placing them in the complex context of a pluralistic and interconnected world. Its ambition is to assist the media in finding the balance between freedom and the responsibility to inform; between the right to know and the duty to protect, while respecting the fundamental norms and values of journalism.

### **A critical subject**

In recent years, we’ve seen widely-covered attacks from New York to Moscow, Paris to Istanbul, Buenos Aires to Mumbai. Yet these high-profile events do not provide a full picture of global terrorism. In northern Nigeria, in Cameroon, in regions under the control of drug cartels in Latin America – communities are also terrorised, reduced to silence and fear. On the seas, the threat of maritime ter-

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<sup>3</sup> <http://sahanjournal.com/westgate-attack-nairobi-al-shabaab-twitter/>

<sup>4</sup> Antoine Garapon, «Que nous est-il arrivé? », *Esprit*, February 2015, Paris, p. 6.

rorism persists, particularly off the coasts of Somalia and Yemen or in the Gulf of Guinea. From Syria to the Philippines, kidnappings and hostage-taking have proliferated in recent years, converting some areas of the planet into prohibited territories. And this violence has spread to the Internet, targeted by cyber attacks that spread beyond the virtual realm.

The most widely-covered violence is that with purportedly religious claims, but the scourge is also motivated by extreme right-wing nationalism or supremacism, such as the Oslo bombing and the Utøya massacre perpetrated by Anders Behring Breivik in 2011 in Norway, the shooting of African Americans at the Baptist Church in Charleston, United States in June 2015 and the assassination of British Labor MP Jo Cox in June 2016.

The media are no doubt at the heart of this issue, often referred to as the “oxygen of terrorism”, in the famous words of former British Prime Minister Margaret Thatcher. “Terrorist attacks,” wrote Brian Jenkins back in 1995, “are often carefully choreographed to attract the attention of the electronic media and the international press. Terrorism is aimed at the people watching, not at the actual victims.”<sup>5</sup>

This characterisation of the media does not imply actual sympathy felt or displayed for terrorist groups, but rather refers to the publicity that they provide them and consequently the power of nuisance that they grant them. The media economy, largely based on a competitive race to attract audiences, incentivises this symbiotic relationship between terrorists and the press.

**“Terrorist attacks are often carefully choreographed to attract the attention of the electronic media and the international press. Terrorism is aimed at the people watching, not at the actual victims.”**

Terrorists rely upon conventional journalistic codes of drama, violence and surprise, especially for television. But with the exponential development of the Internet and social networks, the battle of images and words has taken on an unprecedented scale. As highlighted in a report by the United Nations Office on Drugs and Crime<sup>6</sup>, terrorist groups are using the legal web, especially social networks such as Facebook, YouTube and Twitter<sup>7</sup>, but also the Deep Web and the Dark Web as a means of propaganda, networking, recruitment and funding. “For the first time, terrorists no longer have to depend upon other people to spread their message,”<sup>8</sup> writes Shyam Tekwani, a researcher from the Singapore Internet Research Centre, regarding Asia. “In addition to creating their

5 <https://www.rand.org/content/dam/rand/pubs/papers/2008/P5261.pdf>

6 [https://www.unodc.org/documents/frontpage/Use\\_of\\_Internet\\_for\\_Terrorist\\_Purposes.pdf](https://www.unodc.org/documents/frontpage/Use_of_Internet_for_Terrorist_Purposes.pdf)

7 <http://www.brookings.edu/research/papers/2015/03/isis-twitter-census-berger-morgan>

8 in Paul Smith, *Terrorism and Violence in South East Asia*, Eastgate Books, 2005, p. 228.

own websites, groups such as the Moro Islamic Liberation Front or the Abu Sayyaf group are using technologies such as electronic mail, mobile phones, SMS and radio and video technologies to communicate with each other and to disseminate their messages to the general public.” This allows them, he adds, “to frame their actions and ideology however they want, getting around government or media censorship.” This shift in the ‘oxygen of terrorism’ towards the online space has driven some organizations, including governments, to fight back against violent extremist websites and to demand that major web platforms closely monitor and “clean up” the Internet.

The emergence of the Islamic State group (see: *Words*, page 52) has exacerbated this phenomenon, in that the group has implemented a much more sophisticated system of global strategic propaganda than Al-Qaida. Its messages exploit both psychological and religious well-springs<sup>9</sup> and bypass in part (but only in part) the traditional media. The media effect of attacks on the target population, designed to generate fear, is also a kind of ‘staging’ aimed at seducing new supporters. The Islamic State group has mastered communication techniques and social networks and, above all, it proposes an alluring “narrative” of heroism and virility, sometimes relayed unwisely by traditional media.

In spite of these new online battlefields, traditional media remain crucial stakeholders, as the information and analysis they provide remains in most countries the foundation for a large proportion of public opinion – the very public opinion that terrorism seeks to influence. Traditional media have not always taken the measure of their responsibility in this great propaganda game, and enter into the macabre dance of terror through the theatricalisation of information that hands terrorists the wand of murderous choreography. Repetitive broadcasting of videos depicting columns of soldiers parading in Raqqa or the warlike bravado of ecstatic “foreign fighters” driving around in 4X4s enters into the realm of “heroisation” of the group, warns media sociologist Hasna Hussein.<sup>10</sup>

“In some respects,” notes Michelle Ward Ghetti, Professor of Law At Southern University (United States), “the modern terrorist is created by the media. The latter broaden and enlarge the terrorist and his powers far beyond his true dimension. Television puts everyone at the scene of a crime, helpless to do anything, engendering feelings of anxiety and fear, the terrorist’s instrument of coercion. The public anxiety enhances the perceived power of the terrorist in his own eyes as well as the eyes of the peer groups and others. This enhanced power often leads to imitation and the cycle repeats itself.”<sup>11</sup>

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9 <http://icct.nl/wp-content/uploads/2016/03/ICCT-Gartenstein-Ross-IS-Global-Propaganda-Strategy-March2016.pdf>

10 [http://www.lemonde.fr/idees/article/2016/06/18/terrorisme-assez-ave-les-scoops-de-lepouvante\\_4953153\\_3232.html](http://www.lemonde.fr/idees/article/2016/06/18/terrorisme-assez-ave-les-scoops-de-lepouvante_4953153_3232.html)

11 Michelle Ward Ghetti, « The Terrorist Is A Star! Regulating Media Coverage of Publicity Seeking Crimes », *Federal Communications Law Journal*, Volume 60/Issue 3, 2008, p. 495.

This equation between terrorism and the media, however, is not unequivocal. First, a large number of attacks, as Brigitte Nacos<sup>12</sup> (Columbia University, New York) argues, have no “media intent” and are “self-sufficient”. The cascade of attacks perpetrated in Iraq falls into this “non-media” category. There is also no evidence that silence on terrorist actions would suffice to remove the “oxygen” from them. On the contrary, some say, “radio silence” could cause terrorist groups to escalate their attacks and commit more and more violence so that nobody can ignore them. Finally, the study of terrorist incidents tends to show that the media can to some extent be the “stifler” of terrorism and not its oxygen. Recalling the attacks on the team of Israeli athletes at the Olympic Games in Munich in 1972, the researcher at CNRS (National Center for Scientific Research, France) Jacques Tarnero concluded that “the Palestinian cause will long have the hooded face of a killer. The political effect of sympathy sought has turned into the very opposite.”<sup>13</sup> Others argue, however, that for groups such as the Islamic State, the desire for respectability, the ultimate goal of a power struggle, is less decisive than the will to intimidate and the narcissism of power, largely conveyed through media coverage.

Although seemingly paradoxical, States targeted by terrorism are often reinforced by these traumatic events. It is indisputable that, as a first step, before questions and recriminations about causes and responsibilities arise, terrorism unites the nation or society it strikes, and that during this “national union” period the media generally plays along. “As in other internal crises,” writes Doris Graber, a professor at the University of Illinois (United States), “the media and journalists behave like team members, joining the authorities to try to restore public order, security and tranquillity.”<sup>14</sup> The media play an essential public interest role in the early stages of an attack. The public, worried and frightened, expects precise information, safety advice and analysis. Contrary to the cliché, sometimes politically malicious, about “the irresponsibility of the media,” they have, at many moments in the tormented history of recent years, taken this task very seriously. It is not as if there have only been abuses, gaffes and excesses on TV screens, websites and social networks.

The coverage of terrorism by the media is not limited, however, to these dramatic moments that rupture normality. The quality of journalism and its usefulness to society depend on other factors, particularly its questions about the phenomenon itself, its origins and consequences. Beyond emergencies and newsflashes, the coverage of terrorism requires special investigative and analytical capacities on topics of great complexity affecting international politics, internal political power relations, religion and transnational crime.

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12 Brigitte L. Nacos, *Terrorism & the Media. From the Iran Hostage Crisis to the World Trade Center Bombing*, Columbia University Press, New York, 1994, p. 53.

13 Jacques Tarnero, *Les Terrorismes*, Editions Milan, Toulouse, 1998, p. 46.

14 Doris A. Graber, *Mass Media and American Politics*, Congressional Quarterly Press, 1980, p. 239.

Attacks can be revelatory for the media, their mode of operation, their reflexes and routines, but also their principles and values. “Terrorism is probably one of the areas where professional competence is most needed,” note Michel Wieviorka and Dominique Wolton in *Front Page Terrorism*. “Journalists are very often attracted to terrorism, for three factors of which they should be careful: the event, a trap that attracts the press in the most stereotyped behaviors of the trade; the actors mobilised by the terrorist act (which create fascination); and power (from which the right distance is neither easy to determine nor free of contradiction).”

These questions are of an ethical nature and particularly relate to media representations of violence. But they are also political. Attacks are not fixed in the classic cycle of news, in which one news item quickly follows another. After the attacks of September 11, 2001, journalists sensed that these attacks had opened a new chapter in history. Katherine E. Finkelstein, who had covered the events for the *New York Times*, concluded her testimony in the *American Journalism Review* with six auspicious words: “The terrible story had just begun.”<sup>15</sup> Echoing this sentence, “there was a feeling that the dying had only begun”<sup>16</sup> was the last line of an article of the columnist Pete Hamill published in the *New York Daily News* in the aftermath of the attacks.

Terrorism aims not only to frighten, but also to exacerbate and polarise. In this regard, the Islamic State group speaks of the “gray zone”, “where there is diversity, tolerance, understanding, discussion and debate. It is where there is exchange and enquiry and curiosity,” wrote the journalist from British daily *The Guardian*, Jason Burke, in *The New Threat*.<sup>17</sup> In an article in its *Dabiq* magazine in early 2015, the terrorist organization advocated eliminating this gray zone so that there would be only two groups face to face: “the Caliphate and the Crusaders”. The stakes are therefore considerable: it is a question of avoiding contributing to this fatal polarisation by shortcuts, imprudent phrases, stigmatisations and generalisations (See: *Generalisations*, page 65). The mission of the media, as the Czech writer Milan Kundera said, is “to shed light on the complexity of the real,” and not to simplify it to the point where it no longer represents reality.

Terrorism also tests the freedom and independence of the media – it could be said that, to a certain extent, it takes these values hostage. After mass attacks, the media, by patriotism, by calculation or under duress, generally choose to follow the injunctions of their governments or the emotions of public opinion, at the risk of excessive self-censorship and turning themselves into megaphones of state power. National security, geopolitical stakes or the demands of living

<sup>15</sup> Katherine E. Finkelstein, « 40 Hours in Hell », *American Journalism Review*, November 2001.

<sup>16</sup> Pete Hamill, « Death Takes Hold Among the Living », *New York Daily News*, 12 September 2001.

<sup>17</sup> *The New Threat From Islamic Militancy*, The Bodley Head, London, 2015, p. 244.

together all legitimately lead to calls for restraint, but also more problematically for censorship too.

Too often, some states have used the “terrorism” argument to silence the media and bring disruptive journalists under control. They have also abused the term to incriminate and criminalise legitimate opinions or actions. The public has also acted as a censor, criticising the media that appeared to them to deviate too far from the official line or to be too “understanding” with respect to the “opposing camp”. Reflecting on the behaviour of the media after September 11, 2001, Kim Campbell wondered in the *Christian Science Monitor* whether “journalism can rhyme with patriotism,” whether the omnipresence of American flags on screens or ribbons sported by television presenters “would not interfere with the (journalistic) mission of asking difficult questions to politicians.” There are other views to this question that see no issue at stake.

Despite its violence, terrorism, however, can not stifle the media. On the contrary. In these moments of tension and anxiety, free and pluralistic information is more essential than ever to illuminate the judgment of the public. When the security of the population is directly targeted, the media must protect both the population and democracy by exercising their right and duty to inform. For the Parliamentary Assembly of the Council of Europe, “terrorism should not affect freedom of expression and information in the media as one of the essential foundations of any democratic society. This freedom includes the right to be informed of matters of general interest, including terrorist acts and threats, and the replies thereto by the State and international organizations.” This is an approach echoed by the former Deputy Secretary-General of the United Nations, Jan Eliasson: “Freedom of the media is a defense against terrorist discourse,” he told a Security Council session on the stories and ideologies of terrorism on May 11, 2016 in New York.<sup>18</sup>

The suppression of information has its dangers. “It can undermine the credibility of the media (“what other information does it hide?”), give free rein to the craziest rumors and disrupt our sense of information,” notes American TV channel CBS in its code of conduct. More fundamentally, democracy must learn to live with risk and manage it without undermining the foundations and values that underpin it. “If we can not tolerate the exaggerated horror flashed on the evening news or the random bomb without recourse to the tyrants manual,” said New York-based historian of terrorism John Bowyer Bell, “then we do not deserve to be free.”<sup>19</sup>

The challenge to the media is broad. Terrorism is a subject that involves a cascade of concrete and often very cumbersome decisions, including the life of hostages, the ability of the security forces to intervene, the legitimacy of a government, and even the survival of the political system. While the classic rules

18 <http://www.un.org/press/en/2016/sc12355.doc.htm>

19 in *The Roots of Terrorism*, Richardson, Louise (Ed.), Routledge, New York, 2006, p. 61.

of journalistic practice can still be imposed, they take on a more serious dimension because of the violence involved and the stakes for journalistic ethics.<sup>20</sup>

These decisions are also complicated by the massive intrusion of social networks that have changed the way information is handled. Terrorist groups are producing their own videos and managing their own narratives by speaking directly to the public, without the filtering or mediation of journalists. In addition, millions of citizens are actively participating in the making and dissemination of information without being held to the rules of journalistic ethics. These new media impose new demands on the existing media. “We face danger whenever information growth outpaces our understanding of how to process it,” statistical journalist Nate Silver (United States) warns in his bestseller *The Signal and The Noise*. More than ever, the ethical and professional standards of information processing are essential: to validate facts, contextualise and make sense, to navigate the chaos, confusion and fear created by terrorist violence. “Publicity may be the oxygen of terrorists,” noted Katharine Graham, the director of the *Washington Post* during the Watergate and Pentagon Records scandals, but “news is the lifeblood of liberty.”

# 1

## Key points

- Naming is, to a certain extent, choosing a side
- Terrorism has no official definition
- Terrorism and resistance: a crucial difference
- State terrorism: a “form of government”
- “Glorification of terrorism”: an expression to be carefully defined
- Not all terrorism is “religiously-inspired”
- Establish and report the facts, without stereotype or generalisation
- Lists of terrorist organizations: a useful (but politically-suspect) tool
- “One person’s terrorist is another person’s freedom fighter”



## Chapter 1 Basic Issues in Covering Terrorism

These words have always been tricky; the subject of controversy. “One person’s terrorist is another person’s freedom fighter.” “Today’s terrorist is tomorrow’s statesperson.” These recurring phrases have become clichés in journalistic and political commentaries. They mean that using these terms is never neutral. Naming is, to a certain extent, choosing a side, at the risk of masking reality or accepting the interpretation that one of the newsmakers wishes to impose.

Terrorism is a catchall word. Does it refer to a tactic, or an ideology? Is it a crime, or an act of war? There are dozens of definitions of the word ‘terrorism’, which often emphasise specific points, reflecting a political or moral approach.

“A major hindrance in the way of achieving a widely-accepted definition of political terrorism is the negative emotional connotation of the term,” wrote Ariel Merari, professor at the International Institute for Counter-Terrorism, Tel Aviv University. “Terrorism has become merely another derogatory word, rather than a descriptor of a specific type of activity. Usually, people use the term as a disapproving label for a whole variety of phenomena which they do not like, without bothering to define precisely what constitutes terroristic behavior.”

Although the term comes up in many texts and conventions, there is currently no agreed upon definition within the United Nations (UN), despite the mission assigned in December 1996 to a special Committee established by the General Assembly. Set up in 2003, the High-Level Panel on Threats, Challenges and Change submitted a report approaching a definition the following year. After bringing up the existing texts, particularly the Geneva Conventions condemning

war crimes and crimes against humanity and the 12 United Nations conventions against terrorism, it proposed to use the word ‘terrorism’ to refer to “any action [...] that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act”.

It can be important to make a distinction between ‘terrorism’ and ‘resistance’, as the difference is so pervasive in the media and has led to so many positions and viewpoints. The fight against occupation is an essential point, but as

**“Any action [...] that is intended to cause death or serious bodily harm to civilians or non-combatants, when the purpose of such an act, by its nature or context, is to intimidate a population, or to compel a Government or an international organization to do or to abstain from doing any act.”**

the French political scientist Jacques Tarnero points out, “the choice of methods of combat and targets distinguishes resistance from terrorism.”<sup>1</sup> In other words, a kamikaze attack targeting civilians, in the name of combating occupation, is not an act of resistance, but a terrorist crime.

In this publication, as with media coverage generally, almost every word gives rise to contestation and debate. This is the case with the expression ‘violent extremism’, which is used more and more frequently and for which “there is no generally accepted definition”, noted Ben Emmerson, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, in February 2016. The same is true of the term ‘guerrilla’, which is chosen by armed groups that the targeted State calls terrorists. (See: *Words*, page 52)

tion and protection of human rights and fundamental freedoms while countering terrorism, in February 2016. The same is true of the term ‘guerrilla’, which is chosen by armed groups that the targeted State calls terrorists. (See: *Words*, page 52)

## **1.1 The notion of ‘state terrorism’**

Referring to something as ‘state terrorism’ very frequently gives rise to lively debate. To what extent can States that violate international humanitarian law be described as ‘terrorist’? There are radically-opposed answers and often complete disagreement between those who denounce “acts of terrorism” when they emphasise the number of civilian deaths and those who justify their “proportional” use, although they admit it can cause “regrettable collateral damage”.

State terrorism generally escapes the notice of those who try to forge a common international definition of terrorism within intergovernmental organiza-

<sup>1</sup> *Les Terrorismes*, Editions Milan, 1998

tions. And yet, the word ‘terrorism’ comes from the Reign of Terror perpetrated by Robespierre during the French Revolution, at the end of the 18th century.

Then, it referred to the State’s brutal actions against its political enemies. When is it legitimate to speak of State terrorism? When, replies Gérard Chaliand, terror is used as a “way of governing, allowing the established power, through extreme measures and collective fear, to break those that resist it.”<sup>2</sup>

Torture, forced disappearances, selective assassinations of opponents and widespread massacres are some of these extreme measures.

It may seem paradoxical, but this ‘state terrorism’ can even appear when fighting against terrorism or insurrections. Historical examples abound, each of which naturally often raises emotions, memories and debate.

Complexity is added when ‘state terrorism’ is practised within democratic governments. ‘State terrorism’ has been sometimes linked to the notion of the ‘deep State’, i.e. the network of security services, economic interests, political factions and even criminal groups acting in the shadows, behind the ‘legal façade’ of democracy, and aiming to shatter any change made by the established order, even if that means resorting to terrorist acts.

## 1.2 Avoiding glorification

**Once again, these words present a challenge, because the media face laws that penalise the glorification of terrorism. When, though, can they be said to glorify terrorism?**

The question is evident for the media considered close to “terrorist” organizations: do they unofficially cater to those organizations? What laws apply to these media, which have a disputed journalistic status? Some countries demand that they close down; others are content to monitor them and look out for content that could violate their laws.<sup>3</sup> The accusation of praising or glorifying terrorism can, however, drift, until even a legitimate, journalistic coverage of organizations described as ‘terrorists’ is criminalised, or the media are forbidden to reveal illegal State actions taken in the fight against terrorism.

## 1.3 Reporting on different forms of terrorism

The media (and political spheres) tend to concentrate, depending on the period, on certain forms of terrorism. From about 1960 to 1980, the news mainly covered terrorism linked to the extreme right and left and pro-independence movements. While such terrorism has not completely disappeared, today “religiously-inspired terrorism” attracts the most attention, and particularly attacks instigated by organizations claiming to follow Islam, which generate the widest media coverage.

<sup>2</sup> Encyclopedia Universalis, <http://www.universalis.fr/encyclopedie/terrorisme/>

<sup>3</sup> <http://www.osce.org/fom/203926?download=true>

Although many researchers and religious scholars analyse these equations and formulate often-contradictory theories on whether terrorism is founded on religion, the reference to Islam is strongly contested, not only within the Muslim community, but also by countries where Islam is the State religion. Thus, on 11 May 2016, during one of the meetings of the UN Security Council, the representative of Kuwait explained, on behalf of the Organization of Islamic Cooperation (OIC), that the expression “religiously inspired terrorist groups” was erroneous, as “no religion either condones or inspires terrorism”, although there are “terrorist groups that exploit religions.”<sup>4</sup>

International media also generally stress that these groups are engaged in a war against the West, but often fail to add that these violent actions often strike Muslim-dominant populations, either directly, as in Iraq and Syria, or indirectly, as was the case during the attacks in Brussels on 22 March 2016 and Nice on 14 July 2016, when there were also Muslims among the victims.

In the wake of an avalanche of attacks, references to Islam seem to pervade the media, as was seen following an attack in Munich in 2016 by a young German of Iranian origin. The mention of Iran misled news commentaries, with media once again focusing on Islam, whereas the crime was really committed because of an extreme right-wing ideology also rooted in the Aryan theories developed by certain Iranians and the culture of violence in Western societies, as the Iranian-American journalist Alex Shams pointed out.<sup>5</sup> In their studies and reports on terrorist risks, States and institutions take care not to limit themselves to religiously-inspired groups, and cover every threat. Thus, in its 2015 report, Europol also described extreme right-wing, anarchist and ethno-nationalist organizations.<sup>6</sup>

At a national level, the figures for extreme actions can differ from the global trend. In the United States, for example, since the attacks of 11 September 2001 and until 2015, the violent actions perpetrated by the supremacist or anti-government extreme right caused more deaths than those attributed to “Jihadists.”<sup>7</sup> (See: *Words*, page 52)

Stressing these figures, representatives of the Muslim community question the standards and routines of information processing. They denounce the fact that extreme right-wing attacks are generally less widely covered by the media, and the motives of the perpetrators are depoliticised and often attributed to mental illness. Their white identity and religious beliefs (Christian) do not lead to all the members of their ethnic or religious community being considered terrorists.<sup>8</sup>

4 [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/PV.7690](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/PV.7690) p.61

5 [http://www.huffingtonpost.com/alex-shams/why-did-the-munich-killer\\_b\\_11154486.html](http://www.huffingtonpost.com/alex-shams/why-did-the-munich-killer_b_11154486.html)

6 <https://www.europol.europa.eu/content/european-union-terrorism-situation-and-trend-report-2015>

7 <http://www.nytimes.com/2015/06/25/us/tally-of-attacks-in-us-challenges-perceptions-of-top-terror-threat.html>

8 <http://mediamatters.org/blog/2015/11/30/the-planned-parenthood-attack-and-how-homegrown/207105>

*The Financial Times* made the same remark when Jo Cox, the British Labour MP, was assassinated in June 2016, pointing out that the tabloids' "caution" as to the killer's possible links with the extreme right should apply to all cases of terrorist violence. The newspaper thus commented: "It is striking that both *The Sun* and *The Daily Mail*, two news organizations not widely known for their careful and understated coverage, have stressed that the alleged killer was a 'crazed loner' or a 'loner with a history of mental illness'."<sup>9</sup> Other groups, however, accuse "right-minded" or "politically correct" media of trying to acquit Islam of the acts committed by groups claiming to follow it. Monitored and suspected on all sides, the integrity of the press, tried by the attempt not to stereotype or generalise, is put to a hard test.

**Cyberterrorism:** This form of terrorism once again shows the importance of defining words. While one French dictionary, the *Larousse*, defines cyberterrorism as "all the serious, large-scale attacks (viruses, pirating, etc.) launched on the computers, networks and information systems of a company, an institution or a State, with the aim of provoking a general disruption susceptible of causing panic", others, such as the Council of Europe, apply the term to all the online practices of terrorist groups, including propaganda and recruitment. To avoid generalisation, more precise words have appeared, such as 'cyber jihad' or 'e-jihad' to refer to Al-Qaida or the Islamic State group's use of the Internet. (See: *Words*, page 52, for more discussion of the appropriateness of these words)

For some authors, whether an attack can be qualified as a 'cyber-terrorist' attack depends on its impact and motivation. As Alix Desforges remarks in one of the records published by France's Institute for Strategic Research of the Ministry of Defence (IRSEM), some specialists such as Dorothy Denning make a clear distinction between 'hacktivism' and cyberterrorism. **Hacktivism** covers "operations that use hacking techniques against a target's Internet site with the intent of disrupting normal operations but not causing serious damage".

Today, experts estimate that there is no great risk that terrorist organizations will use cyberterrorism to intimidate and seriously disrupt the functioning of a State or any of its strategic institutions or facilities. At this stage, they believe that such attacks are more likely to be government strategies. However, there is growing awareness as to the vulnerability of States and large companies and their dependence on information systems. The combination of a cyber-attack and a 'conventional' attack to disrupt the reaction of the security services and hospitals is particularly feared.

*UN source: The Use of Internet for Terrorist Purposes*<sup>10</sup>

**Gangster terrorism:** This expression, which refers to the co-existence of criminality and terrorism, is now mainly applied to the extremists who started out

<sup>9</sup> <https://www.ft.com/content/5fd5a4e8-3480-11e6-ad39-3fee5ffe5b5b>

<sup>10</sup> [http://www.unodc.org/documents/frontpage/Use\\_of\\_Internet\\_for\\_Terrorist\\_Purposes.pdf](http://www.unodc.org/documents/frontpage/Use_of_Internet_for_Terrorist_Purposes.pdf)

as delinquents and to the hybridisation between criminal activities (arms, drug and human trafficking, money laundering, etc.) and terrorist activities. This term is sometimes used for the mafia, which violently attacked the Italian State, notably by assassinating the general Dalla Chiesa in 1982 and the judge Giovanni Falcone in 1992.

**Narco-terrorism:** This term refers to the direct involvement of armed, political groups in drug trafficking; the cooperation between criminal groups involved in drug trafficking and armed groups (guerrillas); the taxation of drugs by armed groups and terrorist acts committed by drug traffickers.

## 1.4 Lists of terrorist organizations

The UN does not maintain a global list of all terrorist organizations but instead relies upon specific lists such as the UN 1267 Sanctions Regime List, adopted by Resolution 1267 in 1999.

This list focuses on individuals and groups linked to Al-Qaida, the Taliban and their associates. Since 2011, the sanctions committee established by Resolution 1267 was subdivided to apply solely to Al-Qaida and its associates. Regime 1988 (2011), created the same year, applies specifically to the Taliban.

**Experts estimate that there is no great risk that terrorist organizations will use cyberterrorism to intimidate and seriously disrupt the functioning of a State or any of its strategic institutions or facilities.**

In 2015, Resolution 2253 brought about the “List of Sanctions against ISIL/Da’esh and Al-Qaida”.<sup>11</sup>

These UN lists come under Chapter 7 of the Charter of the United Nations and the sanctions that they imply are thus binding for all Member States. The List related to sanctions against ISIL/Da’esh is managed by the sanctions committee, known as Committee

1267, which is composed of all fifteen members of the Security Council. These lists have consequences for the entities and individuals who are members of these groups, or considered as such (travel ban, bank-account freezes, assets freezes, etc.).

The inclusion criteria are, however, contested by some who criticise their politicisation and their arbitrariness. The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism (until 2011), Martin Scheinin, pointed out in particular the shortcomings of the UN lists.<sup>12</sup>

<sup>11</sup> [https://www.un.org/sc/suborg/en/sanctions/1267/eq\\_sanctions\\_list](https://www.un.org/sc/suborg/en/sanctions/1267/eq_sanctions_list)

<sup>12</sup> <http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-51.pdf>

Several individual countries, including the United States, France, Canada<sup>13</sup>, India and China, and inter-governmental institutions, particularly the European Union (EU), also established lists of organizations that they considered terrorists. These lists reflect the approaches and priorities of the international policies set up by the countries and institutions. They also make it possible to explain the sanction and restriction policies followed.

The expression “terrorist State” is more frequent and designates States that use terrorism as an instrument of international influence. This term also stirs up debate, because actions that a State deems counter-terrorist can be denounced as terrorist actions by those who oppose them or suffer from them. However, it does reflect a reality in international politics. History is full of black files that evoke, without always being able to give conclusive evidence, the involvement of States in terrorist acts, thus fuelling the constant temptation of seeing behind every attack a “great coordinator” and masked conductor.

**Sources:****UN Sanctions Committee List**

<https://www.un.org/sc/suborg/en/sanctions/un-sc-consolidated-list#composition%20list>

**List of foreign terrorist organizations drawn up by the US Secretary of State's Bureau of Counterterrorism**

<http://www.state.gov/j/ct/rls/other/des/123085.htm>

**List maintained by European Union**

<http://eur-lex.europa.eu/legal-content/FR/TXT/HTML/?uri=URISERV:I33208&from=FR> <http://www.consilium.europa.eu/fr/policies/fight-against-terrorism/terrorist-list/>

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13 <http://www.securitepublique.gc.ca/cnt/ntnl-scrct/cntr-trrrsm/lstd-ntts/crrnt-lstd-ntts-fra.aspx>

# 2

## Key points

- Provide clear, precise, rapid and responsible information
- Affirm the duty to inform
- To explain is not to justify
- Keep a critical distance
- Take into account the impact of information on dignity and security
- Be familiar: terrorism, counter-terrorism, laws
- Carefully navigate relations with authorities
- Control the “framing” of terrorism
- Be wary of unsupported theories, peremptory judgements and pre-held biases
- Evaluate anti-terrorism in the context of international human rights law
- Avoid fostering fear
- Adopt a pluralistic, balanced and inclusive vision of information
- Consider terrorism, however targeted, as an attack against everyone
- Think globally and avoid “information nationalism”



## Chapter 2

# Media on the Front Lines

### 2.1 A reference point

**During the first moments of a terrorist act, the media are often the first source of information for citizens, well before the public authorities are able to take up the communication.**

Their mission is therefore essential: providing “clear, accurate, fast and responsible information”<sup>1</sup>, in the words of Frank Sesno, a specialist from George Mason University, United States. The aim is to help citizens to ensure their safety, in tandem with or in parallel to the official services (police, crisis centre, etc.).

By their rigorous handling of information, their symbolic crisis management, their self-control, gravity and empathy, the media and especially TV news anchors and ‘tweeters’ can also reassure public opinion. Their tone and their choice of words and images not only help to avoid panic, but also prevent retaliation against individuals or groups linked in the minds of the public to the perpetrators of the attacks.

The press must act as a beacon of the media sphere. The proliferation of so-called ‘citizen journalism’ (with social networks, mobile phones and blogs) and the dawn of a continuous stream of information have made it an absolute necessity to check, filter and interpret these information flows, which circulate amidst a chaotic jumble of rumour, extrapolation, speculation and trolling.

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<sup>1</sup> U.S. House of Representatives, *Combating Terrorism: The Role of the American Media*, September 15, 2004, p. 8.

Amidst the confusion and anguish that follow attacks, “acts of journalism”, as defined by U.S. journalist and educator Josh Stearns, i.e. activities that uphold the professional and ethical principles of journalism, are decisive.<sup>2</sup>

## **2.2 Ethics and principles**

**Terrorism particularly puts the classical pillars of journalistic ethics to the test:**

### **1. The pursuit of truth**

An essential principle of journalism, the pursuit of truth is imperative in the context of terrorist attacks. Initially, confusion and speculation tend to reign. Consequently, the facts must be scrupulously established, and fuzzy journalism avoided. Fact-checking is also compulsory. The pursuit of truth also implies the right and the duty to explain, even though this is sometimes perceived or criticised as justifying terrorist acts. Daring to decode the ‘reasons for unreason’, the origins of terrorist acts and terrorist demands is, however, essential. The brutality of a violent act cannot serve as a pretext to refuse to analyse its causes.

One of the duties of journalism is to include complexity, refusing the denial of reality in the affirmation that “there is nothing to understand” on the pretext that terrorists are “barbarians, full stop.” The essential rules of journalistic ethics cover this duty in the independent pursuit of truth. When she investigated terrorist groups in Mali in 2013, the *New York Times* journalist Rukmini Callimachi thus faced sharp criticism. She was asked: “How dare you give these people a voice? How dare you see them as anything other than the disgusting dogs they are?”

Her reply was: “The thing is, my reporting doesn’t deny that they’re perpetrating crimes against humanity, but I think that our job as journalists is to understand and to bring gray where there is only black and white. Because there’s always gray.”<sup>3</sup>

### **2. Independence**

Terrorism tests the media’s right to inform on events independently. During crises that threaten citizens’ safety and compromise national security, people are strongly pressured to stand to attention. The call for patriotism, which tends to be as compelling as the attack was brutal, threatens at all times to merge with a call for censorship.

In some countries, the law gives the media a very small amount of leeway and severely limits their action. In a study on the coverage of terrorism in India and

<sup>2</sup> Acts of Journalism, 17 October 2013, <https://www.freepress.net/resource/105079/acts-journalism-defining-press-freedom-digital-age>

<sup>3</sup> <http://www.wired.com/2016/08/rukmini-callimachi-new-york-times-isis/>

Sri Lanka, researchers Shakuntala Rao (State University of New York, Plattsburgh) and Pradeep N'Weerasinghe (University of Colombo, Sri Lanka) concluded that independence was indeed hindered. They particularly remarked upon reported “government manipulation of news, pressures to pander to the marketplace, pressure to please a public indoctrinated with governmental and corporate definitions of ‘patriotism’” and “fear of physical reprisals.”<sup>4</sup>

It is inevitable that the media identify with their community when it is targeted, especially in the initial aftermath of an attack, and refrain from asking questions that could shatter national unity or upset victims. When there is a large-scale terrorist attack, the media tend to suspend their critical relationship with power. Emergencies create a kind of fusional journalism, if only so journalists do not cut themselves off from a public that is in a state of shock and in need of reassurance. This does not, however, mean becoming State reporters. As Brigitte L. Nacos wrote, “suspending the adversarial stance of normal times is one thing, to join the ranks of cheerleaders is another.”<sup>5</sup>

The duty to inform requires that a critical distance be maintained between the media on one hand, and the reactions of the public, the declarations and actions of the authorities and other information channels on the other, whether they are opposition political parties or associations and prominent figures involved in the public debate. Admittedly, such an approach is difficult, as the media run the risk of being accused by the public and the authorities of showing disloyalty in the face of the common threat. However, it preserves their integrity and, in the long run, their democratic function. After the initial shock of the attacks, the time comes for asking disturbing questions and wondering about the level of anticipation and preparation, and the effectiveness of the response and reprisals. Like other institutions, the media have a lawful right to take stock.

Should the media take a position against terrorism, choosing their side? Most journalists are repulsed by the use of violence against civilians, and their editorials mostly reflect their indignation. Nevertheless, this bias against terror must never lead to the violation of the fundamental values of journalism — particularly, the duty to serve the truth. Paul Wood, Middle East specialist for the BBC<sup>6</sup>, noted that George Orwell chose his side during the Spanish Civil War, but “he would never have dreamed of changing the facts to suit his argument.”

“A journalist’s natural function,” wrote the Colombian professor of journalistic ethics, Javier Dario Restrepo, “is to serve the population, not the authorities.”<sup>7</sup>

4 Shakuntala Rao and Pradeep N'Weerasinghe. “Covering Terrorism: Examining Social Responsibility in South Asian Journalism” *Journalism Practice* Vol. 5 Iss. 4 (2011). Available at: [http://works.bepress.com/shakuntala\\_rao/3/](http://works.bepress.com/shakuntala_rao/3/)

5 *Terrorism & the Media*, p. 172.

6 Paul Wood, *The Pen and The Sword: Reporting ISIS*, Shorenstein Center on Media, Politics and Public Policy, Harvard, July 2016, p. 15.

7 Javier Dario Restrepo, *El Zumbido y el Moscardon*, EFE/FNPI, 2004, p. 112.

This independence can be tried, by refusing first to disseminate information that is known to be false at the request of the authorities, and secondly to remain silent on actions carried out by State institutions and that go against the rule of law or international law, such as the practice of torture.

### **3. Responsibility to others**

The media's actions inevitably have an impact on people, institutions, companies, etc., either by action or omission. The media thus balance their right and their duty to inform against their concern to minimise the negative impact of the dissemination of information on the dignity of the victims, particularly when protecting hostages or the safety of security-force operations. However, although journalistic ethics call for a 'feeling of humanity', this cannot compromise the essential function of journalism, which is to inform on subjects of public interest without being intimidated by the mood of the public or the orders of the authorities. There comes a time when questioning oneself about the consequences of informing can become an excessive self-censorship, to the detriment of citizens' right to know.

### **4. Transparency**

Terrorism inevitably casts doubts on the media's editorial choices. Why, for example, publish a terrorist organization's press release, or images taken from a video of hostages being beheaded? (See: *Publishing terrorist propaganda*, page 83) Some media instantly and publicly explain their decisions, while others only give justifications if they are called into question.

This transparency implies that mistakes are corrected with the utmost speed, visibility and honesty. It can also manifest as a public post-mortem that analyses media coverage and identifies its mistakes and excesses. On 24 May 2004, for example, the *New York Times* published a report on its coverage of the invasion of Iraq in 2003, which clearly pointed out its shortcomings.<sup>8</sup> This transparency guarantees the long-term credibility of the media.

## **2.3 The duty of knowledge**

**"The media know how to cover a crisis, but they do not necessarily know the crisis they are covering." This saying emphasises the need to prepare journalists to cover a complex, tumultuous world, as the professor of journalism Philip Seib stressed in 2004 when referring to Iraq.**

More than journalistic skills and techniques, the name of the game is knowing "the substance of the events and institutions that journalists must cover."<sup>9</sup>

<sup>8</sup> <http://www.nytimes.com/2004/05/26/world/from-the-editors-the-times-and-iraq.html>

<sup>9</sup> Philip Seib, *Beyond the Front Lines: How the News Media Cover a World Shaped by War*, Palgrave Macmillan, New York, 2004,

In most media, specialisation is far from the rule. Journalists skip from one subject to another and only furtively touch upon features of a rare complexity. Knowledge offers a guarantee against shortcuts, mistakes and extrapolations. When Oklahoma City, United States, was attacked on 19 April 1995, those who knew that it was the second anniversary of the tragedy that had played out in Waco, Texas — when dozens of members of the Branch Davidian sect were killed during an assault launched by U.S. security forces — were immediately able to put the assumed “Middle Eastern connection” into perspective. They could thus look to the extreme right, which had seen in the tragic event the very embodiment of the “toxicity of the American Federal State”.

In 2008, Kyrgyzstan’s Public Association of Journalists placed special emphasis on the need for specialisation. In its report, members wrote: “Journalists in Kyrgyzstan know little about political extremism and terrorism. In crisis situations, they often lack skills to tackle such issues. Therefore, they habitually reproduce official statements without looking for an opportunity to supplement these with their own investigations or third party analysis and comments.”<sup>10</sup> This leads to creating incomprehension among the public and aggravating the situation rather than resolving it.

Covering terrorism also requires a profound knowledge of counter-terrorism. Numerous institutions, ministries, services and units are involved in counter-terrorism. They are tasked with missions and enjoy specific prerogatives. Counter-terrorism implies many specialisations and sophisticated surveillance and intervention techniques. It involves every power: the executive and judicial, but also the legislative, with the Intelligence and Security Committee (ISC) of Parliament and special investigation commissions.

Attempts to establish international, counter-terrorist cooperation are a further complication, as they involve institutions that are sometimes rarely or poorly covered, such as the UN, the Council of Europe, the EU, NATO or Interpol, whose mandates and skills often overlap or clash. Knowing about the counter-terrorist system is essential to evaluate the effectiveness of the fight against terrorism, but also its conformity with the law and the rule of law. Such knowledge also makes it easier to analyse peremptory declarations as to a State’s readiness and judge the responses proposed by the government or the opposition with greater authority.

## 2.4 Facing the law

**The right and duty to inform in the name of public interest do not exonerate the media from respecting a certain number of laws. The media must know the legislation in force in their own countries and in those where they send their reporters.**

<sup>10</sup> Public Association “Journalists”/IMS, *Political extremism, terrorism and the media in Central Asia*, 2008, Bishkek/Copenhagen.

Following an attack, the authorities can impose momentary bans on coverage for public order or national security. (See: *Live broadcasting*, page 74) These bans applied to the dissemination of information can have their reasons, but they can also be used to control information and protect the authorities from possible criticism.

Terrorism is a subject that is strictly regulated by the law because of the dangers it poses and its significant political sensitivity. Is it legal, for instance, to look at terrorist websites or attempt to contact the members of terrorist organizations? Can journalists film ongoing security service operations? To what extent can the media protect the secrecy of their sources, citing the freedom of the press, when police forces demand a source in the name of national security? What consequences does a state of emergency have for the media? The rules vary from one country to another, and the invocation of the freedom of the press may not be enough to save the media from the heavy hand of the law.

The law also permeates journalistic practice and routine. The general rejection elicited by violent extremism or the pressure to give information can lead media to lack caution in the way they refer to a person suspected of involvement in a terrorist act. They thus run the risk of forgetting the laws on the right to privacy and the right to be presumed innocent.

Each editorial decision implies rigorously assessing the legal risks entailed and bearing the potential consequences of certain acts. For instance, should media be ready to refuse to reveal the identity of a source and risk having one of its journalists or senior managers condemned to a prison sentence?

## 2.5 Relations with authorities

**The media cannot accomplish their mission of general interest if they do not enjoy the freedom to inform. This freedom can be suspended for a certain time in specific cases where there are genuine security risks.**

However, these restrictions can sometimes be excessive. In July 2016, for example, the Media Council of Kenya (MCK) asked the authorities to disclose more information on terrorism and counter-terrorist actions. The deputy CEO of the Council, Victor Bwire, said that the facts made public by the authorities were insufficient, which led journalists to seek information from the international press and social networks publishing content from terrorist websites. In the latter case, they could be accused of spreading propaganda.<sup>11</sup>

Journalists who cover terrorism, which involves national security and the reputation of the security forces and political authorities, are paid “particular attention” by the authorities. They run the risk of being placed under surveillance

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<sup>11</sup> <http://www.standardmedia.co.ke/article/2000206898/media-council-pushes-for-access-to-information-on-terrorism-cases>

## RIGHTS OF MEDIA IN A DEMOCRACY

In 2005, the day before World Press Freedom Day, the World Association of Newspapers (WAN) summed up the rights every democracy should grant the media:

- 1. the right to access official information**, as defined in the ‘right to know’ legislation. Stricter security classifications can be imposed in matters regarding the military or sensitive intelligence, but they must be subject to rigorous examination so as to avoid unjustified attempts to limit public knowledge, particularly as regards political decisions;
- 2. the right for journalists to protect their confidential sources**, and consequently, be protected from unreasonable searches and the monitoring of their communications without a court order;
- 3. the right for journalists to cover all persons involved in conflicts**, including terrorists;
- 4. the guarantee that journalists will not be prosecuted** in the event they publish classified information;
- 5. the ban on ‘black propaganda’**, i.e. the placement of falsified or malicious articles under the cover of journalism, and the authorities’ renunciation to play journalists.

and prevented from conducting investigations in zones held by armed groups, and even being accused of complicity, or detained and convicted.

In 2014, the Nigerian journalist Peter Nkanga said that “Targeting a journalist for reporting on issues of public interest is tantamount to deliberately denying the public their right to be adequately informed about issues affecting their commonwealth. This is an attack on the society.”<sup>12</sup> When terrorism strikes, journalists must, more than ever, continue to fulfil their roles of news providers and ‘counterpowers’. They must not slavishly wait for official releases, but personally seek information and check its accuracy, while being attentive to their responsibilities before broadcasting it.

Relations with security and intelligence services must be clearly defined. Even though attacks can create a sort of ‘sacred union’ with authorities and the public calling for patriotism, the media are not government aides. They retain their task of monitoring the authorities and providing citizens with independent information.

<sup>12</sup> <https://www.indexoncensorship.org/2014/06/nigeria-targeting-journalists-boko-haram/>

In April 2016, James Rodgers, professor of journalism at City University, London, wondered: “How seriously should editors take warnings from ‘anonymous security sources’ about [terrorist] threats? Is this important public safety information, or spin aimed at securing extra funding?”<sup>13</sup>

This approach particularly implies testing the legitimacy of the authorities’ claim that some information must remain secret. The bar of responsibility must obviously be placed very high to avoid playing into the hands of terrorists, but withholding information on the grounds it is a State secret or because of patriotism cannot be accepted if the aim is to cover up illegal or unreasonable actions undertaken by the authorities. The line between what must be silenced and what must be revealed to the public is not always clear, but the question must constantly be asked, and the authorities’ arguments systematically scrutinised.

## **2.6 “Framing” terrorism**

The “news frames” used to cover terrorism are decisive. News frames are “interpretive structures that journalists use to set particular events within their broader context”, in the words of Pippa Norris, Montague Kern and Marian Just.<sup>14</sup>

**Framing involves selecting particular aspects and angles of reality and privileging them in the description, the definition, the interpretation and the moral evaluation of the subject being covered.**

The choice made by the media is not always a conscious one and can reflect news frames developed by others: the authorities, but also public figures, study centres, journalistic routines such as that of giving priority to proximity or to emotion, or an ideological bias. Nevertheless, the choice of the frame is crucial. It can influence the reactions of the public and the authorities. Authors Brooke Barnett and Amy Reynolds thus noted that, to a certain extent, the way the U.S. media framed the attacks of 11 September 2001 was to call for decisive retaliation.<sup>15</sup> The press widely quoted the declarations of politicians proposing a military response, as well as the declarations of ordinary Americans calling for reprisals.

During the Cold War, most terrorist acts were interpreted within the frame of the ideological and geopolitical confrontation between East and West. Since the fall of the Berlin Wall and the rise of ‘Islam-inspired’ terrorism (See: *Words*, page 52), terrorist acts are often covered with a perspective similar to the “clash of civilisations” theory popularised by former Harvard professor, Samuel Huntington. In both cases, the model is very similar, inspired by a Manichean,

<sup>13</sup> <http://www.city.ac.uk/news/2016/april/terror-attacks-put-journalists-ethics-on-the-front-line>

<sup>14</sup> *Framing Terrorism: The News Media, the Government, and the Public*, Routledge, 2003, p. 10.

<sup>15</sup> *Terrorism and the Press. An Uneasy Relationship*, p. 129.

binary conception of information: them vs. us, the ‘bad guys’ against the ‘good guys’.

The same events can thus be framed in radically different ways according to the media’s premises. While some sift through information to find what divides communities, others will choose the facts that demonstrate the need to live

**While some sift through information to find what divides communities, others will choose the facts that demonstrate the need to live together, and the possibility of doing so.**

together, and the possibility of doing so. After 11 September, a certain number of American media published more positive articles on Arab American or Muslim citizens.<sup>16</sup> This frame aimed to avoid retaliation against a specific U.S. community and insisted on the urgency of rising to the challenge issued by Al-Qaida with the law, and not discrimination. It is essential to think about the frame, as journalists can thus go beyond the gregarious reflexes of journal-

alism, its pre-established consensuses, the ‘obvious’ and the vote-catching stakes to offer different, plural, critical perspectives.<sup>17</sup>

The way a terrorist act is framed can also change over time. After a certain time-lapse, when the shock of the attack has faded, the media abandon the cohesional or patriotic frame they had established and entertain a greater diversity of views and opinions. After the Paris attacks in November 2015, Chris Elliott, the former readers’ editor for *The Guardian*, remarked that “The idea that these horrific attacks have causes and that one of those causes may be the West’s policies is something that in the immediate aftermath might inspire anger. Three days later, it’s a point of view that should be heard.”<sup>18</sup>

The frame is expressed through the selection or rejection of subjects, their hierarchy, their placement, the choice of speakers and images. It can also be reflected in the use of some words and epithets. Comparing two attacks, one in Beirut on 12 November 2015, the other in Paris on 13 November 2015, the Lebanese-American journalist Nadine Ajaka showed how a few words were enough to set up a frame that can influence the public’s feelings. News agencies described the attacks in Beirut as an attack against “a stronghold of Hezbollah, the Shiite militant group”. By enveloping the area in a communitarian and geopolitical commentary and thus compacting its diverse identities, these news agencies implied, to a certain extent, that the crime was only to be expected, as the Lebanese Shiite militia is an enemy of the Islamic State. There

16 Brigitte L. Nacos, Oscar Torres-Reyna, “Framing Muslim-Americans Before and After 9/11”, in *Framing Terrorism*

17 <http://www.au.af.mil/au/awc/awcgate/state/crs-terror-media.htm>

18 <https://www.theguardian.com/commentisfree/2015/nov/23/what-we-got-right-and-wrong-in-coverage-of-the-paris-attacks>

was no such characterisation in the coverage of the Paris attacks, and the media only marginally referred to France's military interventions against the Islamic State group.<sup>19</sup>

“Framing” is also, more fundamentally, a philosophy of journalism. The renowned Latin-American specialist of journalistic ethics, Colombian professor Javier Dario Restrepo, offers an enlightening anecdote to that respect. “When he came to Bogotá, the most famous war correspondent in the world, Ryszard Kapuscinski, told a journalist that what he saw in war was tenderness, solidarity and tolerance, and that its characters were children, elderly people and pregnant women. He could have said, like many other correspondents, that you go to war to meet heroes, Rambos, people who like strength and cruelty. For the Polish journalist, however, war, which is the sewer of history and the

**“Ryszard Kapuscinski told a journalist that what he saw in war was tenderness, solidarity and tolerance, and that its characters were children, elderly people and pregnant women.”**

scene where all reasons to believe in human beings expire, becomes a challenge when, like those who see the silver linings in clouds, you try to look at the humanity that remains and the reasons to keep believing in it.”<sup>20</sup>

Similarly to much of the public and authorities, shocked after the attacks, some media are tempted to adopt a martial frame, to criticise the “Care Bears” and to promote “the most effective” ways to respond to the terrorist challenge. The risk is then to do away with what defines the ethics of a society and its commitment to human rights and international humanitarian law.

Gilles Bertrand and Mathias Delori wrote that “The war against ‘terrorism’ is supported by a humanist discourse that is, by definition, blind to its own violence. Communitarian or racist discourses are unique in that they noisily showcase the violence that they deplore. Inversely, ‘modern’, ‘liberal’ and ‘humanist’ discourse does not express its own violence.”<sup>21</sup> This is surely something worth thinking about.

Framing inevitably has consequences on the professional and factual work of the media. It can, for instance, lead to neglecting civilian deaths provoked by a retaliation to terrorist acts, or to silencing abuses committed by one's own side, which raises questions of journalistic practice (equity, impartiality, truth) and humanist ethics (the feeling of humanity). In October 2001, in a memorandum transmitted to the editors, CNN, underlined that “given the enormity of the toll

19 <http://www.theatlantic.com/international/archive/2015/11/paris-beirut-media-coverage/416457/>

20 <http://www.redalyc.org/pdf/160/16008104.pdf>

21 *Terrorisme, émotions et relations internationales*, Myriapode, 2015, p. 74.

on innocent human lives in the US, we must remain careful not to focus excessively on the casualties and hardships in Afghanistan that will inevitably be a part of this war.”<sup>22</sup>

It wasn’t until 2004 that the U.S. press seriously started to inform readers on the use of torture in the U.S. prisons of Bagram or Abu Ghraib, although the practice had been denounced by human rights associations.<sup>23</sup>

The consequences of the drone war on Pakistan’s civilian populations were also long under-covered, because the attacks were considered legitimate by media that were convinced of the necessity to harshly fight terrorist organizations. Journalist Tara McKelvey noted “When drones strike, key questions go unasked and unanswered.”<sup>24</sup> While there are reasons for such framing, it cannot lead to deliberately partial forms of journalism.

Framing also involves explanations of the profound causes of terrorism. Journalists must be particularly wary of unequivocal theories and peremptory equations. Behind many explanations, sometimes backed by experts’ opinions, are ideological biases that are so powerful that they prevent an independent approach to the event.

Is terrorism born from social misery? Is it the product of international interference? Which historical episodes inspire it? What is the actual role of religion? Is ‘Jihadism’ the consequence of the radicalisation of Islam, or, as the French researcher Olivier Roy believes, the result of the Islamisation of radicalism? (See: *Words*, page 52) The answers to these questions determine not only the media’s editorial line, but also frequently the choices of journalistic coverage.

## 2.7 Guaranteeing the rule of law and human rights

**The safety of citizens and their right to life is a fundamental human right, and States are obliged to take measures to ensure it. To do so, they can be exonerated from upholding certain rights and freedoms, temporarily and within strict limits.**

However, the risk of an overreaction violating the international human rights law is constant. The restrictions placed on the freedom of expression can be excessive, surveillance measures disproportionate, searches and arrests arbitrary. The definition of a ‘terrorist act’ in particular can be abusively extended to criminalise legitimate opinions within a democratic society. In the fight against terrorism, international cooperation can also lead to perilous practices. For instance, how to work with the intelligence services of dictatorships without be-

<sup>22</sup> <https://www.theguardian.com/media/2001/nov/01/warinafghanistan2001.september112001>; Quoted in Susan Moeller, *Packaging Terrorism*, p. 5.

<sup>23</sup> [http://www.cjr.org/feature/failures\\_of\\_imagination.php](http://www.cjr.org/feature/failures_of_imagination.php).

<sup>24</sup> [http://www.cjr.org/feature/covering\\_obamas\\_secret\\_war.php](http://www.cjr.org/feature/covering_obamas_secret_war.php)

traying one's own principles? The press has not sufficiently covered these grey areas where, by dint of preaching realism in a world of brutes, democracies can at any time betray themselves.

The Office of the United Nations High Commissioner for Human Rights<sup>25</sup> and, particularly, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, a position held since August 2011 by lawyer Ben Emmerson, are precious references to evaluate the lawfulness of counter-terrorist measures and their conformity with the international human rights law. Local and international human rights associations such as Human Rights Watch,<sup>26</sup> Amnesty International,<sup>27</sup> the International Federation for Human Rights (FIDH)<sup>28</sup> and the International Commission of Jurists (ICJ)<sup>29</sup> have particularly well-developed monitoring of terrorism and counter-terrorism.

Some media also take on the mission of checking counter-terrorist measures against national laws and international human rights law. Thus, following the Paris attacks of 13 November 2015, the French newspaper *Le Monde* established an observatory to monitor the country's state of emergency.<sup>30</sup>

The fight against terrorism can violate citizens' equality before the law, a discrimination that is expressed, for instance, in ethnic profiling, appearance-based prejudice, etc. The attention paid to ethnic and religious profiling policies is all the more notable since many experts consider them to be ineffective. They can also create deep resentment in communities asked to cooperate with security forces.

## 2.8 Confronting fear

**One of the aims of terrorism is to create fear and anguish, which can, in turn, lead citizens to ask for authoritarian measures to be adopted and place the collective blame of an attack on a specific community. This means playing into the terrorists' hands.**

Terrorism attempts to expose “the hypocrisy of democracies” and polarise societies. Jessica Stern, from Harvard University, commented that “The whole aim of terrorism is to get us to overreact”.

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25 <http://www.ohchr.org/Documents/Publications/Factsheet32EN.pdf>; <http://www.ohchr.org/EN/Pages/Home.aspx>

26 <https://www.hrw.org/topic/terrorism-counterterrorism>,

27 <http://www.amnesty.eu/en/news/press-releases/eu/human-rights-in-the-eu/human-rights-and-counter-terrorism/>

28 <https://www.fidh.org/en/issues/terrorism-surveillance-and-human-rights/fighting-terrorism-and-protecting-human-rights-analyses-from-fidh>

29 <http://www.icj.org/>

30 <http://delinquance.blog.lemonde.fr/2015/11/23/observons-letat-durgence/>

As the United Nations agency responsible for “building peace in the minds of men and women”, UNESCO is especially concerned by the ways in which the acts of a few at the extreme fringes of society can foster widespread resentment and suspicion towards much broader groups. Fear is one of the strongest, most visceral emotions there is, and can lead otherwise open and tolerant people down the road of prejudice and discrimination. This fear can be so powerful as to determine the outcome of elections and manifest itself in draconian policies targeted at some of the most vulnerable communities within society.

**Fear is one of the strongest, most visceral emotions there is, and can lead otherwise open and tolerant people down the road of prejudice and discrimination.**

When covering terrorist acts, the tone is crucial for keeping the reactions within the population proportionate and preventing fear from dividing society. Mastering the flow of information and ensuring its truth and accuracy are journalistic practices that can prevent fear from turning into panic or paranoia. Media must remember that,

although terrorism is unique in its ability to shock and scare, the actual level of risk for an individual citizen is relatively small, especially compared to countless other factors that may lack the same emotional impact.

Yet is it surprising that the average person watching wall-to-wall coverage of attacks day after day may become convinced that they are in immediate and pressing danger? The threat and the challenges that the authorities and society face must be apprised serenely, without giving in to exaggeration, sensationalism or the pressures from the part of the political world (or the financial bottom-line of media themselves) that benefits from feelings of insecurity and anguish.

## 2.9 Inclusive journalism

**The media generally address a specific audience, defined by proximity, the market or a political, social, national or religious identity. They also tend to worry about “their” target audience first. Terrorism can claim adherence to a community, or target a specific community.**

The media must strive to explain the particularities of attacks, but they can only do so if they are prepared to cover “the Other”, and show themselves to be attentive to diversity.

This approach is not merely ‘political’. It actually determines the quality of journalism. Only an ‘inclusive journalism’ can cultivate diverse sources of information, whether these are people, associations or institutions. This is essential to offer a pluralistic, balanced vision of breaking news. The ability to respond to

sudden events depends on the time taken to establish an editorial policy open to diversity. It consists of hiring journalists from all of society's communities, having many witnesses and experts on hand and covering communities as a matter of course rather than only seeking them out to inform on events that could reduce them to a group of culprits or victims.

The concern to inform on the diversity of communities should not, however, lead to an impasse of "tribal journalism", forgetting the threat that terrorism represents for society as a whole, and its common values. Commenting on the massacre in a gay night club in Orlando, United States, on 12 June 2016, *New York Times* columnist Frank Bruni remarked that "These locations are never random. [...] But let's be clear: This was no more an attack just on LGBT people than the bloodshed at the offices of *Charlie Hebdo* in Paris was an attack solely on satirists. Both were attacks on freedom itself. Both took aim at societies that, at their best, integrate and celebrate diverse points of view, diverse systems of belief, diverse ways to love. And to speak of either massacre more narrowly than that is to miss the greater message, the more pervasive danger and the truest stakes."<sup>31</sup>

## **2.10 Thinking globally**

**Journalism has its laws. It also has its horizons, determined by geographic, social or cultural proximity. Every day, acts of terrorist violence slip under the radar-screen of international media; because they unfold in countries considered "unimportant", far from the global media platforms that focalise international attention; because they have become commonplace there or because they do not directly affect the citizens or interests of the most powerful countries.**

However, although terrorism strikes a specific, local area, it almost always implies a global approach of information. Even though the perpetrators of the terrorist attacks in Paris and Brussels claimed to adhere to the Islamic State group established in Syria and Iraq, they were neither so far away, nor from "elsewhere". They were actually just a stone's throw away in the neighbourhoods de Brussels, or in the wider suburbs of Paris. Connections must be established between the countries in which bombers or hostage-takers operate, those they come from, those of the victims they target and those of the States that fight them.

**Every day, acts of terrorist violence slip under the radar-screen of international media, because they unfold in countries considered "unimportant".**

<sup>31</sup> <http://www.nytimes.com/2016/06/13/opinion/the-scope-of-the-orlando-carnage.html?ref=opinion>

*Straits Times* (Singapore) Deputy Editor Felix Soh remarked that “if you connect the terrorism dots, almost all of the Southeast Asian countries are linked. We are all in the same boat. But, the region’s media have each gone their own way in covering conflict and terrorism. There is no holistic approach towards covering the scourge of terrorism that has gone from bad to worse.”<sup>32</sup>

This remark also concerns the existence of national, ethnic or religious communities, which criss-cross the world through their diaspora. They are affected by the events that take place in their native and host countries. Some of their members may even support or, at the very least, condone the actions of violent organizations. Between homeland and land of exile, information travels through a global media space.

Terrorism operates amidst overlapping interests and imaginations. The world has become a “cosmopolis”, wrote Timothy Garton Ash, professor at the University of Oxford, in *Free Speech*. He also noted “Thanks to electronic communication, what is published in Bradford [United Kingdom] will often be accessible in Lahore [Pakistan] and vice versa. If the norms for freedom of expression differ starkly between the two places – if, for example, it is normal to question Islam in one place and unacceptable in the other – then violent responses become more likely, in one country or both.”<sup>33</sup>

The media must take an interest in these countries and regions, these “elsewheres” on the outskirts of the news cycles and breaking information. They seem very far off, and even insignificant, until the day an event, perhaps an attack, occurs to shatter the status quo. The question asked by journalist Roy Gutman, 1993 Pulitzer prize-winner, in his book *How We Missed The Story* illustrates how the absence of any substantive coverage in Afghanistan (“too far, too complicated”) in the 1990s, after the Soviets were defeated, led to “missing” the rise of the Taliban and Al-Qaida, until the attacks on 11 September 2001. Likewise, for years, journalistic coverage of the emergence of the Islamic State/Daesh was very limited, and even inexistent, in the major international press. It thus appeared like a monster suddenly springing from a box, although it had been incubating for many years in the Sunni regions of Iraq. Joby Warrick notably showed this in his book, *The Rise of ISIS*<sup>34</sup>, and Jason Burke in *The New Threat from Islamic Militancy*<sup>35</sup>. The links between the different spheres in which terrorist groups operate are also insufficiently mentioned. Libya, Nigeria and Syria are often covered as separate silos, whereas there are connections between them.

32 Felix Soh, “The End of Objectivity”, in Shyam Tekwani (Ed.), *Media & Conflict Reporting in Asia*, Asian Media Information & Communication Centre (AMIC), 2008, p. 35.

33 Timothy Garton Ash, *Free Speech: Ten Principles for a Connected World*, Atlantic Books, London, 2016, p. 19.

34 Joby Warrick, *Black Flags. The Rise of ISIS*, Bantam Press, London, 2015.

35 Jason Burke, *The New Threat from Islamic Militancy*, The Bodley Head, London, 2015.

This increasingly close connection between the international scene and the interior scene is becoming even more complicated due to interconnected forms of violence. Terrorism rages at the crossroads of all criminality, trafficking and corruption. It feeds on the fragmentation of States under the pressure of a poorly-controlled globalisation and the rise of “sub-state” players.

A global approach, i.e. an approach that reflects the reality of an interconnected world, means going beyond merely factual coverage of terrorist attacks unfolding “far away”. Even though journalism’s proximity criterion has its legitimate laws, it is also important to take interest in the impact of terrorist attacks on these “remote” societies, in the human toll and the political repercussions, which is a given for attacks that are closer to home.

The global approach is thus justified by reason, with the new realities of the world. Could it also be justified by emotion? In its indignation over attacks perpetrated against civilian populations, journalism is often guided by the criterion of proximity, but is this attitude ethically and humanely acceptable? Christophe Ayad, Middle East expert for the French newspaper *Le Monde*, thus wondered: “Are the rules we set for Western hostages valid for Iraqi soldiers and civilians tormented by the Jihadists?”<sup>36</sup>

Why do the massacres perpetrated by Boko Haram in Nigeria and Northern Cameroon not provoke any real indignation in Europe? Only the kidnapping of more than 200 schoolgirls in Chibok in April 2014 mobilised the international community around the campaign #BringBackOurGirls. The other attacks, such as the one that caused the death of 2,000 people in Baga on the Chadian border in January 2015, were hardly covered compared to the attacks that took place at the same time in Paris. “I am Charlie, but I am Baga too,” wrote the South-African journalist, Simon Allison, in the *Daily Maverick*, but he was unfortunately one of the only ones to do so.<sup>37</sup>

Similarly, why did the Paris attacks on 13 November 2015 attract so much attention when the 40 Lebanese victims of an explosion in Beirut the previous evening only merited a brief mention? On 14 November, the writer and podcaster Mohamed Ghilan tweeted “What is sadder? The #ParisAttacks or that the #BeirutAttacks didn’t get more than a fraction of the attention that the world gave #Paris today?”<sup>38</sup>

Was it journalism following the principle of proximity, or gross negligence? Security, access and communication problems in zones controlled by armed groups – the north of Nigeria, for example – partly explain this disproportion in journalistic coverage, as well as the attitude of the local governments, some

36 [http://www.lemonde.fr/actualite-medias/article/2014/09/25/les-medias-face-a-l-etat-islamique\\_4494681\\_3236.html](http://www.lemonde.fr/actualite-medias/article/2014/09/25/les-medias-face-a-l-etat-islamique_4494681_3236.html)

37 <http://www.dailymaverick.co.za/article/2015-01-12-i-am-charlie-but-i-am-baga-too-on-nigerias-forgotten-massacre/>

38 <https://twitter.com/mohamedghilan/status/665410198878711810>

of which choose not to raise too loud an outcry about acts perpetrated on their territory.<sup>39</sup> It is, however, difficult to justify such different levels of coverage.

Journalistic routines are very difficult to change, partly because of the attitude of the general public, which is to turn away in disinterest from countries “that are not like [them]”, in the words of the Australian professor Folker Hanusch.<sup>40</sup> Another reason for such disinterest is that these countries do not exert any power over the international scene. “The audience must share the blame”, added Folker Hanusch.

This “nationalism of information”, noted Michel Wieviorka and Dominique Wolton in their 1987 book *Terrorisme à la une*<sup>41</sup> (“Front-Page Terrorism”), this “weaker mobilisation of the public as soon as events do not directly affect their nationals or territory, is a barrier to the project to mobilise democracies against terrorism.” Thinking globally is thus crucial in the fight against terrorism. It is not only a matter of humanity and effectiveness, but also a matter of journalistic quality: only this way can terrorism truly be measured.

And the function of journalism, to paraphrase British author George Orwell, is not to tell people what they want to hear, but to tell the truth, even if no-one wants to hear it.

**Thinking globally is thus crucial in the fight against terrorism. It is not only a matter of humanity and effectiveness, but also a matter of journalistic quality.**

39 <https://www.theguardian.com/world/2015/jan/12/-sp-boko-haram-attacks-nigeria-baga-ignored-media>

40 <http://www.newstatesman.com/politics/media/2015/11/disproportionate-coverage-paris-attacks-not-just-media-s-fault>

41 Gallimard, 1987, p. 70.

# 3

## Key points

- Take care when broadcasting live
- Take note of media blackouts during security operations
- Source information and qualify informants
- Correct any errors immediately and visibly
- Be cautious about leaks and confidential sources
- Explain why anonymity has been granted to a source
- Make use of experts, but exercise caution
- Keep a sense of proportion
- Don't glamorise terrorists
- Respect the dignity of victims, and particularly children
- Don't use respect for privacy to justify obscuring the truth
- Don't leave it to others to 'qualify' an act or group
- Avoid a moralist ideological approach that blurs reality
- Remember that not all words – jihadism, war – can be used objectively
- Take figures and polls with a grain of salt
- What to show and how? The balance between the duty to inform and respect for privacy
- Publish essential images without resorting to sensationalism
- Be careful publishing images of onlookers
- Check the veracity of images before publishing
- Avoid amalgams and generalisations
- Control and deconstruct hate speech, rumours and conspiracy theories



## Chapter 3

# Ground Rules

### 3.1 The discipline of caution and doubt

**Covering terrorism is a unique challenge for the media, because of the confusion and the anguish it causes, the thirst for real-time information it elicits, the political stakes involved and every player's wish to control the narrative.**

Doubt and caution are accordingly a constant requirement. “Oh, just one more thing”: the catchphrase of the hero of the well-known television series “Columbo” applies to the coverage of terrorism, because it lends itself to every short-cut and every ruse.

It could be said, as the professor and journalist Jeff Jarvis suggested at the time of the Boston Marathon attack on 15 April 2013 that the media should have a programme called “What We Do Not Know News.”<sup>1</sup>

The *New York Times* adopted the phrase to cover the killings in Orlando on 12 June 2016 and the massacre in Nice on 14 July 2016, when they published articles entitled “Orlando Shooting: What We Know and Don't Know” and “Truck Attack in Nice, France: What We Know, and What We Don't”.

When an attack takes place, the media go into emergency mode. They give priority to live broadcasting in a context dominated by uncertainty and news snippets, amidst a media environment that is increasingly taken up by social networks working overtime. The snares of rumours, disinformation and emotion

<sup>1</sup> <http://buzzmachine.com/2013/04/22/and-now-the-news-heres-what-we-dont-know-at-this-hour/>

are ever present. Twitter accounts publish photos of allegedly missing persons, announce inexistent abductions and disseminate unconfirmed claims. For the media, restraint is a crucial issue, because the impact of terrorism increases with such rumours and false news, distracting the police from urgent tasks and sparking confusion and fear within the population.

The practice of live blogging (publishing information online in real time) means a permanent risk of overreaction, even on the sites of traditional media. This mix of information gathered by the editorial team and other sources, along with reactions and comments, constantly pushes the media to the limit of the truth, even though some reassure themselves or justify their actions by saying that they can quickly correct a piece of information if it turns out to be incorrect. However, as Chris Elliott, *The Guardian's* former Readers' Editor wrote, "‘Never wrong for long’ is not an appropriate maxim when millions of people are seeking reliable information in a fog of rumour and claim alongside counterclaim."<sup>2</sup>

It is essential to remain critical of other news players, and to be wary of oneself and one's own prejudices. Even pillars of the media and major news agencies can make mistakes. If a piece of information cannot be checked, it must be sourced and marked as such, by giving its origin and warning the public that it

**“‘Never wrong for long’ is not an appropriate maxim when millions of people are seeking reliable information in a fog of rumour and claim alongside counterclaim.”**

has not yet been confirmed. This rule also applies to ‘conventional truths’, preconceived ideas and widely accepted theories, such as the oversimplified theory that terrorism originates in discrimination or poverty.<sup>3</sup>

Anne Speckhard, the author of *Talking to Terrorists*, gives an example. Her interviews with the families of terrorists show that, even if the parents of Palestinian suicide bombers declare that they are proud of their ‘martyr’ children in public,

in private, they often express bitterness towards the organizations that recruited them and led them to commit suicide. “They celebrate in public, but privately are devastated”, she wrote.<sup>4</sup>

Everything must be checked, weighed and justified. The famous adage of sceptical journalism, “If your mother says she loves you, check it out”, applies now more than ever.

<sup>2</sup> <http://www.theguardian.com/commentisfree/2015/nov/23/what-we-got-right-and-wrong-in-coverage-of-the-paris-attacks>

<sup>3</sup> [http://www.lemonde.fr/les-decodeurs/article/2015/11/25/cinq-idees-recues-sur-l-islam-et-le-terrorisme\\_4817306\\_4355770.html](http://www.lemonde.fr/les-decodeurs/article/2015/11/25/cinq-idees-recues-sur-l-islam-et-le-terrorisme_4817306_4355770.html)

<sup>4</sup> <http://www.smh.com.au/comment/terrorists-the-word-from-inside-their-minds-20130725-2qn6y.html>

When faced with a terrorist attack, the media's reflex is to try to name the perpetrator as quickly as possible. The risk is rushing into accusations that are founded on similarities with other attacks, the credulous acceptance of official theories and even prejudices. In many cases, media have extrapolated facts from insufficient clues and formulated theories that turned out to be false. In March 2012, after French soldiers of foreign origin were killed in Montauban, France, some media first privileged a far-right connection, whereas the perpetrator of the crimes, Mohamed Merah, claimed a radical Islamic view. Similarly, when Oklahoma City, United States, was attacked in 1995, many media immediately underlined the Arab connection, describing "two suspects of Middle Eastern appearance with dark hair and beards." The perpetrator, Timothy McVeigh, was actually white and belonged to the far right.<sup>5</sup> Some media even gave the names of four American-Arab "suspects", without carefully checking their information, despite the severity of the accusations.

The consequences of such a mistake can be disastrous for the persons and communities thus stigmatised. In the days following the Oklahoma City attack, Hamzi Moghrabi, chair of the American-Arab Anti-Discrimination Committee, processed dozens of cases of harassment and threats towards people "of Arab appearance" throughout the U.S. Some media justified themselves declaring that they had only used the indications provided by investigators.<sup>6</sup> However, one source of error is excessive deference to the authorities, as if they knew the truth. During the Madrid attacks in 2004, the media first transmitted the Spanish government's position, accusing ETA. The assumption had its logic, as the separatist, armed Basque organization was still active. It should not, however, have eclipsed the other possibility, which was that Islamist extremists were behind the attack, as the Spanish government had backed the invasion of Iraq in 2003. Most media rushed to correct the mistake as soon as leads were confirmed, but the episode marked a fracture between journalists and the word of the State.

Journalists specialising in terrorism mainly rely on sources within the institutions and organizations concerned. For obvious reasons, these sources most frequently need to remain anonymous. However, they are rarely neutral or disinterested. The information they disclose can thus hold half-truths, or even lies in the service of political causes. In *Packaging Terrorism*, Susan Moeller, professor at the University of Maryland, gives a good summary of the dangers involved for journalism: "Media over-rely on official (and former official) sources for both breaking information and analysis – and do too little vetting and public disclosure of their conflicts of interest. They present the officials' statements as fact, too rarely offering independent discussion or confirmation of those statements. They often let officials speak anonymously."<sup>7</sup>

5 <http://ajrarchive.org/Article.asp?id=1980>

6 <http://ajrarchive.org/Article.asp?id=1980>

7 Susan Moeller, op. cit., p. 61.

'Tips' and leaks must be taken with extreme circumspection, because they can be false. It is sometimes very tempting for media or individual journalists to give the impression that they are close to the police investigation teams. The downside is that they can serve as instruments for strategies and manoeuvres that are beyond them. The sphere of counter-terrorism complies with the demands of the realm of intelligence, and it is guided more by dissimulation and disinformation than by information ethics. This means it is more important than ever for journalists to have many, varied sources at their disposal, whether they are institutions, universities or civil society. They can thus check everything, especially the information that seems so striking and exclusive that they would love nothing better than to publish it.

Editorial teams should take certain precautions to reduce the risks posed by anonymous sources: the journalist should, in particular, justify this process to the chief editors, and explain to the public why the source wished to remain anonymous. Some media require that their journalist disclose the identity of the anonymous source to a superior among the editing staff.

After an attack, official declarations, condolences and expressions of grief or indignation must also be checked with the 'hypocrisy detector'. The Hispanic site, *Fusion*, did this following the attacks against Orlando's LGBT community in 2016, by reminding their readers of the discriminatory and stigmatising declarations made by anti-LGBT politicians suddenly desperate to exhibit their "compassion" for the victims.<sup>8</sup>

The same circumspection must be applied for experts. More even than for other subjects, the task of explaining and framing terrorism is regularly entrusted not to media editorial teams but external experts, in the form of interviews or opinion articles. These often bring a true wealth of information, but caution is still required. The media should be wary of the peremptory declarations of TV celebrities claiming to know and understand everything. Experts can make mistakes, because they are the prisoners of theories developed too far from the reality of the situation. They may also frame their input so as to promote a political agenda: theirs, that of the institution they work for, or that of the foundations, ministries or intelligence agencies, etc., that fund them. They can exaggerate the threat because their professional economic model depends on it.

It is thus crucial to check the quality and independence of their expertise. The media must specify the qualifications of these experts, the institution they belong to (left-wing or right-wing, linked to a university or a ministry, etc.), and ensure they lift any ambiguities in the questions that are set to them. It is thus essential for the media to question experts in a contradictory way, as they would other news players, witnesses, or politicians, and not treat them as scientists who know the truth and seem infallible and therefore incontestable.<sup>9</sup>

8 <http://fusion.net/story/3122969/Orlando-pulse-massacre-politicians-react-hypocrisy/>

9 <http://www.slate.fr/story/110375/faux-experts-terrorisme>

Covering terrorist violence also requires keeping a sense of proportion. Reason must be the rule, in the volume of the journalistic coverage – too much information can cause just as much anxiety as too little information – in its “sound level” and in its portrayal of violence. The portrayal of violence is a media classic, fuelled by news programmes, but also by many films, TV series, and video games. “When it bleeds, it leads” is a common adage. The media practically go on auto-pilot, almost automatically contributing to the amplification of the terrorist impact, and even its exaggeration. They must be aware of this, and constantly assess their treatment of information to re-establish a sense of restraint and balance if necessary. (See: *Confronting fear*, page 38)

**Too much information can cause just as much anxiety as too little information – in its “sound level” and in its portrayal of violence.**

The media must learn to measure their “tone”, not to feed the “noise machine”, not to contribute to spreading anxiety or fueling anger and not to make the terrorism phenomenon or its players seem larger than they really are. More than ever, the public expects the media to be its anchors and save it from being sucked into the whirlwinds of news.

Are terrorists really being viewed as stars, as some government officials sometimes denounce? Generally, the terms used to refer to the perpetrators of terrorist attacks are terms of condemnation and rejection: the media speak of killers, barbarians, monsters and assassins. However, a certain way of describing terrorists can also unconsciously indicate or elicit a kind of admiration. When we inconsiderately speak of the “mastermind” behind attacks, or of “sophisticated” attacks, are we not running the risk of glorifying the killers and presenting them as exceptional beings, asked National Public Radio (US).<sup>10</sup> (See: *Words*, page 52)

Some portraits of Ilich Ramírez Sánchez, known as “Carlos the Jackal”, the Venezuelan terrorist involved in many attacks in the 1970s, Osama bin Laden, Anders Behring Breivik and Abu Musab al-Zarqawi have sometimes verged on fascination.<sup>11</sup>

When televisions played and replayed a video of one of the terrorists involved in the Paris attacks on 13 November 2015, crowing at the wheel of a 4x4 and dragging corpses that were victims of the Islamic State, did they not unconsciously fuel the sordid attraction of terrorism?<sup>12</sup> The titles of reports and books about terrorists also give an idea of the permanent risk of descending the ‘slippery slope’. Media claim to be indignant at the inhumanity of the killers while

<sup>10</sup> <http://www.wnyc.org/story/breaking-news-consumers-handbook-terrorism-edition/>

<sup>11</sup> <http://www.wnyc.org/story/breaking-news-consumers-handbook-terrorism-edition/>

<sup>12</sup> [http://www.francetvinfo.fr/faits-divers/terrorisme/attaques-du-13-novembre-a-paris/qui-est-abdelhamid-abaaoud-le-cerveau-presume-des-attentats-de-paris\\_1178553.html](http://www.francetvinfo.fr/faits-divers/terrorisme/attaques-du-13-novembre-a-paris/qui-est-abdelhamid-abaaoud-le-cerveau-presume-des-attentats-de-paris_1178553.html)

exploiting it to excite the curiosity of the public or satisfy its “fascination for evil”. One of the aims of terrorists is to project an image of power. When the media exaggerate the strategic sense of terrorist groups or emphasise their tactical skills for ideological reasons – to support police measures or condone an armed intervention – or, by sensationalism, magnify the severity of the threat, they inevitably become the providers of oxygen of which Margaret Thatcher spoke. The loudest journalists, experts or magistrates to denounce terrorism are sometimes those who reinforce its media power.

It is also very tempting and, at first glimpse, not as reprehensible, to praise to the skies people who embody counter-terrorism, working in the security services or the magistracy. Turning the “good guys” into celebrities sometimes consecrates remarkable figures, but there is a real risk of not respecting the critical distance that is essential to journalism.

### 3.2 Respect-based ethics

**Covering terrorism requires respect-based ethics. Victims are at the core of journalistic coverage. Journalists rush towards the victims, to take photos of them and interview them.**

This is part of the duty to inform, but it must be strictly regulated to ensure that the victims and their friends and family are respected, especially since most of the people caught up in an event as victims or witnesses do not know how the media work.

All too often, hordes of journalists race for traumatised people, jostle them, fire questions at them and select them according to their supposed role in the theatricalisation of suffering. All too often, they film the wounded and the dead aggressively and get far too close, like the journalists who, after the Lockerbie, Scotland, attack in 1988, lifted the sheets covering deceased persons to take photos of them.<sup>13</sup> All too often, they violate private lives. Was it necessary to play and replay the conversations recorded between the victims of the New York attacks of 11 September 2001 and the emergency services? Raphael Cohen-Almagor, founder and former Director of the Centre of Democratic Studies, University of Haifa, commented: “They exploited the suffering of the people trapped and soon to be dead inside the struck towers, playing again and again the emotional mayhem of people who were trying to cope amidst overwhelming horror, disbelief, fear, and terror. Those sensational broadcasters showed very little sensitivity to the victims in pursuit of better ratings.”<sup>14</sup>

What are the ground rules that journalists should follow to both fulfil their duty to inform and respect victims’ dignity and rights? They can depend on local contexts. In warring countries, for instance, the imperative of facilitating the

<sup>13</sup> Joan Deppa, *The Media and Disasters: Pan Am 103*, David Fulton Publishers, London, 1993.

<sup>14</sup> <http://www.cjc-online.ca/index.php/journal/article/view/1579>

## BALANCING INFORMATION WITH HUMANITY

The Dart Center for Journalism and Trauma, an organization specialising in issues linked to the journalistic coverage of violence, published a series of guidelines that best combine the principles of information and humanity. It also called for the media to remember that victims have rights, including that of granting or refusing their “informed consent” to interviews or photos.

Here are the main points:

1. **Ask the victims’ consent.** Victims have the right to refuse to be interviewed or filmed.
2. **Assess the state of shock** of the persons being interviewed: it is possible that they are not able to grant their “informed consent” and could feel manipulated.
3. **Do not aggravate the victims’ state of shock.** Questions must be cautious and respectful. Photographers and camera operators in particular must ensure they do not violate the victims’ privacy. Do not ask stupid questions such as “How do you feel?” – one of the first symptoms of an attack is a numbing of the senses.
4. In some countries, be **extremely attentive to local cultural codes**, particularly when interviewing women.
5. If victims refuse to give their testimony, **do not offer money to persuade them.** Interview the heads of humanitarian organizations for the information you need instead.
6. Think of the **impact of the photos of victims** and the testimonies of survivors on their families.

Source: <http://dartcenter.org/content/working-with-victims-and-survivors>

dissemination of information, especially for the families of the victims, can outweigh the respect of private life, and even death. In Iraq, after the car bombing in Karrada District in 2015, at least one television channel broadcast the official lists of the dead and wounded, which had been provided by a local hospital.<sup>15</sup>

The Dart Center has also published specific recommendations for interviewing children who are the victims or witnesses of violence. (See also: *Images of children*, page 63) These stress the necessity of seeking the informed consent of a parent or guardian, the caution needed when asking questions

15 <http://www.aljazeera.com/news/2015/05/150509151030459.html>

and the utmost attention that must be paid to respecting the child's dignity and psychological state.<sup>16</sup>

However, these respect-based ethics should not become a pretext to withhold the truth. During the Lockerbie attack in Scotland in 1988, the relative of a family of victims was indignant at the intrusive and even violent behaviour of some journalists, who were filming people in tears or fainting from pain. They later confided: "It is very important to record these raw emotions, even if it's unpleasant for people who hold to their private life. During these moments, we are no longer private individuals and must forget our own ego for the good of all." This opinion may seem insensitive to some, but it questions ethics, which must not obstruct the duty to inform.

### 3.3 Victims: more than just names

After the attacks of 11 September 2001, the *New York Times* published portraits and biographies of the victims. It was time to "break through the abstraction". "Previous mass-death treatment was too telegraphic," declared Christine Kay, a *New York Times* Metro editor. "They had birth date, where they went to school... They weren't impressionistic."

"And impressionism," added journalist Roy Harris, "rather than obituary-style detail, was needed to help readers see these victims as real people."<sup>17</sup>

This presentation was adopted by French newspapers such as *Libération* after the Paris attacks on 13 November 2015 and *Le Soir* after the Brussels attacks on 22 March 2016. The idea is to give a face, a personality to the victim by eliciting a passion, a hobby or a philanthropic commitment that gave meaning to their lives.

"What if you focus on this one woman gardening, one man taking his daughter to ice-skating lessons, or maybe smoking cigars?" asked Christine Kay. In a subliminal way, this technique also makes everyone equal, human beings facing suffering or death.

### 3.4 Words

It was stated in the first chapter that the terms 'terrorist' and 'terrorism' are almost always controversial. The main news agencies, media institutions and newspapers use these words sparingly, more frequently preferring to use concrete terms like "bombers" or "attackers", to the great displeasure of governments or the public, who want the "assassins" and "barbarians" to be denounced directly.<sup>18</sup>

16 <http://dartcenter.org/content/interviewing-children-guide-for-journalists>

17 Roy Harris, *Pulitzer's Gold: A Century of Public Service Journalism*, Columbia University Press, New York, 2016, p. 47.

18 <http://www.aljazeera.com/programmes/listeningpost/2013/05/201352512137941940.html>

For the media, as for the UN, the challenge is finding “the most objective” term, the least partisan possible, to describe a particular act or violent organization. Is a group defined by its actions or its ideology, its means or its ends? It is relatively easy to call any indiscriminate attacks against civilians or violent actions targeting State representatives (police officers, magistrates, soldiers, etc.) “terrorist” attacks. This was the case of the attacks perpetrated by the Red Brigades or the far right in Italy during the two decades – from the end of the 1960s to the end of the 1980s – that are known as the “Years of Lead”. Or the attacks orchestrated by *Action Directe* (AD, or “Direct Action”) in France, the *Rote Armee Fraktion* (RAF, or “Red Army Faction”) in West Germany, ETA in Spain and the IRA in the United Kingdom. The sarin gas attacks perpetrated by members of the *Aum Shinrikyo* sect in Tokyo, Japan, on 20 March 1995 are also considered terrorist attacks.

The Latin-American guerrilla movements in the 1970s and 1980s, however, are a different matter. Examples are the Uruguayan Tupamaro National Liberation Movement, denounced as a terrorist movement by the authorities while its members saw themselves as progressive militants fighting against dictatorial governments. How should we refer to political groups that resort to terrorist acts, i.e. acts targeting non-combatants, in situations of dictatorship or occupation?

Editorial teams have battled with the “terrorist” puzzle for years. While terrorist violence is unanimously rejected, this ethical position does not solve the terminological dilemma. “Some words have emotional resonance, or their definitions are highly debatable”, says the Reuters handbook under “emotive words”.

“Apocalyptic language is the language on which fundamentalism prospers.”

What can be done? Charles Prestwich Scott, one of *The Guardian*’s former editors, coined the famous phrase “Facts are sacred, but comment is free”, even though, ideally, comment is only respectable if it is founded on proven facts. It is legitimate for opinion articles and editorials to use the terms ‘terrorism’ and ‘terrorist’ freely, even to fuel controversy, if organizations resort to violent, indiscriminate actions. In the news, however, greater restraint is required, and the priority must be placed on describing an act rather than ‘qualifying’ it, often under the pressure of emotion, public opinion or the authorities.

There are two crucial criteria to using these terms:

- **Use them relevantly.** In an international scene dominated by crossed propaganda campaigns, there is a permanent temptation to exaggerate, bringing some to immediately qualify radical protests as “terrorist” acts.
- **Keep the mastery of words.** Media must faithfully take up, between inverted

commas or by giving the source, the term that is used by others (government, rebels, etc.), but they must not give others the privilege of defining a group or describing an action, whether they are armed groups, public authorities or “partisan associations”. The journalist has a duty to be autonomous in his or her service of the truth. He or she must avoid being only the reporter or the messenger of interpretations forged by the players of current events, who are, by definition, partial. The journalist must “neutralise” and “objectify” declarations, particularly those expressed in interviews, by giving the facts, the figures and the data allowing the public to rationally judge the use of words. Susan Moeller, author of *Packaging Terrorism*<sup>19</sup>, for instance, offers three criteria in her characterisation of terrorism: the deliberate targeting of civilians; the goal, beyond the victims, of affecting public opinion as broadly as possible and the intention to create a psychological impact that is greater than the physical damage caused. (See: *What is terrorism?*, page 19)

Moeller, a researcher for the University of Maryland, United States, specialises in the media’s role in the international scene. She also warned against taking a mainly moral and ideological approach to terrorism by speaking of it as ‘**an axis of evil**’, ‘**barbarity**’ or ‘**abjection**’. She thus wrote: “When terrorists are talked about as a monolithic enemy rather than as distinctive actors looking to

**Words largely choose their side, as when some speak of ‘assassins’ and others of ‘martyrs’, of an ‘incursion’ or an ‘invasion’, an ‘attack’ or ‘reprisals’.**

achieve specific political ends, when terrorists are portrayed as brainwashed religious fanatics not as rational political actors, terrorism seems inexplicable.”<sup>20</sup> An emotional approach actually complicates the rational study of the phenomenon and thus risks leading to the adoption of ineffective measures. Furthermore, as British academic Jacqueline Rose noted, “Apocalyptic language is the language on which fundamentalism prospers.”

The controversy extends to many more words than “terrorism”, because words largely choose their side, as when some speak of ‘**assassins**’ and others of ‘**martyrs**’, of an ‘**incursion**’ or an ‘**invasion**’, an ‘**attack**’ or ‘**reprisals**’. This “collateral language”<sup>21</sup>, which infiltrates any discussion on terrorism and the response chosen to oppose it, is constantly used by opposing sides to impose a partial vision of current events and intimidate the journalists who use the “wrong words”. However, the media must use caution when they take up the words coined by terrorists or the authorities. These are coded words, whether

19 Susan D. Moeller, *Packaging Terrorism: Co-opting the news for politics and profit*, Wiley-Blackwell, 2007, p. 18.

20 Susan D. Moeller, op. cit., p. 22.

21 *Collateral Language: A User’s Guide to America’s New War*, New York University Press, 2002.

they are **'revolutionary tax'**, which is nothing less than an extortion, **'surgical strikes'**, which tend to deny the impact of bombings on the civilian population, or **'enhanced interrogation techniques'**, a synonym of torture. They must also be rigorous when using words as loaded as **'fundamentalism'** and **'genocide'**, and prefer the rigorous explanation to the imperious statement.

Further controversy surrounded the designation of the **'Islamic State'**, the movement established by Abu Bakr al-Baghdadi in Syria and Iraq, giving an idea of the semantic battlefield. France, for instance, pleaded for the exclusive use of the term **'Daesh'**, the Arab acronym of 'Islamic State of Iraq and the Levant', *Dawlat islamiya fi 'iraq wa sham*.<sup>22</sup> Laurent Fabius, France's Foreign Minister, thus stated: "The terrorist group we're talking about isn't a state; it would like to be, but it's not, and to call it a state is to do it a favour. Likewise, I recommend not using the expression 'Islamic State', because it leads to confusion between 'Islam', 'Islamism' and 'Muslim'." In the Saudi newspaper *Riyadh*, Amjad Al Munif underlined the similar viewpoint of several other Arab-speaking media sources who denounced "semantic propaganda".<sup>23</sup> Furthermore, during an interview with *Al-Arabiya*, the Grand Mufti of Egypt noted that the group "is not a State but [...] terrorists", and that they "had nothing to do with Islam". He asked the media not to use the group's full name in Arabic, but rather to call it "the terrorist organization of Daesh".

For some, it is not only a matter of determining whether or not an organization should be characterised as 'terrorist', but denying it the right to name itself, as the name is a crucial element in a group's propaganda. This position is confirmed by the fact that the organization in question severely punishes those who call it the "wrong name", revealing the stakes of this battle of words and acronyms.

What is the right practice? All the players involved in terrorism have a keen awareness of the importance of words, to the extent that authorities have developed counter-message strategies. An example is the document published by the U.S. Department of Homeland Security, "Words that work and words that don't: A guide for counterterrorism communication."<sup>24</sup> In its resolution of 19 December 2015 and in its sanctions list, the UN uses the acronym 'ISIL' (Islamic State of Iraq and the Levant), but adds "also known as Da'esh".

The media have the right to use any term they want, due to their freedom of expression and the definition of their editorial line, but is it not more journalistically logical to refer to an organization by the name it has given itself? In his book *Jihad Academy*, the journalist and former hostage Nicolas Hénin wrote:

22 <http://www.metronews.fr/info/Iraq-et-syrie-ne-dites-plus-etat-islamique-dites-daech/mnio!U1u1LnHQJYy2k/>

23 <http://www.alriyadh.com/1055386>

24 <http://www.investigativeproject.org/document/127-words-that-work-and-words-that-dont-a-guide-for>

“I consider that I should not use any other name than the one it uses itself; I’d prefer to focus my critique on its actions and ideology rather than resort to anathema.”<sup>25</sup>

The Associated Press (AP) agency has chosen the middle path by using the name ‘Islamic State group’ “to avoid phrasing that sounds like they could be fighting for an internationally recognised state.”<sup>26</sup> *Agence France-Presse* (AFP) uses the expressions “the Islamic State organization”, the “Islamic State group” or the “Jihadists of IS.”<sup>27</sup> Others choose to speak of the “group known as Islamic State”. And some try to avoid the issue by privileging the use of the acronym, IS, the way people refer to the ETA or the FARC, without feeling themselves obliged to write out the full name.

The same questions could be asked regarding the term ‘**Jihadist**’ itself. This expression is increasingly used, if only to avoid using the expression ‘Islamic terrorist’, which some fear stigmatises Islam in its entirety, and not only those who claim to follow it to wage their war. But is that not playing into the hands of terrorists? Some believe it is. “Regarding jihad, even if it is accurate to reference the term [...], it may not be strategic, because it glamorises terrorism, imbues terrorists with religious authority they do not have”, noted a memorandum of the U.S. Homeland Security department.<sup>28</sup>

Allie Kirchner, researcher for the Stimson Center, a research centre in Washington, commented, “Terrorists have exploited the word jihad to create the false

impression that the text of the Quran supports their violent crimes.” She further added: “By focusing on the narrow concept of jihad used by terrorists, the U.S. media has inadvertently reinforced the link between terrorism and Islam within the American consciousness and contributed to the negative perception of Islam held by an increasing percentage of the American public.”<sup>29</sup>

**“Strictly speaking, jihad means an inner spiritual struggle, not a holy war. It is not by tradition a negative term. It also means the struggle to defend Islam against things challenging it.”**

*Al Jazeera*’s style guide banishes the term: “Strictly speaking, *jihad* means an inner spiritual struggle, not a holy war. It

is not by tradition a negative term. It also means the struggle to defend Islam against things challenging it.”<sup>30</sup> The term is even more contested as it is

25 Fayard, Paris, 2015, p. 9

26 <https://blog.ap.org/announcements/now-we-say-the-islamic-state-group-instead-of-isil>

27 <http://bigbrowser.blog.lemonde.fr/2015/06/30/comment-designer-letat-islamique/>

28 Cited in *Terrorism and the Press: an uneasy relationship*.

29 <http://www.stimson.org/spotlight/losing-the-meaning-of-jihad-terrorism-and-the-us-media/>

30 <http://www.poynter.org/2015/al-jazeera-memo-illustrates-the-importance-of-word-choice/315683/>

used, in counter-jihad expression, by some neo-conservative and even far-right groups who, behind a critique of terrorism, lead a more general campaign against Islam.

Similarly, should we speak of a '**war**' against terrorism? After the attacks of 11 September 2001, the Bush administration decreed a "war against terror". Then, after the Paris attacks of 13 November 2015, French President François Hollande spoke of a "war against terrorism". In both cases, commentators intervened to dispute the expression, either to polemicise, or, more rationally, by showing that the term was inappropriate. Peter Goldsmith, General Attorney of England and Wales from 2001 to 2007, said "If you talk about a people as engaged in a 'War on Terror', you risk not only dignifying their cause, you risk treating them as soldiers and not as criminals."

U.S. President Barack Obama also declared himself against this term and in 2009 advised against using it, preferring to refer to a "fight" against terrorism.<sup>31</sup> The testimony Dominique Faget from *Agence France-Presse* gave after the Paris attacks of 13 November 2015 gives an idea of the reticence of referring to terrorist actions as a "war": "Over the past few days I've heard a lot of people speak of 'scenes of war,' of 'a situation of war,' of 'war medicine.' But you have to put things in perspective. On Friday, November 13, we witnessed a series of terrorist attacks in Paris, blind massacres, the worst attacks the French capital

31 <http://www.theguardian.com/world/2009/mar/25/obama-war-terror-overseas-contingency-operations>

## CONSIDERING WORDS

Roy Peter Clark from the Poynter Institute for Media Studies, St Petersburg, United States, summarises all these dilemmas in a list of questions:

1. What is the **literal meaning** of the questionable word or phrase?
2. Does that word or phrase have any **connotations**, that is, associations that are positive or negative?
3. How does the word correspond to **what is actually happening** on the ground?
4. What group (sometimes called a '**discourse community**') favours one locution over another, and why?
5. Is the **word or phrase 'loaded'**? How far does it steer us from neutral?
6. Does the word or phrase **help me see**, or does it **prevent me from seeing**?

has seen since the liberation in World War II. But this is not a war. War - like what I covered in Lebanon, in Chad and more recently in eastern Ukraine - is to live in daily fear of death, to live on borrowed time, to not have security anywhere, anytime. It's to watch people falling around you every day, from bullets or shells that rain down on entire cities. It's to have dead bodies lying on the street, because people are too scared to go outside to take them away. War is when – at any moment – you risk finding yourself at the mercy of an isolated shooter or lunatic, those who run around without restraint in most of the world's conflict zones. War is when you can't count on the police to ensure security, when you see thousands of refugees on the roads. 'War medicine' is when you have to amputate in a hurry an extremity [a limb] that in normal circumstances would have been saved."

**“This is not a war. War is to live in daily fear of death, to live on borrowed time, to not have security anywhere, anytime. It's to watch people falling around you every day, from bullets or shells that rain down on entire cities.”**

What position should be adopted? Once again, editorial writers have the right to choose whether they call the fight against terrorism a “war” and whether they condone a country's communication policy. However, journalists must show more impartiality, either by attributing the expression to those who have chosen to use it, or by using inverted commas to show that it is the interpretation of a fact and not a fact that is generally accepted.

The important thing is to decode the term, particularly in the light of international law, and to indicate whether or not it is contained in a policy that mainly focuses on propaganda and a “battle of ideas”. The journalist's role implies maintaining a critical distance from all speeches, official or not, and requires explaining to the public the meaning of the words that surround and reveal a policy.

### **3.5 Figures**

**Number of attacks per year, typology of the victims, assessment of counter-terrorist actions, percentage of terrorists in the population, proportion of acts according to the ideology or the religion of the perpetrators, etc. The study of terrorism abounds with figures.**

And with reason, because figures help to guide the reflection on terrorism. Why, for instance, are the vast majority of terrorist attacks perpetrated by men? The attempt to answer this question sheds light on significant aspects of the context and motivations of radicalisation.

However, caution is required, because the collection of these figures often depends on the goals behind their dissemination. Figures frame the understanding of terrorism and significantly determine States' policies and the editorial positions of the media. Figures have consequences. The advocates of a hard fight against terrorism will tend to interpret attack statistics in an alarmist way, while those who fear a blow to freedom or a "clash of civilisations" will undoubtedly attempt to give a more understated perspective. Consequently, all numerical data must imperatively be checked, along with the methodology used to compile it. Its provenance, the period it concerns, who disseminated it and its purpose must also be underlined.

Figures are infinitely seductive. Peter Andreas and Kelly M. Greenhill, the authors and co-editors of *Sex, Drugs and Body Counts: The Politics of Numbers in Global Crime and Conflict*, thus wrote: "it is precisely because numbers are equated with science that they provide such a tempting and powerful political tool. [...] For the media and the broader public, this too often means accepting and regurgitating the claims rather than questioning and challenging them."<sup>32</sup> They add: "There are several straightforward questions that can and should be regularly posed when dealing with conflict-related statistics". These questions are: who came up with them? Why? How? For whom? According to the authors, figures should especially elicit uncompromising questions when the activity measured is secret, hidden and illicit. Their book contains a particularly enlightening chapter on combating the financing of terrorism, which shows the extreme fragility of advanced figures.

These reservations notwithstanding, it is incontestable that carefully gathered and interpreted figures are of real use in carrying out a serious informative work, and are a sort of "detox" for the media sphere, separating truth from lies and thus unraveling urban legends and preventing communities from being stigmatised. It is particularly important not to pick and choose figures based on one's own prejudices: isolating an accurate figure can be another way of skewing information. Choosing a period to show the evolution of the threat – the last three years, or over 50 years – is not neutral either. Such a choice can emphasise or, on the contrary, diminish the magnitude and significance of a form of terrorism.

Furthermore, figures do not say everything. Statistically smaller or less numerous attacks can have a far greater political and societal impact. The political scientist Arnaud Blin thus noted that "terrorism is defined by its psychological and emotional aspect, and that the perception of the facts and their impact is far greater than the raw data". To illustrate his point, he remarked that "a small bomb falling on a bungalow in Corsica, France, would not have the same emotional impact as the *Charlie Hebdo* massacre".<sup>33</sup>

<sup>32</sup> *Sex, Drugs, and Body Counts. The Politics of Numbers in Global Crime and Conflict*, p.264

<sup>33</sup> <http://www.atlantico.fr/decryptage/et-origine-terroristes-commettant-plus-attaques-dans-mondeest-alain-blin-1958758.html>

The media must also resist the temptation to rush and rely too heavily on surveys, which often make up “degree zero” journalism. Unfiltered, they lend themselves to sensational or simplistic headlines. The media also too often refrain from reading the details of the survey and simply repeat the summaries. Who commissioned the survey? When was it carried out? On what sample of the population? What were the conditions of security and freedom? What questions were asked? Some institutions that carry out surveys are obviously more conscientious than others, but critical distance is a requisite in all circumstances – even when those who commissioned the survey are respectable intergovernmental or non-governmental organizations.<sup>34</sup>

### 3.6 Images

**Images are at the core of terrorist acts. This was already true of plane hijackings, hostage situations and car-bomb attacks, even though terrorists had not mastered image recording or dissemination.**

It is even more so today, now that terrorist groups have their own media such as *Inspire* (Al-Qaida) or *Dabiq* (Islamic State), technical teams, as well as social networks to disseminate their messages or stage their violent actions. Now that witnesses can publish a ‘live stream’ of attacks by using their smartphones and connecting to the main social networks, thus becoming “involuntary reporters”, as *Agence France-Presse* has put it.<sup>35</sup>

Knowing how to “strike a balance between [the] duty to inform the public, [...] [the] concern for the dignity of victims being paraded by extremists, and the need to avoid being used as a vehicle for hateful, ultraviolent propaganda”, in the words of Michèle Léridon, Global News Director at *Agence France-Presse*, has become a critical issue.<sup>36</sup>

The debate raged in France more fiercely than ever after the attacks that took place in Nice on 14 July 2016 and Saint-Étienne du Rouvray on 26 July 2016. The French newspaper *Le Monde*, which had already chosen not to publish photos or video clips disseminated by terrorists, decided to apply this rule to the photos of mass murderers to avoid the “posthumous glorification” of terrorists, as editorial director Jérôme Fenoglio announced.

This decision was then taken by other media, some of which went further by banishing any mention of the names of perpetrators. It was, however, contested. Michel Field, news director at *France Télévisions*, thus questioned: “Anonymous attacks, without names or faces? Nothing could better activate roving conspiracy theories or promote social anxiety, which already suspects the media of not saying everything or of wanting to silence the truth.”

34 <http://journalistsresource.org/tip-sheets/research/statistics-for-journalists>

35 <https://correspondent.afp.com/involuntary-reporters>

36 <http://blogs.afp.com/makingof/?post/couvrir-l-etat-islamique-afp>

These dilemmas are nothing new, but they have taken on a further dimension since the proliferation of the Internet and social networks. Not only the propagandists of terrorist organizations, but also web users who are little concerned about the most basic rules of journalistic ethics can operate with complete impunity. The *Columbia Journalism Review* thus opined that “the traditional media are no longer the sole arbiter of what should or should not be seen.”<sup>37</sup>

Glorification can set in, and even become self-sufficient, first within the “jihado-sphere”. (See: *Words*, page 52) Cacophony and uncertainty prevail. “Nobody knows exactly where the line separating newsworthy from dangerous or overly disturbing content lies”, noted the *Columbia Journalism Review*.<sup>38</sup>

For instance, was it right to disseminate the images of people falling from New York’s Twin Towers on 11 September 2001? To publish scenes of hostages who have been beheaded, even just in short clips or photos? To disseminate video-surveillance images from the Parisian restaurant where a terrorist blew himself up on 13 November 2015?<sup>39</sup>

Lively controversy broke out when images were disseminated showing the execution of a policeman by one of the *Charlie Hebdo* attackers in Paris on 7 January 2015, and the execution of an unarmed security guard during the Westgate mall attack in Nairobi in September 2013.

Should victims’ bodies be shown in general? The law often contains answers to these questions. When Claude Erignac, Prefect of Corsica (France), was assassinated in February 1998, France’s justice system condemned media that had published a photo of his body lying on the pavement. In France, the dissemination of images showing victims is punishable by a €15,000 fine.<sup>40</sup>

In other countries, situations can vary. After the Ben Gardane attack in Tunisia in March 2016, the Arabic-speaking online platform Sasa News claimed that Tunisian media were widely disseminating images of the bodies of victims and terrorists. Radhia Nasraoui, President of the Association for the Fight Against Torture in Tunisia (AFTT), criticised their conduct, stating that the dignity of the

**The challenge is mainly ethical. The media’s choice will thus vary according to their level of sensationalism and professionalism, but also their political line, and whether they attempt to conceal or magnify violence.**

37 [http://www.cjr.org/behind\\_the\\_news/to\\_publish\\_or\\_not\\_foley\\_video.php](http://www.cjr.org/behind_the_news/to_publish_or_not_foley_video.php)

38 [http://www.cjr.org/behind\\_the\\_news/to\\_publish\\_or\\_not\\_foley\\_video.php](http://www.cjr.org/behind_the_news/to_publish_or_not_foley_video.php)

39 <http://www.rtl.be/info/monde/france/m6-revele-la-video-de-l-explosion-de-brahim-ab-deslam-a-paris-de-nombreux-telespectateurs-sous-le-choc-813044.aspx>

40 [http://www.liberation.fr/france/2016/07/15/nice-apres-l-attaque-rumeurs-et-videos-choquantes-sur-les-reseaux-sociaux\\_1466284](http://www.liberation.fr/france/2016/07/15/nice-apres-l-attaque-rumeurs-et-videos-choquantes-sur-les-reseaux-sociaux_1466284)

dead, as well as that of detained persons, had to be respected, because of the lack of charges against them.<sup>41</sup>

However, the challenge is mainly ethical. The media's choice will thus vary according to their level of sensationalism and professionalism, but also their political line, and whether they attempt to conceal or magnify violence. In *Control Room* (2004), a documentary focusing on the media and particularly *Al Jazeera* during the invasion of Iraq in 2003, the Egyptian-American producer Jehane Noujaim concluded that the Qatari channel had chosen to show an unfiltered vision of the war, without erasing graphic or bloody images.

On the contrary, U.S. channels mainly showed a “clean war” made up of “surgical” strikes and causing only “collateral damage.”<sup>42</sup> In the case of terrorist acts, Paul Wood, a reputed BBC reporter, stated that the rules of “taste and decency” effectively “soften or sanitise – that is censor – the horror of the event.”

How can the media find their way between all these practices and standards? How can they not play into the hands of terrorists, while not using these ethical or political considerations as pretexts to hide the truth? Some media may be tempted to “adapt” images by removing or blurring certain elements, but such a practice is unacceptable if it aims to mask elements that could “betray” reality, especially to guide the political interpretation of an image. This practice can, however, be justified if the goal is to mask or delete elements that could shock the public, compromise the dignity of the victims or afflict their friends and family.

The beheading of hostages by terrorist groups crystallised these debates within editorial teams. *Agence France-Presse* thus abstained from disseminating videos of beheadings. The agency's Global News Director Michèle Léridon wrote: “We released only a very small number of still images from those videos, and tried to ensure they were the least degrading towards the victims. [...] We also try to seek out and publish photos of the victim taken before their ordeal, to try to give them back some dignity in death.”<sup>43</sup> Reuters published video stills on its Twitter accounts and posted an edited version of the video on its website, without the beheading or its aftermath. Their criterion? Deciding “whether the material is necessary to an understanding of the reality portrayed or described,” states the agency's “Handbook of Journalism”. In other words, whether it is newsworthy and serves public interest.

The *New York Times* chose to publish a medium black-and-white photo taken from an Islamic State video on an inside page of its print edition. The newspaper's editorial staff neither published the video online, nor included a link. Dean Baquet, the newspaper's executive editor, stated “There is no journalistic

41 [http://www.sasapost.com/media\\_coverage\\_between\\_paris\\_and\\_tunis-attacks/](http://www.sasapost.com/media_coverage_between_paris_and_tunis-attacks/)

42 <https://www.youtube.com/watch?v=f3rMo5cgaXQ>

43 <http://blogs.afp.com/makingof/?post/couvrier-l-etat-islamique-afp>

value to my mind of showing what a beheading looks like.” While this was a cautious decision, even this was contested by Margaret Sullivan, the *Times*’ public editor, who thought that “not using anything at all from this despicable video would have been even better.”<sup>44</sup>

For *The Guardian*, the rules are clear: “Do not use the video and avoid pictures that glamorise the perpetrator – i.e. posing with the hostages or with weapons. Use audio sparingly. Only use a closely cropped still picture of the hostage(s) [...]. The main image should ideally be a picture of the hostage(s) in another context.”<sup>45</sup>

Lastly, if televisions do decide to broadcast potentially shocking videos, they must warn their viewers and give them the time to change the channel or look away.

### Images of children

Publishing images of children is generally subject to strict legal and ethical standards, especially when the images feature injured, traumatised or deceased children. In some countries, the images of children must be blurred.

The media regularly publish photos of child victims, believing that they reflect a reality from which we should not turn away. The photo taken of children’s bodies lined up under blankets, faces uncovered, after the Ghouta attack in Syria in 2013 is one example of this, as is that of little Alan Kürdi, a young Syrian refugee, lying dead on a Turkish beach on 2 September 2015. While some Arabic-speaking media were astonished by the global reaction to this photo and chose to focus on the stirring of a global feeling of humanity and guilt, in Europe, its publication unleashed a lively debate within the media and the public. The French newspaper *Ouest-France* declared that it was publishing the photo because it opened the eyes and the conscience, but many readers said they were scandalised.<sup>46</sup>

**Publishing images of children is generally subject to strict legal and ethical standards, especially when the images feature injured, traumatised or deceased children.**

Are there any alternatives? “Instead of using a photo of a dead child, for example, publishing a picture of a child’s clothes covered with blood conveys the same message but is less upsetting,” suggested the German journalist Simon Balzert.<sup>47</sup> There is, however, a limit to

44 <http://publiceditor.blogs.nytimes.com/2014/09/03/should-the-times-have-observed-a-complete-blackout-on-isis-video-images/>

45 <http://www.imediaethics.org/guardians-3-guidelines-for-reporting-on-isis-murder-videos/>

46 <http://www.odi.media/wp-content/uploads/2015/09/Billet-du-Mediateur-du-Monde-du-3-septembre.pdf>

47 <http://onmedia.dw-akademie.com/english/?p=9779>

this avoidance policy. Belgium's Council of Journalistic Ethics noted that photos could have a significant informational content that took precedent over their potentially shocking character and justified their publication. For the Council, the horror resides in the existence of such scenes, and not in the fact they are shown.

The media should also wonder about the opportunity of publishing photos of children taken before the catastrophe, and acquired from the victim's loved ones or taken from social networks. More than the legal issues, the crux of the matter is arbitrating between the need to inform and the ethics of respect.

### “Citizen” images

The media increasingly use photos taken by witnesses at the scene of a killing, or at the frontlines.<sup>48</sup>

In the minutes following an attack, photos taken by witnesses are posted on social networks. Very often, journalists hurry to contact their authors and ask if they can republish them. This can sometimes be taken very badly and seen as a “vulture-like” proceeding, especially as some witnesses are bombarded with a large number of requests, despite their stress levels.<sup>49</sup>

*Agence France-Presse* follows clear protocols concerning these “involuntary reporters”: “The first thing we do is to ask if the person is safe. Then we ask if he or she is the author of the image online [...] and then we ask if we could use the image ourselves. Some media don't go through this process and publish whatever they find online,” wrote Rémi Banet and Grégoire Lemarchand, heads of the AFP's social network unit, on 25 March 2016 following the Brussels attacks.<sup>50</sup>

Generally, the witnesses do not expect a financial compensation from the media that ask permission to use their photos. *Agence France-Presse* thus remarked “it's rare. Not one did it following the Brussels attack.” However, some media sometimes offer these “news bystanders” money for exclusive images, despite the ethical reservations expressed. A British tabloid thus allegedly paid €50,000 for a video taken in one of the Parisian restaurants attacked on 13 November 2015.<sup>51</sup>

If such a transaction does take place, very strict criteria should be respected, and it should be ensured that it genuinely satisfies public interest and does not hinder justice. Moreover, the media should not offer money to acquire videos

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48 <http://eyewitnessmediahub.com/uploads/browser/files/Final%20Press%20Study%20-%20eyewitness%20media%20hub.pdf>

49 <http://www.bbc.co.uk/blogs/academy/entries/dba0657a-fb54-4289-a0ad-6e33292ae7e0>

50 <https://correspondent.afp.com/involuntary-reporters>

51 <http://www.theguardian.com/media/2015/nov/24/daily-mail-cctv-video-paris-attack>

produced by attackers. In some countries, such a transaction would represent a criminal offence, punishable by a prison sentence, because it is considered a contribution to terrorism financing.

The use of “citizen” images must be strictly regulated. First of all, this practice could incite simple citizens not only to risk their safety to have their photos disseminated in major media, but also to violate fundamental rules of journalistic ethics, particularly regarding the respect of victims. The media should add clear warnings to their requests in order to prevent such risks.

Next, extreme caution must be used when selecting images, as they may have been tweaked, fabricated or edited to manipulate information. Images must be sourced at all costs. Particular attention must be paid to the images circulating on social networks, or those sent by amateurs or militants who are not known to the editorial team.<sup>52</sup>

Techniques have been developed to check the authenticity of images, such as *Eyewitness Media Hub*'s Reveal project<sup>53</sup> and *First Draft News*' resources.<sup>54</sup>

They are based on a careful analysis of the place, the date and the techniques used, so as to detect incoherencies or reveal manipulations. Google also has a ‘reverse image search’ that allows users to find all the pages on which an image was published.

The same caution must be used for the images disseminated by agencies that take on occasional collaborators in zones entirely controlled by a terrorist organization. Such is the case of photos taken in Raqqa or Mosul by journalists who either work clandestinely or submit their work to censors of the Islamic State group. These photos must have clear captions, so as to warn the public.

### 3.7 Generalisations

**Terrorist attacks often reveal the prejudices that reign among the media and society in general. These prejudices lie behind the temptation to disseminate without restraint rumours incriminating members of specific communities.**

Such news shortcuts create risks of generalising, i.e. stigmatising or even criminalising the entire religious, ethnic, national or political group that terrorists claim to follow. In a study entitled “Tolerance and terror” that was published in 2014, the Media Council of Kenya noted that Kenyan journalists had partly contributed to spreading the dominant idea that people of Somalian descent were potential terrorists.

<sup>52</sup> <http://observers.france24.com/fr/20151106-comment-verifier-images-reseaux-sociaux>

<sup>53</sup> <https://www.journalism.co.uk/news/how-the-reveal-project-aims-to-help-journalists-verify-eyewitness-media/s2/a572616/>

<sup>54</sup> <https://firstdraftnews.com/resource/test-your-verification-skills-with-our-observation-challenge/>

Generalising is a very common temptation. “Islamist” terrorism is thus regularly attributed to the Islamic religion, despite its diversity of beliefs and practices, and to the entire Muslim population. However, no one dreams of accusing “Western civilisation” when an extremist claims to adhere to white supremacy, like the far-right Norwegian terrorist Anders Behring Breivik. This discordancy exposes the media to being accused of bias. It led the Arabic version of RT (*Russia Today*) to note that “We have not seen any experts specialising in the far-right being asked on TV how to combat this type of extremism and prevent it in the future.”

The media must faithfully relate the reactions of the representatives and members of the communities that are suspected or threatened with popular vindictiveness. This implies giving them the appropriate amount of visibility, rather

**The media must faithfully relate the reactions of the representatives and members of the communities that are suspected or threatened with popular vindictiveness.**

than making them news “footnotes”. However, this desire to fight generalisation in the name of journalistic ethics implies also reporting expressions that seemingly condone attacks. In this case, it is crucial to check the accuracy of the alleged declarations or demonstrations of support for terrorist groups, their context and the number of people in the community who express them.

One of the ways to protect oneself from generalising is covering society in all its diversity and complexity – and not only

when there are shocking or dramatic events such as attacks. The knowledge acquired after regular contact with different communities enables the media to give a more representative image of the diverse components of society, rather than blaming an entire community for actions committed by some of its members.

Some States generalise when they consider those who peacefully defend their ideals, such as the respect of their cultural rights or territorial autonomy, to be terrorists because of the presence of armed groups fighting for the same reasons. Intellectually and politically advocating for secession or autonomy is enshrined in freedom of expression and cannot be confused with the justification of terrorist acts committed by violent, separatist organizations.

Admittedly, it is sometimes difficult to establish clear boundaries between terrorist groups and other persons or groups who intellectually or politically share some of their ideals, especially since some movements and political parties are the legal or semi-legal “showcases” of armed groups. Once again, however, journalists must be careful not to automatically adopt the viewpoint of the authorities or the dominant population. It is up to them to carry out an investiga-

tion and validate the information on the groups allegedly serving as façades or acting as satellites for illegal armed groups.

### 3.8 Hate speech

**One of the media's challenges is undoubtedly mastering hate speech and the hateful acts that are unleashed in the aftermath of attacks. The media cannot hush them up as if they could stop the contagion by doing so.**

This form of censorship is counter-productive and in any case, silence does not long resist the pressure of social networks. The media must, on the contrary, help the public to gain an idea of the discussions circulating within the sphere of opinion. Their role is also to analyse them, qualify them and deconstruct them. Particular attention must be paid to forums and 'letters from the readers', as these very often contain the most brutal forms of racism and prejudice. The media should set up moderation systems founded on their principles and values, journalistic ethics and international laws, so as to prevent the freedom of expression and diversity of opinions from becoming pretexts to incitement to discrimination and violence.

The media must, however, consider calls to fight hate speech with a critical perspective. Once again, words are controversial and the international community remains divided on what can actually be construed as hate speech and its counter-measures. Moreover, in authoritarian regimes and even in democratic countries where the press is subjected to campaigns led by well-organised groups, the accusation of spreading hate speech can be invoked abusively to censure the expression of legitimate ideas. As a UNESCO report on online hate speech points out, "Counter-speech is generally preferable to suppression of speech. And any response that limits speech needs to be very carefully weighed to ensure that this remains wholly exceptional, and that legitimate robust debate is not curtailed."<sup>55</sup>

**“Counter-speech is generally preferable to suppression of speech. And any response that limits speech needs to be very carefully weighed to ensure that this remains wholly exceptional, and that legitimate robust debate is not curtailed.”**

### 3.9 Rumours

**Terrorist attacks inevitably provoke rumours, especially as information is difficult to come by, fear agitates public opinion and the media are caught up in the constraints of time and competition.**

55 <http://unesdoc.unesco.org/images/0023/002332/233231e.pdf>

It is all the more tempting to relay hoaxes and speculation when they seem to confirm prejudice or stereotypes. After the Paris attacks on 13 November 2015, *Le Monde* noted that to inform was also to disprove rumours<sup>56</sup>, because their effects, amplified by social networks, can be catastrophic. They can fuel fear and panic, stigmatise communities, slander individuals and give a false idea of reality.

The media must set up a monitoring team tasked with tracking and deconstructing rumours.<sup>57</sup> They must also ensure that their teams use great caution when retransmitting, and especially re-tweeting, unconfirmed information. When a prestigious media channel re-tweets something, the public sees it as proof. “Achieving due accuracy is more important than speed”, notes the BBC in its editorial guidelines.

The fight against rumours also more broadly applies to conspiracy theories, which predictably follow serious attacks.<sup>58</sup> Fantasists build theories by selecting snippets of information, detecting “troubling details” in photos, manipulating declarations or exposing “suspicious coincidences”. These contribute to polluting information flows when they are endlessly repeated and widely disseminated on social networks. The media should take pains to deconstruct them, because they risk not only creating a smokescreen between the news and the public, but also making it easier to generalise and stigmatise.

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56 [http://www.lemonde.fr/les-decodeurs/article/2015/11/20/informer-c-est-aussi-dementir-les-rumeurs\\_4813894\\_4355770.html](http://www.lemonde.fr/les-decodeurs/article/2015/11/20/informer-c-est-aussi-dementir-les-rumeurs_4813894_4355770.html)

57 <https://medium.com/1st-draft/a-crash-course-in-verification-and-misinformation-from-the-boston-marathon-bombing-5f599e6c4476>

58 [http://www.conspiracywatch.info/Theories-du-complot-pour-bien-commencer\\_a1.html](http://www.conspiracywatch.info/Theories-du-complot-pour-bien-commencer_a1.html)

# 4

## Key points

- Provide emergency assistance to victims
- Ensure your own security
- Don't hinder emergency services
- Agree on clear rules for the use of live broadcasting, images, social media etc.
- Assume that terrorist groups have access to the information you broadcast
- Don't interview terrorists or hostages
- Don't describe tactics or strategies of security forces



## Chapter 4

# Covering an Attack

### 4.1 Initial confusion

**Journalists are often among the ‘first responders’, i.e. those who are the first to arrive at the scene of an attack. There, they are faced with major ethical and professional challenges in emergency conditions.**

Which side should come into play first: journalist or rescuer? Should they help the victims, or hurry to take photos of them in their suffering?

*Agence France-Presse’s Editorial Standards and Best Practices* note: “Although we are deployed on the ground to provide news coverage we do not surrender our humanity. [...] it is a consensus that the journalist has an obligation to assist when an innocent person’s life is in danger and no one other than the journalist can help.”

The Dart Center gives the following advice: “Realise that victims may be in shock or severely injured when you first approach them. Calmly introduce yourself and then ask whether they need any medical help. If they do, seek medical help immediately.”<sup>1</sup> In Pakistan, the International Committee of the Red Cross (ICRC) even held training sessions to provide journalists with basic first-aid skills (staunching bleeding, performing a cardiac massage, etc.) so they could help when they were the first to arrive at the scene of an attack.<sup>2</sup>

<sup>1</sup> <http://dartcenter.org/content/first-responders>

<sup>2</sup> <https://www.icrc.org/eng/resources/documents/news-release/2010/pakistan-news-270710.htm>

The media must also think of the safety of their reporters at the scene (See: *Safety of Journalists*, page 91). The perpetrators of terrorist acts may still be there, 'secondary' attacks may be planned, weakened walls could crumble, etc. The media must prepare their teams for this kind of danger and equip them correctly. The Kenyan journalist Osman Mohamed Osman commented on the *Sahan Journal's* website on 5 April 2015 that the journalists who had been sent to the scene of the Westgate mall attack in Nairobi in September 2013 "were not wearing protective gears, a grievous mistake that could have turned fatal."<sup>3</sup>

The Kenyan expert John Gachie added that many of them "were conspicuous by their haste to court danger; tempt fate, grand-stand and hog the limelight. It was by fate that none of the journalists was injured – it was a miracle."<sup>4</sup>

The Dart Center has published a series of invaluable recommendations on the procedures that should be followed, not only to protect journalists but also to inform them how to act around emergency services and victims.<sup>5</sup> Journalists should particularly make sure they do not prevent rescuers from doing their job by coming between them and the victims, setting out cumbersome technical equipment or monopolising the communications networks.

From the first seconds of an attack, journalists must give information as rigorously and as quickly as possible to ensure the safety of citizens, the effectiveness of emergency services and the collective understanding of the event. It is, however, difficult to escape the confusion.

Regarding the Paris attacks of 13 November 2015, *Agence France-Presse* photographer, Dominique Faget, wrote: "My editor tells me that there have been shots fired in [Paris's] 10th arrondissement. For the moment, that's all we know. [...] People are running in all directions, but we don't yet know why. [...] All of the sudden I am pushed by the police along with a group of passersby into a restaurant."<sup>6</sup>

## 4.2 Preparation

**Improvisation is a major risk that the media can partly prevent by establishing procedures before attacks. These must hold up against the chaos that terrorist acts generate by their suddenness and brutality.**

In the aftermath of an attack in Tunisia on 16 July 2014, the French-Tunisian journalist Lilia Blaise commented on the ensuing precipitation, lack of information, erroneous figures, lack of reaction and lack of preparation for a news flash

3 [http://sahanjournal.com/garissaattack-kenyan-media-covers-terrorist-attacks/#.WF6RN\\_krLIX](http://sahanjournal.com/garissaattack-kenyan-media-covers-terrorist-attacks/#.WF6RN_krLIX)

4 [https://issuu.com/mediacouncilkenya/docs/media\\_observer\\_magazine\\_october-dec](https://issuu.com/mediacouncilkenya/docs/media_observer_magazine_october-dec) [p.21]

5 <http://dartcenter.org/content/first-responders>

6 <http://blogs.afp.com/makingof/?post/Guerre-et-guerre>

during primetime viewing. She noted that, between the lack of communication from the authorities and the poor handling of information, some media seemed to have been overwhelmed by the events.<sup>7</sup>

How can a team that is generally divided between several isolated services, e.g. domestic policy, foreign policy, civil society, etc., be brought together? How should reporters be sent to the field? How can the media establish an internal verification and moderation system for information to avoid as many rumours and extrapolations as possible? What experts can they contact? Such mobilisation cannot be improvised. It implies defining roles and tasks, formulating specific editorial and ethical rules, setting up precise instructions and establishing back-up solutions. Anything less is too little too late. In a textbook published by Deborah Potter and Sherry Ricchiardi in 2007, the International Center for Journalists (ICFJ) made a list of the steps to take before a crisis event happens, and how to be prepared to react at any time<sup>8</sup>, which can serve as a roadmap for the media.

It is essential to have solid contacts within the security and emergency services. During the Boston Marathon Attack in the United States in 2013, the local newspaper, *The Boston Globe*, was one of the most reliable sources because it had developed contacts with frontline services at the right time and its journalists knew their strengths and weaknesses. They must also have defined the way to process current events. Having a clear set of fundamental ethics rules (on the use of images, interview rules, respecting the secrecy of security operations, etc.) is decisive. Every member of the editorial team should be aware of them so that they can immediately act in accordance with the media's editorial line. The risk of blunders increases when, in the first moments of an attack, the editorial teams are incomplete because it is the evening, a weekend or a holiday, or they are relying on interns or temporary staff. Reading from a common book of rules is crucial.

Emergencies must also be “domesticated” by planning precise policies on sending out reporters, the chain of command within the editorial team and live coverage. It is crucial to have an experienced news director decide what will or will not be disseminated and in what way. Jeremy Stahl, a journalist for *Slate*, gives an example of lines of conduct regarding the management of social networks: “First, media outlets need to turn off their automated Twitter feeds to ensure that frivolous and/or off-topic items don't get sent out by mistake [...], do not pass on speculation. [...] Don't shame people on Twitter for passing on speculation. Because of the nature of breaking news, factual mistakes will be made and everyone will make them [...] don't rely on people who've heard something on police scanners – a notoriously unreliable source if you're looking for solid, confirmed information.”<sup>9</sup>

7 <https://inkyfada.com/2014/07/media-terrorisme-tunisie-deontologie/>

8 [http://www.icfj.org/sites/default/files/Disaster\\_Crisis.pdf](http://www.icfj.org/sites/default/files/Disaster_Crisis.pdf)

9 [http://www.slate.com/articles/technology/technology/2013/04/boston\\_marathon\\_bombing\\_all\\_the\\_mistakes\\_journalists\\_make\\_during\\_a\\_crisis.html](http://www.slate.com/articles/technology/technology/2013/04/boston_marathon_bombing_all_the_mistakes_journalists_make_during_a_crisis.html)

### 4.3 Live broadcasting

During attacks, the media very often go “live”, a practice that satisfies an urgent need for information, but that also contributes to the inherent dramatisation of the coverage of exceptional events, especially in audiovisual media.

In some countries, the authorities set up news embargoes and ban live broadcasting at the scene of an attack. Officially, this is to protect lives and facilitate police operations, but some governments also resort to this measure to control communications and “frame” the narrative. In 2015, India’s government added a clause to its program code banning the “live coverage of anti-terrorist operations by security forces.”<sup>10</sup> India’s broadcasting union, the News Broadcasters Association (NBA), had already changed its code of ethics following the criticism levelled at the media after the Mumbai attack in 2008.<sup>11</sup>

In spite of this, in the last few years, many of the most emblematic terrorist acts have been covered live and immediately broadcast, not only by the media, but also social networks. In February 2014, the chief of Kenya’s defence forces, Julius Karangi, said before a crowd of journalists that he regretted that, during the attack on Westgate mall, Nairobi, in 2013, the media had covered the event live, allowing the attackers to “monitor activities that the government security

forces were planning.”<sup>12</sup> Strict rules are needed: do not endanger people, do not hinder emergency and security operations, do not provide terrorists with crucial information.

**Strict rules are needed: do not endanger people, do not hinder emergency and security operations, do not provide terrorists with crucial information.**

During the operation that was launched on 9 January 2015 after the attack targeting the satirical newspaper *Charlie Hebdo*, several audiovisual media broadcast a local politician’s announce-

ment that there was a person hiding in the printing firm where the perpetrators of the massacre had taken cover.<sup>13</sup> The same day, a French television channel had made the same mistake when it broadcast an announcement that someone was allegedly hiding in the cold room of the Parisian ‘HyperCacher’ shop where people were still being held hostage. During these January 2015 attacks, despite terrorists being still holed up, some television channels also broadcast information and images showing the deployment of security forces, including

10 <http://timesofindia.indiatimes.com/india/Centre-bans-live-coverage-of-anti-terror-operations/articleshow/46670046.cms>

11 [http://nbanewdelhi.com/pdf/final/NBA\\_code-of-ethics\\_english.pdf](http://nbanewdelhi.com/pdf/final/NBA_code-of-ethics_english.pdf)

12 <http://www.coastweek.com/3706-latest-news-kenya-forum-reviews-role-of-media-amid-increasing-militant-attacks.htm>

13 <https://www.theguardian.com/world/2015/jan/09/charlie-hebdo-attack-suspects-gunman-killed-dammartin-en-goele-port-de-vincennes-paris>

the exact position of some of them, and the overall strategy used. Criminal investigations were opened to look into these incidents, which were condemned by the *Conseil supérieur de l'audiovisuel* (CSA, or “High Audiovisual Council”), France’s regulatory body.

Similarly, on 18 March 2016 in Brussels, a television channel placed a broadcast vehicle next to a house where one of the perpetrators of the attacks of 13 November 2015 was hiding before the security forces had even arrived. This angered the Director of the judicial police, who stated that the safety of his staff and the public had been offered up on the altar of ratings.<sup>14</sup>

Informing the public becomes even more complicated when simple citizens, neighbours and bystanders film the scene and freely publish videos or information on social networks, thus circumventing the rules set up for journalists and confronting traditional media with serious ethical dilemmas. The media cannot ignore these information flows, but they must view them critically. The blunders of “news amateurs” do not exonerate the professionals from the principles of caution they must uphold.

What can be done? On 22 November 2015, “at the invitation” of the security forces, the Belgian media observed “radio silence” (i.e. a news blackout) during an operation that took place in the neighbourhoods of Brussels and Charleroi to track persons involved in the Paris attacks of 13 November. Christophe Berti, the senior editor of *Le Soir*, a Brussels newspaper, said that he had received two calls asking him not to give the precise names of the neighbourhoods where the operations were to take place. His editorial staff decided that not giving the name of the street or the house number where the police forces would be working could not be considered disinformation.<sup>15</sup>

Likewise, television channels took a series of measures to avoid any blunders. Jean-Pierre Jacqmin, news director for *Radio Télévision Belge Francophone* (RTBF, the public broadcasting organization of French-speaking Belgium) explained that when cameramen film in the street, they zoom in on the journalist’s face so as not provide any details on the location and tactics of the intervention forces. However, for both Christophe Berti and Jean-Pierre Jacqmin, such restraint must be temporary and clearly explained to the public. Christophe Berti thus stated that his team had continued to work and investigate, and that the next day, they had submitted 20 pages on the story.

In other cases, media have set up a few minutes’ delay between field-reporting and broadcasting so that experienced editors could view the coverage and decide what could be broadcast and what would be blurred. This was the choice

14 [http://www.lemonde.fr/attaques-a-paris/article/2016/03/21/arrestation-de-salah-abdeslam-la-police-belge-condamne-le-comportement-de-certains-medias\\_4886784\\_4809495.html](http://www.lemonde.fr/attaques-a-paris/article/2016/03/21/arrestation-de-salah-abdeslam-la-police-belge-condamne-le-comportement-de-certains-medias_4886784_4809495.html)

15 [http://www.lemonde.fr/actualite-medias/article/2015/11/23/les-medias-belges-en-mode-chaton-pendant-l-intervention-de-la-police\\_4815820\\_3236.html](http://www.lemonde.fr/actualite-medias/article/2015/11/23/les-medias-belges-en-mode-chaton-pendant-l-intervention-de-la-police_4815820_3236.html)

## WHAT TO DO IN A HOSTAGE SITUATION?

How should the media ensure a coverage of hostage situations that is “complete”, “unobtrusive” and “noninflammatory”, as the U.S. Task Force on Disorders and Terrorism<sup>1</sup> advised. The following are a few rules, based on the suggestions made by the Poynter Institute’s Bob Steele (United States) and taking into account the history of hostage situations:

- 1. Always assume that the hostage taker has access to your reports.** Accordingly, avoid giving any information that could reveal the tactics of the intervention teams, such as images showing the police officers’ positions, diagrams showing potential intervention scenarios or the transcripts of police communications.
- 2. Avoid giving details on the hostages that could endanger them further.** In 2014, after an editorial error, the *New York Times* published an article that was supposed to come out after the death of Islamic State hostage, Steven Sotloff, mentioning that he was Jewish. The information was taken down from the site “after 27 minutes”, when the newspaper realised its mistake.<sup>2</sup>
- 3. Refrain from theorising about the terrorist(s)’s psychological traits or political convictions:** one wrong word, and the situation could take a turn for the worse. The same caution should be used when analysing the hostage takers’ demands.
- 4. Refrain from speculating on the terrorists’ plans, the authorities’ response or the hostages’ experiences.** Such speculation can disrupt the authorities’ management of the crisis.
- 5. Clearly explain to your public that, for security reasons, you are refraining from disseminating some information.** Carefully assess whether, for the same reasons, you should refrain from broadcasting the crime scene live.
- 6. Do not attempt to interview terrorist groups.** The U.S. television channel CBS requires “imperative circumstances” before allowing its journalists to interview a terrorist live, as the channel wishes to avoid becoming ensnared in the trap of giving terrorists a direct and unfiltered podium. In addition, journalists are not generally trained for such a specific kind of interview, in which there is a great deal at stake and one wrongly-phrased question or badly-chosen word could endanger the lives of the hostages. Raphael Cohen-Almagor thus cautions: “Interviews under such conditions are a direct reward for the specific act of terrorism under way and can interfere

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1 United States Department of Justice, National Advisory Committee on Criminal Justice Standards and Goals, Disorders and Terrorism (Washington, DC: US Government Printing Office, 1976).

2 <http://www.bbc.com/news/magazine-29120308>

with efforts to resolve the crisis.” Furthermore, if the interview is conducted by telephone, it risks monopolising the line and making the negotiators’ task more difficult. In France in January 2015, a 24-hour television channel conducted interviews with terrorists, but they were only broadcast once all the hostages had been released.

- 7. Do not interview the hostages.** *Agence France-Presse’s Michèle Léridon* notes that the media should avoid disseminating “statements made under duress”.
- 8. Use your technical equipment with caution.** Generally, the police cordon off the scene, but in the absence of orders or instructions, the media must be aware that, at night, lighting and cameras can cause disruption. Press helicopters or drones can be interpreted as the beginning of an intervention, complicate the communication between captors and negotiators with their noise or even disrupt the equipment used by security forces.
- 9. Do not negotiate media privileges with terrorists or their “representatives”:** During the hijacking of flight TWA 847 in Beirut in June 1985, American newscasters were constantly discussing with intermediaries, including negotiating over the possibility of speaking with the hostages.
- 10. Do not act as mediator.** Journalists are sometimes tempted to intervene as mediators in terrorist operations, as in October 2002 when the famous Russian journalist Anna Politkovskaya (posthumously awarded the 2007 UNESCO / Guillermo Cano Prize for Freedom of the Press) met with Chechen terrorists during a hostage taking at the Doubrovka theatre in Moscow. The title of her resulting testimony is eloquent and poignant: “I tried and I failed”.
- 11. Immediately call the authorities** if the terrorist(s) contact your office.
- 12. Think about the value of the information before interviewing relatives of the hostages,** especially live. Charged emotions and some “coded” phrases addressed to the interviewee may destabilize a situation where people are already on the verge of a nervous breakdown.

made by the British channels BBC and ITN when a hostage situation occurred at the Iranian Embassy in London on 5 May 1980. They only went live when the special forces had saved the hostages.

**Do not touch anything at the scene of an attack.** Everything must be left in place, similar to a crime scene,<sup>16</sup> in order to avoid complicating the task of investigators.<sup>17</sup> Journalists must also refrain from moving objects, bodies, etc., even to make it easier to film or to improve a photo angle. Doing so could compromise the whole investigation and is punishable by law. In the U.S., on 4 December 2015 after the shootings in San Bernardino, journalists were able to enter the apartment rented by the perpetrators and broadcast images live. They had the permission of the landlord and the Federal Bureau of Investigation (FBI), but it caused incredible chaos, which raised serious ethical questions. Journalists exhibited private photos and others searched through drawers. Even though the FBI had left the scene, the media should have wondered about the risk of destroying evidence. The *Columbia Journalism Review* made the following comment: “Without the safety net of editing, live TV requires judgment in the seconds between seeing something revealing and sharing it with millions of viewers. On Friday, amid the media scrum in the apartment of two deceased alleged killers, that judgment was in short supply.”<sup>18</sup>

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16 <https://www.unodc.org/documents/scientific/STNAR39.F.Ebook.pdf>

17 <http://www.mediacrimevictimguide.com/special.html>

18 [http://www.cjr.org/hit\\_or\\_miss/post\\_1.php](http://www.cjr.org/hit_or_miss/post_1.php)

# 5

## Key points

- Visit terrorist areas without being manipulated
- Interview terrorist groups without being used as tools
- Inform on investigations without compromising them
- Cover trials without glamorisation or demonisation



## Chapter 5 Interacting with Terrorist Groups

### 5.1 Visiting areas controlled by terrorist groups

In the days of classic guerrilla warfare, the media regularly visited areas under the control of organizations seen as terrorists by the governments fighting them. The author and political scientist Gérard Chaliand made this one of his specialities, and his reports on the Peshmerga and the fighters of the African Independence Party for Guinea and Cape Verde (PAIGC) are still classics of guerrilla war reporting.

Some incursions are considered among the ‘greatest hits’ of journalism, like that of the *New York Times*’ special envoy, Herbert Matthews, in the Sierra Maestra, Cuba, during Fidel Castro’s insurrection in the 1950s. Another example is the Uruguayan journalist Eduardo Galeano’s time among the Guatemalan guerrilla fighters at the end of the 1960s.

Since the rise of extremely brutal groups such as the Shining Path in Peru in the 1980s or the Armed Islamic Group (GIA) in Algeria in the 1990s, this “rebel tourism” has practically vanished, to the extent that some journalists now wonder about the relevance and even the decency of such adventures.

The *Islamic State* documentary disseminated in summer 2014 by *Vice News* once again crystallised these debates.<sup>1</sup> Medyan Dairieh, an experienced war correspondent, spent three weeks embedded within ISIS forces in Syria. Besides being endangered by coalition bombs, the security risks were obvious: to

1 <https://news.vice.com/video/the-islamic-state-full-length>

what extent would the Islamic State group tolerate a journalist from a U.S. media outlet? How could he avoid being apprehended by rival groups or security forces, who severely disapprove of such reporting? Furthermore, Dairieh was confronted with Daesh's very strict regulations, as the group was concerned with controlling its image and the message conveyed. To what extent, then, did *Vice News* become the propagandist of a terrorist organization interested in recruiting foreign fighters and showing the State-like nature of its power over a swathe of Syria and Iraq? Sebastian Meyer from *Foreign Policy* remarked: "The documentary is fascinating. Watching men and young children declare their passion for jihad, seeing masked men on horses patrolling city streets – it's hard to look away. How much it tells us about the reality of life under a caliphate is an entirely different matter."<sup>2</sup>

In his analysis of another "authorised report" on Islamic State territory in Iraq and Syria, produced by the German journalist Jürgen Todenhöfer in October 2014, Jean-Pierre Filiu, professor at *Sciences Po*, the renowned social science research University in Paris, was not far from considering the author to be a

**If the media accept this risk, they must explain the conditions in which the report was carried out, the limits that were set, how they framed the persons interviewed, the constant surveillance, the verification of all the footage by the militants, etc.**

'useful idiot'; a conveyor of terrorist propaganda.<sup>3</sup> However, the German reporter believed that as he had always tried to speak with both sides in all the wars he had covered, this one should not be an exception.<sup>4</sup>

Transparency is crucial here. The media must think how the report will be exploited by the terrorist group. Even if the tone is critical or negative, militants can pick out the clips or images that suit them and redistribute them across their own media and social networks. They can also stage the presence of "invited or authorised international journalists" for the popu-

lation under their control and present it as a recognition of their importance and power on the international scene. If the media accept this risk and decide to negotiate "the invitation" with terrorist groups, they must explain the conditions in which the report was carried out, the limits that were set, how they framed the persons interviewed, the constant surveillance, the verification of all the footage by the militants, etc. They must also refrain from using a Holly-

<sup>2</sup> <http://foreignpolicy.com/2014/08/09/how-to-take-a-picture-of-a-severed-head/>

<sup>3</sup> <http://www.sudouest.fr/2015/01/02/moyen-orient-daesh-sur-le-front-des-medias-1781707-5166.php>

<sup>4</sup> <http://www.independent.co.uk/news/world/middle-east/inside-isis-the-first-western-journalist-ever-given-access-to-the-islamic-state-has-just-returned-9938438.html>

wood news set-up and thus glamorising the terrorist group. Sobriety and rigour must prevail over the temptation of flamboyant dramatics. Otherwise, as Aidan White from the Ethical Journalism Network remarked, the media run the risk of becoming involuntary fighters for the extremists in the propaganda war. Limiting reports to a ‘he said, she said’ scenario is not an option either. Although the report can be crude, it must be placed within its context. It must be explained, and the statements that are false or debatable corrected or qualified.

More serious still is when journalists accompany armed forces on operations. “What would you do if terrorists suggested that you film a future attack?” shot a diplomat during a discussion with journalists. The very idea seems indecent, but it is not outrageous. According to Dale Van Atta<sup>5</sup>, in the 1970s a German photographer accompanied the Red Army Faction during an attack targeting a residence in Hamburg. And how should we judge the report that a journalist from a British channel carried out in 2010 at the heart of the Taliban country, when militants were directly targeting the British forces deployed in Afghanistan? What are the legal and ethical implications of reports featuring “the other side”, in the adverse camp?

## 5.2 Publishing their press releases

**On 19 September 1995, the U.S. terrorist known as the “Unabomber” had the *Washington Post* and the *New York Times* publish his manifesto, claiming that in exchange, he would desist from his violent actions.<sup>6</sup>**

Although the transaction had been condoned by the FBI, in despair over a manhunt that had lasted several years, it divided the media and journalism in general.<sup>7</sup>

Robert Lichter, director of the Center for Media and Public Affairs, for instance, stated: “If you could be sure of saving human lives, you should publish.” Everette F. Dennis from Columbia University, on the other hand, declared that “A news organization should really not be in the business of public safety and police work.” Others, too, accused both newspapers of playing into the Unabomber’s hands and creating a dangerous precedent.

With the rise of social networks, terrorist groups have less need to go through the media to have their messages disseminated. However, the authorities are still extremely hostile to the dissemination of terrorist interviews or press releases in the media. In 1988, the British government banned British media channels from giving voice to the leaders and members of the Irish Republican Army (IRA), its legal front, the political party *Sinn Féin* and protestant para-

<sup>5</sup> *Harvard International Review*, Autumn 1998, p. 69.

<sup>6</sup> <http://www.washingtonpost.com/wp-srv/national/longterm/unabomber/manifesto.text.htm>

<sup>7</sup> <http://www.poynter.org/2002/the-post-the-times-and-the-unabomber/2142/>

military organizations. The media circumvented this measure by entrusting presenters or comedians with reading incriminating declarations. After the attacks of 11 September 2001, the Bush administration accused the Qatari channel *Al Jazeera* of inciting its readers and viewers to anti-Americanism and giving a voice to terrorism when it chose to disseminate Bin Laden's video messages.

How should the media treat these messages, given that they are designed to have real impact: recruit activists, fuel fear or cause political repercussions in the target country? According to many experts, the fact Bin Laden sent his video tape the day before the presidential elections in November 2004 reinforced President Bush's security-focused campaign to the detriment of his Democrat rival, John Kerry.

These videos are often newsworthy, but the duty to inform implies rigorously decoding them, because the media could be manipulated, or even accused of complicity. As the Arabic-speaking newspaper *Al-Quds* states, the videos and media campaigns disseminated by Daesh have the potential to tempt thousands of young Westerners to join the fight in Iraq and Syria.<sup>8</sup> The media should not restrict themselves to serving as a communication channel however and whenever a terrorist group wants. They must select the genuinely newsworthy clips, cut out propaganda, explain the context and ask the opinion of the authorities targeted.

The same care is needed for the videos of hostages who are forced to address their governments. In January 2006, for instance, *Al Jazeera* broadcast a video showing Jill Carroll, independent journalist for the *Christian Science Monitor* (United States), when she was held hostage in Iraq. The channel nevertheless followed strict rules, removing the sound, cutting the scene where the journalist was shown with a revolver pointed at her temple and removing her declarations criticising the U.S. government. Another of *Al Jazeera's* principles is to contact the embassy of the hostage's country and only disseminate the footage when their family has been alerted.<sup>9</sup>

*Agence France-Presse* simply does not broadcast the images of hostages during their detention.<sup>10</sup>

### 5.3 Interviewing terrorists

**Interviewing terrorists can shock the public, who often think it indecent, and antagonise the authorities, who are tempted to denounce the media's complicity.**

<sup>8</sup> <http://www.alquds.co.uk/?p=254548>

<sup>9</sup> [http://www.nbcnews.com/id/10948626/ns/world\\_news-terrorism/t/al-qaida-tapes-often-come-through-al-jazeera/](http://www.nbcnews.com/id/10948626/ns/world_news-terrorism/t/al-qaida-tapes-often-come-through-al-jazeera/)

<sup>10</sup> [https://www.afp.com/sites/default/files/paragraphrich/201604/12\\_avril\\_2016\\_charte\\_deontologique.pdf](https://www.afp.com/sites/default/files/paragraphrich/201604/12_avril_2016_charte_deontologique.pdf)

Brigitte Nacos summarised the situation in the following terms: “It does not make a difference whether an interviewer is tough on the terrorist or his sympathiser. The mere fact that the terrorist is interviewed by respected media representatives and treated ‘as someone whose contribution to public debate is worthy of attention’ elevates the person virtually to the level of a legitimate politician.”<sup>11</sup>

John Owen, the co-editor of *International News Reporting*, wrote: “Central to this debate was the issue of whether journalists should seek out the views of those who are sworn enemies of ‘your country’, including those who practise terrorism and belong to groups branded as terrorists. Some fellow journalists and many viewers in Britain thus condemned the BBC and its correspondent David Loyn for airing the views of the Taliban as part of his reporting from one of their strongholds in southern Afghanistan. Loyn took great risks to get to the Taliban at a time when British soldiers were increasingly under attack.”

For others, seeking interviews is fundamental in the media’s duty to inform and analyse. It can be essential to understanding terrorist acts, decrypting their motivations and thus shaping policies to prevent them. “Meeting terrorists is a journalist’s duty, not sedition”, noted SA Aiyar in the *Times of India* in July 2014.<sup>12</sup> The interviews with terrorists conducted by specialists such as Anne Speckhard, psychology professor and author of the reference book *Talking to Terrorists*,<sup>13</sup> are particularly enlightening, even though some see them as increasing the risk of trivialising evil and humanising barbarity.

The media must nevertheless satisfy a certain number of conditions. Interviews conducted during a terrorist or counter-terrorist operation are particularly risky, especially if they are broadcast live. The risk is that they will serve the terrorists’ tactics and reinforce the position of the hostage takers during a negotiation or a confrontation with security forces. Fred Friendly, famous former executive of CBS News, noted that direct, unedited interviews were unacceptable. Most media organizations’ codes of conduct ban such initiatives.

Non-live interviews are the easier to devise and plan for, but they still present serious challenges, one of which is safety. The fate of Daniel Pearl, journalist for the *Wall Street Journal*, is a reminder of the danger involved. He was kidnapped in Karachi in 2002 when he was trying to interview Al-Qaida members in Pakistan, and brutally executed. Such interviews also test journalistic integrity: there is a real risk of becoming a pawn in the “Great Game” of terrorism if the media do not manage to keep control of the interview or process it correctly. The context of the interview – at the heart of a terrorist sanctuary and at the mercy of terrorist security services – can also induce a more timid, less

11 Brigitte Nacos, *Media and Terrorism*, p. 66.

12 <http://blogs.timesofindia.indiatimes.com/Swaminomics/meeting-terrorists-is-a-journalists-duty-not-sedition/>

13 <http://www.annespeckhard.com/talking-to-terrorists.html>

“aggressive” journalistic conduct, due to the risk of an unforeseeable, violent reaction from the interviewees.

Establishing contact with persons guilty of criminal actions also raises a legal question: do journalists have the right to make contact with terrorists without warning the security forces, whose mission is to pursue and judge them? Should the actors Sean Penn and Kate del Castillo have warned the authorities that they were negotiating an interview with the ‘narco-terrorist’ fugitive ‘El Chapo’ Guzman for *Rolling Stone*? Most journalists would probably reply that it is not the job of the media to be informers for the police, but the procedure undeniably raises serious ethical questions.

In 1986, when the NBC television channel (United States) aired an interview with Abul Abbas, presumed to be the orchestrator of the terrorist attack against the *Achille Lauro* cruise ship, high-ranking U.S. officials denounced a form of complicity and complained that the channel refused to say where the interview had taken place.<sup>14</sup> This opinion was shared by other media. The editorial writer of the *Sarasota Herald-Tribune* (United States) thus stated that they hoped that if NBC ever had the opportunity to interview terrorists again, they would send an interviewer equipped with a net (to capture them).

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14 [http://articles.chicagotribune.com/1986-05-07/news/8602020000\\_1\\_abul-abbas-achille-lauro-terrorists](http://articles.chicagotribune.com/1986-05-07/news/8602020000_1_abul-abbas-achille-lauro-terrorists)

## TO INTERVIEW OR NOT TO INTERVIEW?

Ultimately, the choice mainly depends on each media’s editorial policy and idea of journalistic independence and responsibility, but there are some basic rules upon which most media agree:

1. **Remain completely in control of the journalistic mission**, and refuse any limits on questioning that the terrorist group would like to set.
2. **Favour a documentary or ‘auteur article’ format over a conventional question-and-answer interview**, which provides less scope for the introduction of context, complexity or corrections to the statements of the interviewees.
3. **Clearly and transparently explain to the public the reasons** for which the interview was requested and the conditions in which it was conducted.
4. **Correct the false or fallacious statements that may have been uttered** by the interviewees and give voice to the other players involved (authorities, victims, etc.).

However, the Colombian professor of journalistic ethics, Javier Dario Restrepo, supports journalists' rights to conduct these interviews with people considered criminal by the authorities. He remarked: "One of a journalist's duties is to inform on reality as completely as they can. A fugitive's opinion is part of the reality that citizens have the right to know so as to understand the phenomenon and judge security policies and mechanisms. Although the journalist knows where the interview took place, he or she should not share the information with the authorities, because the consequences could be losing the trust of other sources, which affects citizens' right to receive quality news." Of course, he noted that "it is a different matter entirely when, by a journalist's incompetence or irresponsibility, the interview turns into a glorification of terrorism", but "if the authorities' duty is to locate and capture delinquents, the journalist's is to ensure that citizens are well informed, and these two duties must not interfere with each other."<sup>15</sup>

## 5.4 Reporting on ongoing investigations

**The media must not be guilty of publishing information that could compromise law enforcement investigations. For instance, should the media broadcast the fact that police have a new lead concerning a vehicle used by terrorists without knowing if such a detail could alert the terrorists or compromise the search?**

A New York newspaper made this mistake after the bombing of the World Trade Centre in 1993, forcing the police to prematurely arrest a suspect who had been placed under surveillance and was to lead them to the other perpetrators. On 18 March 2016, a French weekly had to defend itself against accusations of "irresponsible" conduct by the Belgian police after broadcasting that the DNA of a terrorist fugitive involved in the attacks of 13 November had been found in a Brussels apartment.<sup>16</sup>

The media should contact the security forces to ensure that broadcasting such information will not have a negative impact on the search for the perpetrators. Even, after serious consideration, if they decide not to follow the police's recommendations for caution? John Wilson, former editorial director for the BBC, wrote that "Journalists are reluctant to agree to blackouts. They dislike the idea of being hand-in-glove with authority [...]. [...] Most editors believe them justified as a rare occurrence so long as they are not imposed by outside authority, so long as the news organizations are genuinely persuaded by reasons given and so long as the blackout is publicly acknowledged whenever possible after the event, a gesture to keep faith with the public."<sup>17</sup>

15 [http://www.fnpi.org/consultorio-etico/consultorio/?tx\\_wecdiscussion\[single\]=31581](http://www.fnpi.org/consultorio-etico/consultorio/?tx_wecdiscussion[single]=31581)

16 <http://tempsreel.nouvelobs.com/attentats-terroristes-a-paris/20160318.OBS6708/attentats-de-paris-l-empreinte-de-salah-abdeslam-retrouvee-dans-l-appartement-perquisitionne.html>; <http://www.lesoir.be/1157328/article/actualite/france/2016-03-21/l-obs-se-defend-d-avoir-failli-faire-echouer-l-arrestation-d-abdeslam>

17 *Understanding Journalism: A Guide to Issues*, p. 143.

## 5.5 Reporting on terrorism trials

Trials are key moments in collective mourning and the establishment of justice as an essential part of the democratic response to terror. They also help to inform and educate on terrorist acts and terrorism in general.

However, covering these trials raises many questions as to the role of the media. Will they serve as megaphones for the terrorists, jolt the raw sensitivity of survivors and the friends and family of the victims or fuel a feeling of hostility and revenge towards a justice system that gives killers “too many rights”?

This dilemma is particularly tricky in the countries that allow the live coverage of hearings, and thus enable the accused to address the public freely, justify their actions and even continue to spread propaganda for their cause. This was the case at Anders Behring Breivik’s trial, held to judge the death of 77 people after a double terrorist attack in Oslo and on the island of Utøya in 2011.<sup>18</sup> The authorities limited the dissemination of images from the trial, but allowed live-tweeting. How could journalists not give voice to the accused when they were

**The medias’ key task is nearer that of the judges and magistrates: establishing and clarifying the facts, checking that the procedure is lawful and that fundamental rights are respected, revealing the manipulations of the terrorists, the lawyers or the State, etc.**

limited to 140 characters, at the risk of publishing his statements without checking them or giving context? Some journalists set limits for themselves and repeatedly warned their followers, but everyone recognised the situation was perilous and could go wrong at any time.

Furthermore, trials do not only take place within the boundaries of the courthouse: they also occur outside, in public squares where groups of sympathisers or victims come to express their views; on social networks that disseminate a constant flow of messages and that must accordingly be monitored and checked. The issue is preventing these trials from becoming spectacles, and ensuring that terrorists do not have another opportunity to ‘mediatise’ their actions. The media should also be aware that the authorities can tarnish the integrity of the judicial process by orchestrating their own dramatics to score points, especially in terms of public opinion.

The press can become an actor in this set-up, through its reporting methods, format and tone, but also through its editorial and political choices – by preferring vindictive justice, for instance, or, on the contrary, by emphasising the importance of the serenity and equity of justice. Its key task, however, as an

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18 <https://www.journalism.co.uk/news-features/reporting-the-anders-breivik-trial/s5/a548869>

autonomous player in the judicial process, is nearer that of the judges and magistrates: establishing and clarifying the facts, checking that the procedure is lawful and that fundamental rights are respected, revealing the manipulations of the terrorists, the lawyers or the State, etc. The press, as the watchdog of institutions, the guarantor of rule of law and the moral reference for a public that is sometimes tempted by summary justice, places the trial within the defence of the fundamental values that terrorists target and violate, “where the verdict educates the public about the importance of the rule of law in a democratic society, creates a collective memory and sets standards for future conduct of states and people”, in the words of the Dutch jurist, Beatrice de Graaf.<sup>19</sup>

These trials are also a crucial moment for the victims. De Graaf thus wrote: “terrorism trials are the platforms where victims may regain their voice and where their fate, as a consequence of the terrorist’s offence, is put centre stage.” She added: “such trials offer a powerful platform for revealing and challenging the terrorists’ narratives by confronting them with the messages of horror, pain and destruction they inflicted upon their victims.”

Finally, the media must ensure they do not compromise justice, at the risk of seeing defence lawyers claim that their clients have already been judged in the press and that they will thus be deprived of a fair trial. However, this accusation is difficult to prove before a jury. On 30 June 2015, in its judgement of *Abdulla Ali v. the United Kingdom*, the European Court of Human Rights considered that “adverse media coverage did not prejudice the outcome of proceedings against a suspect in a terrorist plot”.

However, as a report drafted by the UN Counter-Terrorism Implementation Task Force (CTITF) pointed out, “While freedom of expression must always be upheld, media coverage must not become inflammatory so as to negatively impact upon an accused’s presumed innocence.”<sup>20</sup>

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19 <http://www.icct.nl/download/file/ICCT-de-Graaf-EM-Paper-Terrorism-Trials-as-Theatre.pdf>

20 <http://www.ohchr.org/EN/newyork/Documents/FairTrial.pdf>

# 6

## Key points

- Assure the security of journalists and editors
- Protect sources against surveillance and hacking
- Prepare for the risk of journalist kidnapping
- Define a policy in case of abduction (publicity, negotiations, ransoms)
- Provide assistance to journalists suffering from PTSD



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## Chapter 6

# Safety of Journalists

### 6.1 Increasing risks

**Kidnappings, executions, threats or hacking: terrorism represents a direct and growing threat for journalists. This evolution marks a break in the history of violence and conflict.<sup>1</sup>**

Classic guerrillas, often described as terrorists by the authorities, generally had a policy of welcoming journalists into areas under their control, mostly to strengthen their credibility by showing their organizational capacity or their popular support. This was the case during the Cold War, when there were armed, rebel organizations in Latin America such as Nicaragua's Sandinista National Liberation Front, and Africa with the Eritrean People's Liberation Front.

However, at the end of the 1970s, the paradigm changed little by little. Organizations such as the Khmer Rouge in Cambodia, the Red Brigades in Italy, the Shining Path in Peru and the Armed Islamic Group (GIA) in Algeria targeted journalists, considering them as the auxiliaries of the powers they were combating, and thus as enemies.

More than one hundred journalists and media workers were assassinated in Algeria between 1993 and 1997. During the Lebanese Civil War (1975-1990), kidnapping international journalists became a common tactic. Some, like the American Terry Anderson or the Frenchman Jean-Paul Kauffmann, were held hostage for years before they were freed. Journalists were murdered in Europe

<sup>1</sup> <http://edition.cnn.com/2011/OPINION/09/08/simon.press.freedom.911/>

too. In 2000 in Spain, for example, *El Mundo* journalist José Luis López de Lacalle was killed by ETA<sup>2</sup>.

Today, terrorist hostility towards journalists has become the norm. According to the Committee to Protect Journalists (CPJ), 40% of the journalists murdered in 2015 were killed by groups claiming adherence to radical Islam. International press correspondents in particular are considered potential hostages, or sacrificial lambs, whose execution is dramatised to serve terrorist propaganda. This happened to James Foley, Steven Sotloff (United States) and Kenji Goto (Japan), who were beheaded by Daesh.

The local journalists, like those belonging to Raqqa Is Being Slaughtered Silently (RBSS), a group of Syrian journalists operating at the heart of the self-declared caliphate, are also mercilessly hunted and tracked as far as their sanctuary in Turkey. Reporters on assignment can also be threatened by the authorities, either because they do not want reporters making contact with armed groups and spreading their propaganda, or because their own counter-terrorist practices violate the standards of international law.

In such conditions, should journalists venture into these red zones, these “uncivil places”, as Richard Sambrook, the BBC’s former director of global news, calls them? The question has almost ceased to be asked. Most international media have decided to stop sending their journalists to zones of severe insecurity, such as those controlled by the Islamic State group, drug cartels or the Lord’s Resistance Army in Uganda. However, in that case, can they accept the articles and videos of freelance journalists who continue to go there? Some media refuse, believing that they should not contribute to the insane risks taken by journalists who wish to make a name for themselves by bringing back the photo or the article that will guarantee them – or so they hope – a place in an editorial team.

Some journalists have no choice, because they work in areas where terrorist groups operate: in the Sahel, the tribal zones of Pakistan or the states of Tamaulipas and Veracruz in Mexico. They try to respect basic safety instructions, but they are eminently vulnerable. In November 2015, Pakistani media directors made a series of guidelines available to improve journalists’ safety.<sup>3</sup>

Most organizations working to defend journalists have published handbooks on the safety of reporters. Some media also impose strict evaluations of security conditions and send their teams for training before dangerous missions. These training sessions are generally headed by former Special Forces members. However, there is no “zero-risk” scenario.

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<sup>2</sup> <http://www.eltiempo.com/archivo/documento/MAM-1265933>

<sup>3</sup> <http://ijnet.org/en/blog/pakistani-media-leaders-compile-list-safety-recommendations-journalists>

These precautions also concern the protection of editorial teams. Some media have been the direct targets of terrorist acts. On 2 September 1989, the offices of the Colombian newspaper *El Espectador* were targeted by a truck bomb. They can also be the targets of bomb alerts, which force them to leave their offices. “Media organizations should always have a contingency plan in case of emergencies – like back-ups – to ensure uninterrupted news coverage,”<sup>4</sup> noted Richard Sambrook.

<sup>4</sup> <http://magazine.journalismfestival.com/journalism-dos-and-donts-in-terror-situations/>

## UNESCO ACTION FOR THE SAFETY OF JOURNALISTS

**Promoting the safety of journalists and combatting the impunity of those who attack them are at the centre of UNESCO’s action to support press freedom across every media platform.**

Since 2008, the Director-General has presented a biennial report on the safety of journalists and the dangers of impunity within the International Programme for the Development of Communication (IPDC). UNESCO also initiated the UN Plan of Action on the Safety of Journalists and the Issue of Impunity, which was endorsed by the UN Chief Executives Board on 12 April 2013. The plan establishes a framework for action for the UN and its partners (national authorities, local and international non-governmental organizations [NGOs], press institutions and the academic sphere).

In April 2013, the 191<sup>st</sup> session of the Executive Board of UNESCO adopted the UNESCO Work Plan on the Safety of Journalists and the Issue of Impunity, which completes the fieldwork already carried out, in line with the UN Plan of Action, with special attention paid to South-South cooperation. The Work Plan also calls for closer cooperation with the Special Procedures of the Human Rights Council, including the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression and the UN Special Rapporteur on extrajudicial, summary or arbitrary executions, as well as regional Rapporteurs such as the Special Rapporteur for freedom of expression and access to information in Africa, the Special Rapporteur for freedom of expression in the Organization of American States (OAS) and the Organization for Security and Co-operation in Europe (OSCE) Representative on freedom of the media.

UNESCO’s annual World Press Freedom Prize symbolises UNESCO’s commitment, by commemorating the memory of Guillermo Cano, the director of the Colombian newspaper *El Espectador*, assassinated by narco-terrorists in Bogotá in 1986.

**More information: <http://en.unesco.org/themes/safety-journalists>**

## 6.2 The protection of sources and surveillance

The confidentiality of sources is one of the pillars of journalistic practice. In the coverage of terrorism, it is imperative.

It is not only a matter of protecting witnesses and interviewees against reprisals, but also removing them from the intrusive surveillance of all those – spies, police officers, private firms, detectives, criminals, etc. – who shadow journalists, tap their phones or spy on them using the Internet.

This protection partly depends on the laws adopted by each country. The recommendations and reports of the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, along with Resolutions of the Council of Europe, rulings of the European Court of Human Rights and the Inter-American Court of Human Rights all offer invaluable guidelines defining this right to confidentiality.

However, since the controversy originating with U.S. whistle-blower Edward Snowden and his revelations on mass surveillance in 2013, wariness has become widespread, even in countries with laws that protect privacy. The media are now slightly more attentive to protecting their communications.

**It is crucial to adopt appropriate technologies, train journalists in digital security and communications encryption and respect rigorous procedures when contacting sources and publicly using their statements.**

It is crucial to adopt appropriate technologies, train journalists in digital security and communications encryption and respect rigorous procedures when contacting sources and publicly using their statements. However, there

is still much to do in this area, especially since for reasons of practicality or speed, the established security measures can very quickly slacken, opening gaps in source-protection systems that could be exploited by ill-intentioned snoopers.

The duty to guarantee the confidentiality of their sources implies that journalists must take special care to prevent their contacts from being recognised. Too often, blurring faces or distorting voices is a partial or approximative method, as it is not difficult for neighbours, employers or security agents to recognise clothes, an apartment, gestures, speech rate or an accent. The most extreme caution is required, as the consequences of thoughtlessness can be devastating. Journalists continue to circulate in red zones with personal computers or mobile phones containing information that is confidential or compromising for them or their sources.

### 6.3 In the event of journalist kidnappings

Kidnapping is one of the main dangers for journalists who cover terrorism, especially since this K&R (kidnapping and ransom) industry, as the professionals call it, is increasingly merging with common criminality: groups sell on hostages; corrupt mediators try to involve themselves in negotiations; the rules of the game change according to events.

Despite the unpredictable and arbitrary nature of hostage-taking, it is useful to learn a few basic notions. How should kidnappers be dealt with, and how do you tell which attitude will most irritate them? The testimonies of former hostages, books like *News of a Kidnapping*, written by Nobel laureate in literature Gabriel García Márquez, and practical guides like the UNESCO and Reporters Without Borders' *Safety Guide for Journalists* can offer invaluable pointers, although they are not infallible.<sup>5</sup>

The media must also establish specific procedures in the event one of the members of their editorial team is kidnapped. Particularly, they should decide whether to make the situation known, or keep silent. The opinions of experts and former hostages diverge on the subject, and the choice is all the more difficult as the media have neither a monopoly over decision-making, nor control over the situation. Faced with many unpredictable players and the capacity of terrorist groups to fabricate and disseminate their own information, the media must also consider the policy of their own government. The U.S. and the U.K. defend an uncompromising position, and notably refuse to pay ransoms in exchange for the release of hostages, while other European countries have chosen to negotiate, often going through regional governments to conceal transactions. Negotiations are of a rare complexity, as they involve a range of players – terrorist groups, security services, the media, the friends and family of the hostages and profiteers of every kind – and geopolitical stakes, not to mention varied domestic policies. Negotiations are thus increasingly conducted and guided by specialised security companies, which generally tend to recommend discretion. They believe that this will keep the ransom demands relatively low, and not complicate relations with the hostage takers. However, former hostages deem that, on the contrary, they owe their freedom to vigorous public campaigns.

Dilemmas lurk at the boundary of journalistic ethics: are other editorial teams bound to respect the silence observed by the media who have had a journalist kidnapped? Should they follow government instructions, or respect the wishes of the hostages' families, at the risk of neglecting their duty to inform? On several occasions, particularly when David Rohde from the *New York Times* was kidnapped in Afghanistan and held from November 2008 until June 2009, the whole profession managed to keep the kidnapping of their colleagues a secret.

<sup>5</sup> [https://rsf.org/sites/default/files/guide\\_journaliste\\_rsf\\_2015\\_en\\_0.pdf](https://rsf.org/sites/default/files/guide_journaliste_rsf_2015_en_0.pdf)

It is undoubtedly the route that many media choose, as journalistic ethics impose a “criterion of humanity”, which places the protection of human life at the very top of the news hierarchy.

Others, however, believe that information should prevail and that silence could even represent a danger for the media, particularly for freelancers, as they could underestimate the risks of sending journalists to certain areas.

For Jamie Dettmer, columnist for the news website *The Daily Beast* (United States), silence serves only to give the terrorist groups an advantage in the propaganda war, as it leaves them to initiate any drama. Although a media blackout is justified in the very first days after a disappearance, it may also relieve the authorities of the pressure needed for their mobilisation in the countries where hostage takers operate.<sup>6</sup>

## **6.4 Terrorism and trauma**

**Covering an attack or an armed conflict at the heart of “Terrorland” risks having an emotional impact on the journalists called upon to cover the event.**

First of all, this is experienced as anxiety, insomnia, irritation and physical problems such as fatigue or headaches. More seriously, it can lead to Post-Traumatic Stress Disorder (PTSD), which can cause incapacitating feelings of horror, fear and despair. Currently, too few media have adopted sufficient procedures to protect collaborators placed in situations of extreme stress. In February 2014, one of the reports published by the Media Council of Kenya on the coverage of the Westgate mall attack, which took place in Nairobi in September 2013, noted that “Some of the reporters were traumatised and shocked and received no counselling after the incident.”<sup>7</sup>

There is also a risk of traumatism for the journalists who are not in the field, but who view images of beheadings or the testimonies given by the victims of attacks or torture, to check their authenticity and decide what will be disseminated in their own media. This is what a study published by the *Eyewitness Media Hub* at the end of 2015 calls the new “digital frontline”, which Jackie Spinner from the *Columbia Journalism Review* called “a place where journalists can be battered by repeated exposure to trauma even if they never have to put on a bulletproof vest”. She added: “Like a correspondent in the field who witnesses horrific events, social media reporters and editors who view such content on their computers can end up feeling isolated or experience nightmares and flashbacks, typical symptoms of post-traumatic stress disorder.”<sup>8</sup> According to the study, 40% of the journalists who were interviewed admitted that viewing video testimonies had had negative effects on their personal life.

6 <http://www.thedailybeast.com/articles/2014/09/02/the-media-blackout-on-hostages-helps-isis.html>

7 <http://www.mediacouncil.or.ke/en/mck/index.php/news/101-media-council-tables-findings-on-westgate-coverage>

8 [http://www.cjr.org/first\\_person/social\\_media\\_reporters\\_and\\_vicarious\\_trauma.php](http://www.cjr.org/first_person/social_media_reporters_and_vicarious_trauma.php)

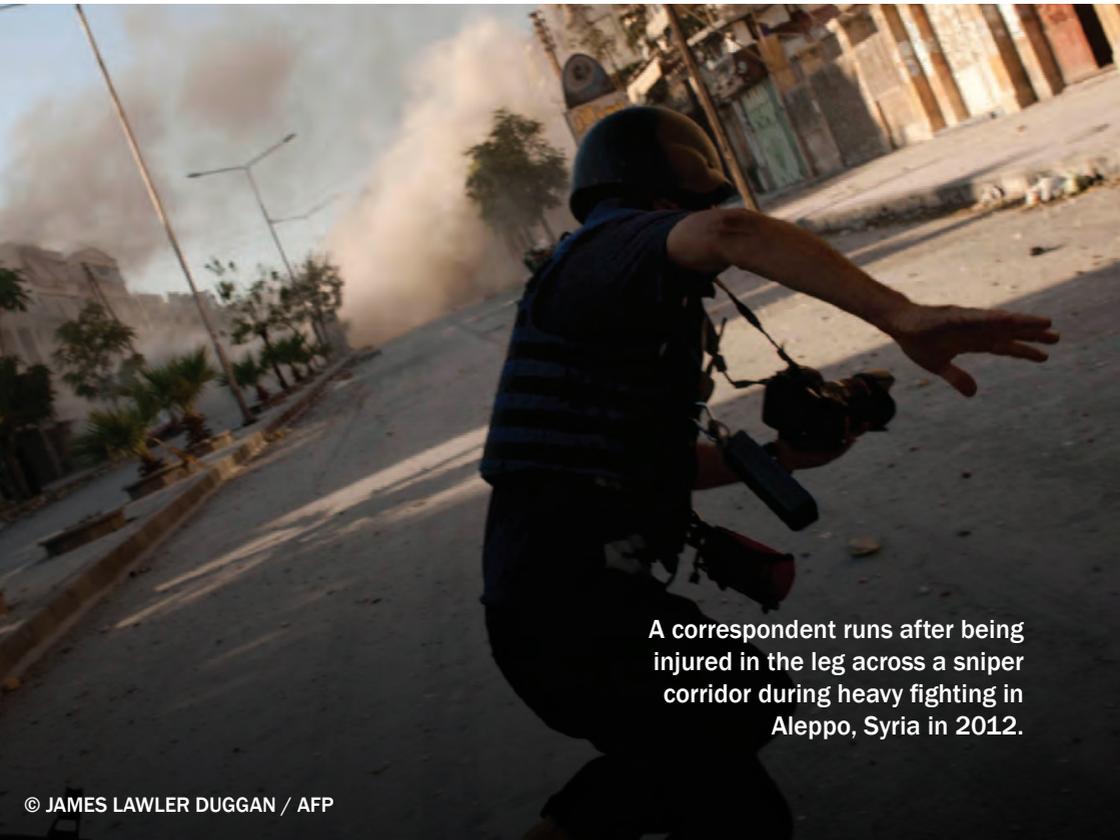
Journalism schools and the media do not generally prepare for indirect traumatism. Such avoidance cannot be tolerated any longer. The Dart Center for Journalism & Trauma (Columbia School of Journalism) gave practical advice, saying that, as well as the measures taken by media editorial teams to prevent PTSD, the people tasked with viewing violent images on social networks should adhere to strict discipline and adopt precise guidelines to minimise the risks of over-exposure. They could therefore reduce the number of viewings, conceal certain parts of the image when analysing the video, reduce the luminosity of the screen or schedule frequent breaks.<sup>9</sup>

The challenge, as Bill Kovac, former curator of the Nieman Foundation at Harvard, writes in the preface to the Dart Center Manual, *Tragedies and Journalists*, is to “help us all think more deeply and creatively in dealing with the residue of destructive fear and uncertainty while producing the kind of journalism that informs effectively”.<sup>10</sup>

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9 <https://dartcenter.org/blog/2016/11/storyful-releases-podcast-confronting-vicarious-trauma>

10 Hight, J., & Smyth, Fr., *Tragedies and Journalists: A Guide for More Effective Coverage*, Dart Center, 2003.



**A correspondent runs after being injured in the leg across a sniper corridor during heavy fighting in Aleppo, Syria in 2012.**

# 7

## Key points

- After the initial emergency, review the actions of all stakeholders (authorities, emergency services, politicians, etc)
- Objectively evaluate your own coverage before, during and after an attack



## Chapter 7

# When Calm Returns: Taking Stock

### 7.1 After the shock, fundamental questions

The shock of an attack is such that it is difficult to ask certain questions immediately, because the public is not ready to hear them. As mentioned previously, ideas that may seem inappropriate in the immediate aftermath of an attack, such as the wider global context and possible causes, become important points of conversation in the subsequent days.

Likewise, when the security forces ask the media not to air the images of interventions or elements of an ongoing investigation, it is difficult to challenge them, as, once again, the public may not understand why the press could not accept such restrictions. However, when the exceptional emergency is over, journalists have a right and a duty to take stock, and particularly to wonder about the responsibilities and the actions of the authorities, civil society and the political sphere.

These questions inevitably concern the effectiveness of State services and institutions. Could the attack have been predicted? Did the intelligence services fail? Were security measures sufficient? Were the intervention and emergency medical services ready and sufficiently trained? Were hospital capacities up to the task? Were the lists of suspects and victims updated and distributed in real time?

However, there are also more political questions. Did the authorities let the alarm bells of radicalisation go unheard? Did they profit from the emotion

caused by hostage-taking to restrict public freedoms and increase their prerogatives over society? Did they pay enough attention to the grievances of the communities that the terrorists claim to represent?

All of these questions are part of the media's task of informing, explaining and monitoring. Following the attack in London in July 2005, Brooke Barnett and Amy Reynolds noted that, although the event had occurred on its own soil, the British press was very critical. Journalists questioned the closure of the whole Underground network, criticised the slow reaction of the emergency response teams and wondered about British engagement in the war in Iraq.<sup>1</sup>

In Belgium, after the attacks of 22 March 2016, the media, who also transmitted the findings of the parliamentary committee of inquiry, wondered about the flaws in the police monitoring of terrorism suspects, the coordination between security forces and the collaboration and reactivity of the emergency services.

Later, when the shock of the attacks has dulled and other subjects dominate the news, the media must return to the subject, and not just for seasonal pieces marking anniversaries and commemorations. They must particularly ensure that the victims, who occupy the limelight in the first moments of media coverage, are not forgotten. They must ensure they cover the news and come back to matters of compensation, mourning, physical and psychological reconstruction and reintegration into society. They may also wonder about an attack's longer shock waves, as H el ene Romano and Adolie Day suggest in their book *Apr es l'Orage* ("After the Storm"), which explains the impact of terrorist attacks months after the events, particularly on children.

The crux of the matter is continuing to cover subjects on which the response to future attacks depends, "because there will be other attacks". Journalists must particularly check whether the reforms of security or emergency measures have actually been implemented and if prevention and 'deradicalisation' policies are effective.

This procedure particularly lends itself to investigative journalism, and should undoubtedly be undertaken by other institutions than just the media. Medical associations, human rights groups, police trade unions or the official watchdogs in charge of monitoring the institutions involved in the response to attacks could all help in this effort. However, it is up to the media to check that the situation is effectively followed up and that the authorities and other institutions are confronted with their operational procedures and responsibilities.

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<sup>1</sup> *Terrorism and the Press. An Uneasy Relationship*, p. 127.

## 7.2 A media post-mortem

**Due to its violence, its consequences and the controversy that it elicits, terrorism tests journalism. The media must also think about their own practices and hold debriefings.**

They must first wonder about their readiness, reactivity, coordination and cooperation in the face of such events. In the event they notice shortcomings, they must train reporters and the “chain of command” from the editorial team right up to management.

The usefulness and functioning of the equipment used for reporting must also be evaluated (type of camera, availability of a wifi network, etc.).

The media must also consider their writing priorities and analyse whether they sufficiently covered the subjects revealed by the attacks. On 31 January 2001, a report drafted by the Hart-Rudman Commission warned that the U.S. was not prepared to confront a terrorist threat. Despite the seriousness of the commission’s warning – “Americans will likely die on American soil, possibly in large numbers,” it said – and the prestige of its members, only some media covered its findings.

Richard Cohen, columnist for the *Washington Post*, wrote after the attacks that the media had done “a miserable job preparing the American people for what happened on 11 September”. He added: “We – and I mean most of us – were asleep.”<sup>2</sup>

“Why, for instance, did no journalist thoroughly investigate the dysfunctional agencies cited in the report?” wondered Susan Paterno in the *American Journalism Review*. “If reputable agencies and public officials had warned of a terrorist attack, why have so few news organizations explored the depth and breadth of that belief?”<sup>3</sup>

When the pressure slackens, it is also the time to ask whether the “cause” championed by the terrorists had really been treated seriously and sufficiently before the event, and if it would have been possible to prevent the explosion of violence by paying greater attention to the requests, social exclusion and strategies of influence within some communities – even minorities.

The media must also review their coverage in the light of ethical rules. They must establish whether it was disproportionate, whether it kindled public voyeurism or instrumentalised the victims, whether it showed itself to be too passive, submitting to the intervention forces and whether it served as a megaphone for the terrorists. The role of journalism schools and associations, as well as their ethical councils, is crucial to hold these debates and thus contribute to a culture of

<sup>2</sup> Susan Paterno, “Ignoring the Warning”, *American Journalism Review*, Novembre 2001.

<sup>3</sup> Susan Paterno, “Ignoring the Warning”, op. cit.

information on terrorism that combines freedom and responsibility.

Terrorism is a key testing ground, Charlie Beckett writes in *Fanning the Flames*.<sup>4</sup> “Improving coverage of terrorism is important because violent extremism is a significant issue and symptomatic of wider problems around the world. The case for more intelligent, informed, and socially responsible reporting of terror is not just a moral plea. It is a chance to show that journalism remains a vital part of modern society.”

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<sup>4</sup> [http://www.cjr.org/tow\\_center\\_reports/coverage\\_terrorism\\_social\\_media.php](http://www.cjr.org/tow_center_reports/coverage_terrorism_social_media.php)



Thousands of people gathered in Yaoundé, Cameroon to protest against terrorist group Boko Haram in 2015.

# FOCUS: Destruction of Cultural Heritage

## TEXT PROVIDED BY UNESCO

The current conflicts in the Middle East, particularly in Iraq, Syria and Yemen, have attracted widespread media attention not only due to the heavy loss of life and the resulting refugee crisis, but also for its devastating impact on the cultural heritage and cultural diversity of the affected countries.

Cultural heritage and pluralism have become the direct targets of systematic and deliberate attacks, often driven by ideological motives. Moreover, with urban areas standing on the frontlines, heritage properties often suffer from collateral damage. In Syria, for example, cultural heritage sites, including UNESCO World Heritage sites such as the Citadel of Aleppo and the Old City of Damascus, have been heavily damaged during fighting. Cultural heritage is also severely affected by widespread looting and the illicit trafficking of cultural objects, which not only finances organized crime, but also terrorist organizations.

## MEDIA COVERAGE ON CULTURAL HERITAGE DESTRUCTION

It is arguably this latter link with terrorism, and the exploitation of cultural heritage destruction by terrorists for propaganda purposes, that has received the strongest media attention. Indeed, while the accelerated destruction of cultural heritage in Iraq and Syria garnered media coverage beginning in February 2014, references to UNESCO by international media outlets peaked in the months that saw news or activities specifically related to terrorism: the destruction of cultural artefacts in the Mosul Museum in Iraq (27 February 2015); the destruction of the archaeological site of Nimrud (5 March 2015); the fall of the World Heritage site of Palmyra to ISIL/Daesh (20 May 2015); and the destruction of the Baalshamin Temple in Palmyra (23 August 2015). However, neither the liberation of Palmyra from ISIL/Daesh nor UNESCO's rapid assessment mission there generated comparable media coverage.

## IMPROVING MEDIA COVERAGE

Reporting on the intentional destruction of cultural heritage by terrorist organizations has generated debates on whether these reports spread terrorist propaganda. Indeed, because most of the areas in question are inaccessible, the mainstream media relies on propaganda videos by extremist groups for images and videos of the attacks. Similar to other propaganda content, such as the beheadings of victims, the use of these types of images amplifies the reach of terrorists and provides them with the attention they seek when carrying out their choreographed atrocities. Therefore, questioning and debate within the mainstream media on the ethics of using propaganda material may be in order. Moreover, the use of alternative visuals, such as satellite imagery, could be strengthened.

Another way in which the media could improve their reporting is by emphasising the cross-cultural, and often universal, dimensions of the affected monuments, sites

and intangible practices, which – particularly in regions such as the Middle East – reflect centuries of exchange between many different cultures, as well as the amazing continuity and resilience of ancient traditions across the centuries. This underlines the fundamental universality that characterises the cultural heritage of all people, which in turn should inspire respect and mutual understanding among groups and individuals.

## **KEY INFORMATION FOR JOURNALISTS**

With regard to the intentional destruction of cultural heritage by terrorist organizations, it is the human dimension that should be emphasised by journalists, more so than images of destruction. Indeed, culture and heritage, as expressions of identity, repositories of memory and traditional knowledge, are essential components of a community's identity and social capital. The significance of culture in the lives of communities and individuals makes its continuity a powerful tool for building resilience, serving as a basis for sustainable recovery. For these reasons, the destruction of cultural heritage, which is often combined with the persecution of individuals based on their cultural, ethnic or religious affiliation, resulting in “cultural cleansing”, is also a violation of human rights, including the right to culture, the right to enjoy, develop, and have access to cultural life and identity, the right to education, the right to assemble and freedom of expression.

Another aspect is the ethical and philosophical dimensions related to any proposed restoration or reconstruction project, including the challenges of maintaining or recovering the authenticity of what was damaged or lost, and to the need to ensure that the affected communities can fully participate in decisions related to their cultural life. Finally, the media should become aware of the basic international legal instruments and provisions of international humanitarian law related to the protection of cultural property during armed conflicts, including various UNESCO Conventions such as the 1954 Hague Convention and its two (1954 and 1999) Protocols, the 1970 Convention, as well as the Statute of the International Criminal Court.

## **KEY SOURCES**

UNESCO provides verified and confirmed information on destruction and trafficking. As such, it is the prime source for reliable information on this issue. In addition, the competent national authorities of the countries concerned will often be able to provide or corroborate factual information (such as the Directorate General of Antiquities and Museums in Syria). Reputed international institutions and national research projects may also be able to provide first-hand information, often in connection with a specific initiative (e.g. ICOMOS, ICOM, IFLA or US-based ASOR Project on the safeguarding of the Syrian cultural heritage).

**More information: <http://www.unesco.org/themes/culture-at-risk>**

# FOCUS: Illicit Trafficking of Cultural Property

TEXT PROVIDED BY UNESCO

*There has been increasing media attention to the issue of stolen or smuggled cultural property, which can provide a significant source of funding for terrorist groups. UNESCO is the lead U.N. agency responsible for implementing the 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, which has been ratified by 131 countries.*

## **A RENEWED FOCUS ON CULTURAL PROPERTY**

Recent events in the Middle East especially have created a renewed interest in illicit trafficking. Press reports have begun to cover cases involving stolen or illegally-exported objects, illegal excavations and discoveries of fake or forged objects, along with the prosecution of thieves etc.

The volume of this coverage has especially skyrocketed in relation to cultural property from Iraq and Syria, and its link with the financing of terrorism. Numerous reports state that the illegal trade in cultural property is one of the most lucrative businesses for terrorist groups alongside international arms and drug trafficking. In the case of the ISIL/Daesh group, illicit trafficking of cultural property represents a significant source of financing. The group considers artefacts as natural resources to be seized and profited from, giving out permits and taxing diggers up to 20%.

## **PUTTING THE ISSUE IN CONTEXT**

Ultimately, it is important to understand that the issue of illicit trafficking of cultural property is a world-wide phenomenon. Artefacts are trafficked then laundered to give them false provenances, typically through legitimate internationally connected dealers; they are eventually sold through legal channels to buyers in the West, Gulf and Asia. This has been further exacerbated since the advent of the Internet.

Furthermore, while ISIL/Daesh is a major player in the smuggling of the region's cultural goods, they are neither the first nor the only group that have seen the financial benefits of illicit trafficking of cultural property. For instance, since the start of the conflict in Syria, different groups have traded in cultural property in order to acquire weapons or merely as an alternative means for funds.

In Iraq, the looting of archeological sites had been practiced before the current conflict. Plunder and pillage of cultural property has been common since the country's isolation after the first Gulf War and again after the 2003 invasion. It should be clarified that ISIL/Daesh did not 'invent' the practice of archeological looting but they have definitely strengthened and enhanced the circumstances, occurrence and volume of cultural property that is illicitly trafficked to the point that media has started to pay more attention to the issue.

In times of conflict, this trafficking becomes relatively easier as borders are less secure, and areas under serious threat are out of the relevant authorities' reach. In the Middle East, cultural property is usually trafficked from clandestine excavations, thus preventing authorities from giving an accurate estimate of its worth. Media reports are constantly giving false numbers on the value of the illicit market. One report claimed, for instance, that ISIL/Daesh generates hundreds of millions of dollars from the trade in cultural property, more than the total global legal trade of artefacts.

In reality it is impossible to put a number on illicit trafficking of cultural property, primarily, because there is a strong chance that a lot of the looted artefacts have not emerged into the market yet, and also because we have no idea how many pieces have already been sold to private owners. The private nature of transactions has always been hard to quantify, and definitive proof is difficult to come by.

## **REPORTING ON THE TOPIC**

The current problems of media coverage of illicit trafficking of cultural property are similar to the wider issues covered in this publication. This is especially true when it comes to the accuracy of information, with unverified information and exaggerated numbers widespread. For this reason, it has become critical that media platforms ensure that they verify their information and not merely rely on previous reports made by unrecognised sources. Information regarding illicit trafficking of cultural property, or authentication of existing information, should come directly from UNESCO or partners such as INTERPOL, the United Nations Office on Drugs and Crime (UNODC), the International Institute for the Unification of Private Law (UNIDROIT) or the World Customs Organization (WCO).

Initially, it would be wise when preparing a report on cultural property to explain its importance to societies and illustrate how cultural property is a reference for future generations and should be preserved and protected.

Journalists should avoid giving estimations of the size of the market, as this information is unknown. What is more, journalists need to focus on the symbolic and historical value of cultural property as opposed to focusing on financial aspects. Additionally, there should be more reports on the contributions the international community has already taken to denounce and curb this trade, such as the fact that the UN Security Council has passed Resolutions banning all trade in cultural property from Syria and Iraq. Resolution 2199 expressed its concern that ISIS and others are “generating income from engaging directly or indirectly in the looting and smuggling in cultural heritage items (...) to support their recruitment efforts and strengthen their operational capability to organize and carry out attacks.” In response, UNESCO coordinates with its partners to implement these Resolutions and provides support to Member States on effective ways to integrate them into domestic legislation.

**More information: <http://www.unesco.org/themes/culture-at-risk>**

# Useful Resources

## Intergovernmental institutions

United Nations Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism

<http://www.un.org/victimsofterrorism/en/special-rapporteur-promotion-and-protection-human-rights-while-countering-terrorism-specific-work>

United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression <http://www.ohchr.org/EN/Issues/FreedomOpinion/Pages/OpinionIndex.aspx>

Counter-terrorism Implementation Task Force (CTITF, reporting to the Secretary-General) <http://www.un.org/en/terrorism/ctif/index.shtml>  
*Composed of 36 entities that intervene according to their specific institutional mandate (<http://www.un.org/en/terrorism/ctif/entities.shtml>), such as UNESCO or the World Customs Organization.*

United Nations Security Council Counter-Terrorism Committee (1373 Committee) Counter-Terrorism Committee Executive Directorate - CTED, created by Resolution 1535 (2004)

<http://www.un.org/en/sc/ctc/rights.html>; <http://www.un.org/en/sc/ctc/resources/>

United Nations Office on Drugs and Crime (Terrorism Prevention Service)  
<https://www.unodc.org/>

Financial Action Task Force (FATF) <http://www.fatf-gafi.org/>  
*Notably published a guide of best practices for States in their fight against the financial sources of terrorist groups. <http://www.fatf-gafi.org/publications/fatfrecommendations/documents/bpp-finsanctions-tf-r6.html>*

## United Nations Conventions

<http://www.un.org/fr/terrorism/instruments.shtml> [https://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2\\_fr.xml&clang=\\_fr](https://treaties.un.org/Pages/DB.aspx?path=DB/studies/page2_fr.xml&clang=_fr) dont:

### Examples

Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents (1973)

[http://www.un.org/en/documents/view\\_doc.asp?symbol=A/RES/3166%28XXVIII%29](http://www.un.org/en/documents/view_doc.asp?symbol=A/RES/3166%28XXVIII%29)

International Convention against the Taking of Hostages (1979)

<http://legal.un.org/avl/ha/icath/icath.html>

International Convention for the Suppression of Terrorist Bombings (1997)

<http://www.un.org/law/cod/terroris.htm>

International Convention for the Suppression of the Financing of Terrorism (1999) <http://www.un.org/law/cod/finterr.htm>

International Convention for the Suppression of Acts of Nuclear Terrorism (2005)

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# A framework for coverage that is responsible, proportionate and free of stigmatisation and sensationalism...

**“Publicity is the oxygen of terrorism.”** *Margaret Thatcher*

**“News is the lifeblood of liberty.”** *Katherine Graham*

Targeted towards journalists and media professionals, this handbook is designed to provide key information and encourage reflection on the way that terrorism is covered in the media.

Based upon advice from leading institutions and experts, and filled with examples, it explores the professional challenges and ethical dilemmas inherent in terrorism reporting, and poses fundamental questions about what the impact of current treatment may be on social cohesion and the prevalence of fear in society.

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## Terrorists on Trial: A Performative Perspective

On 30 March 2011, ICCT – The Hague organised an Expert Meeting entitled ‘Terrorism Trials as Theatre: A Performative Perspective’. The Expert Meeting applied a performative perspective to three well known and recent trials in different parts of the world: the trials against the Dutch Hofstad Group, the Mumbai 2008 Terrorist Attack Trial and the Guantanamo Military Tribunals. As such, the Expert Meeting did not concentrate solely on the immediate judicial performance of the magistrates and/or the defence; instead, the trials were put in their wider sociological context, adopting notions of social drama and communication sciences. This Expert Meeting Paper is a further adaptation of the Discussion Paper that was used as basis for debate during the Meeting.

### Introduction

On May 8, *Washington Post*-journalist Jeff Greenfeld drew up a vivid picture of what would have happened had operation Geronimo resulted in capturing Osama bin Laden alive. After the initial applause, the victory soon would have turned sour. Putting bin Laden on trial for mass murder in a New York federal court – putting aside the fact that it is very unlikely that Congress would allow this in the first place – would have provided major headaches:

‘What if information about his location had been obtained through “enhanced interrogation techniques” and was ruled inadmissible? What if bin Laden acted as his own lawyer, turning the trial into a months long denunciation of America? What if one holdout resulted in a hung jury? [...] A military commission at Guantanamo Bay, then? The process was agonizingly slow (only five cases concluded in nine years), and a death sentence for bin Laden would mean years of appeals.’<sup>1</sup>

The author wishes to thank Fred Borch, Elies van Sliedregt, Jacco Pekelder, Edwin Bakker, Alex Schmid, Joost Augusteijn and especially Quirine Eijkman for their comments on the draft paper.

<sup>1</sup> Jeff Greenfield, ‘What if we’d taken him alive?’, *Washington Post*, 8 May 2011.

Moreover, legal questions would be ‘nothing next to the security consequences of taken bin Laden alive’. What if any terrorist organisation worldwide would seize an elementary school, threatening to kill all children unless bin Laden would be released?

Utilising criminal law and ultimately making use of civilian courts to try, sentence, and lock terrorists away, is not an undisputed approach within counter-terrorism. We do not need alternative history to prove this point. Former Vice President Dick Cheney voiced strong opposition against organising civilian terrorism trials in the United States (US). In a reaction to Attorney General Eric Holder’s decision to prosecute Khalid Sheikh Mohammed (KSM) before a civilian court in 2009, he lamented: ‘I can’t for the life of me figure out what Holder’s intent here is in having Khalid Sheikh Mohammed tried in civilian court other than to have some kind of show trial’.<sup>2</sup> Cheney objected to this decision, arguing that giving KSM and the other suspected terrorists a civilian trial in New York would be a major security failure and strategic disaster: ‘they’ll simply use it as a platform to argue

<sup>2</sup> Andrew Ramonas, ‘Cheney Says Holder Wants “Show Trials” for KSM’, 23 November 2009, available at: <http://www.mainjustice.com/2009/11/23/cheney-says-holder-wants-show-trial-for-ksm>. Quoted in: Awol Kassim Allo, ‘The ‘Show’ in the ‘Show Trial’. Contextualizing the Politicization of the Courtroom’, in: *Barry Law Review*, Vol. 15, Fall 2010, pp. 41-72, here: 44.



their cases – they don't have a defence to speak of – it'll be a place for them to stand up and spread the terrible ideology that they adhere to'.<sup>3</sup>

Indeed, even with legality intact, terrorism trials are highly likely to turn into a show, a spectacle. This insight was corroborated with the outcome of the first trial against a Guantanamo 'ghost prisoner', Ahmed Khalfan Ghailani, which sparked off a heated political debate. The defendant was convicted in the federal court in Manhattan for his role in the 1998 embassy bombings in Kenya and Tanzania, which earned him a 20-years' sentence. Republican critics objected the fact that the jury acquitted Ghailani on all other charges, 280 in total, including every murder count. This in turn was used as proof that terrorism detainees should solely be prosecuted before a military commission.<sup>4</sup> Not the final verdict as such, but the use of civilian courts in combating terrorism became heavily contested.

Notwithstanding this criticism, terrorism trials are an exceptional opportunity for understanding and countering terrorism, since it is the only place where all actors involved meet: terrorists, state's representatives, the judiciary, the audience, surviving victims, terrorist's sympathisers, etc. The media will moreover report and broadcast their performance. As a nexus of terrorism violence, law enforcement and public opinion, terrorism trials thus offer an ideal opportunity to showcase justice in progress and demonstrate how terrorist suspects are dealt with by the laws of the land. However, governments and security officials more often than not are reluctant to put terrorist suspects before civilian courts. This reluctance can be explained by considering terrorism trials as a type of theatre, where the show develops its own unforeseeable and autonomous dynamics, out of control for the executive power. Terrorism trials almost inevitably produce political disputes. The whole crime of terrorism is a political concept and an essentially contested one as well.<sup>5</sup> Terrorism trials essentially deal with suspects that challenge the existing rule – or are at least perceived as posing a political threat. Government's unease pertains to the fact that it has to hand over control over this threat to the judiciary, with its own criteria in dealing with offences rather than purely looking at it as a security threat. Governments also face national and international public opinion,

which might turn the trial into a media circus with its own uncontrollable dynamics, probably even causing new security risks.

This paper will examine the way in which a terrorism trial in modern day democracies – where the state's monopoly of violence is limited by an established set of rules and criminal law procedures and controlled through parliamentary oversight and mass media coverage – serves multiple ends, depending on the various actors involved, who are all busy trying to mobilise their respective target audiences around their narratives and (in)justice frames. A *performative perspective* on terrorism trials is introduced, meaning that trials are the stage where the different actors adopt and act out strategies with the aim of convincing their target audience(s) in and outside the courtroom of their narrative of (in)justice.

In the words of the president of the Special Tribunal for Lebanon Antonio Cassese, terrorism has a profound negative impact on the national and international community because it subverts both national law and the international rules of the game. Not only do terrorists create havoc, kill and slaughter people whom they are not legally at war with; terrorism also disturbs social and international peace as it provokes states to commit breaches of their own legal standards, to breach treaties and violate the law itself in reaction to the initial terrorist attack or threat.<sup>6</sup> Democratic states have a lot to loose in the battle against terrorism; the rule of law, legitimacy and justice are not the most insignificant casualties. To protect these 'victims', to effectuate a better understanding and a better use of legal tools in the battle against terrorism, closer attention needs to be paid to the judicial and social-political mechanism and effects of terrorism trials, especially with regard to their performativity, which may create new legends of justice and/or injustice.<sup>7</sup>

Research into the character and impact of political trials in contemporary history has matured over the last decades, but research into terrorism trials as a political and/or show trial is rather new. Awol Kassim Allo did groundwork in analysing the show element in political trials.<sup>8</sup> This paper aims to gauge the performative element in *terrorism trials* in particular. Three principal questions will be addressed: Why are governments often at unease

<sup>3</sup> Ibid.

<sup>4</sup> Charlie Savage, 'Ghailani Verdict Reignites Debate Over the Proper Court for Terrorism Trials', *New York Times*, 18 November 2010.

<sup>5</sup> William E. Conolly, *The terms of political discourse* (Princeton University Press, 1993 [3<sup>rd</sup> edition]), p. 10; See also Alex Schmid, 'Terrorism. The definitional problem', in: *Journal of International Law*, Vol. 36 (2004), No. 1, pp. 375-420.

<sup>6</sup> Antonio Cassese, *Terrorism, Politics and Law. The Achille Lauro Affair* (Princeton: Princeton University Press, 1989), pp. 139-140.

<sup>7</sup> For a theoretical and historical analysis of this concept see: Beatrix de Graaf, *Evaluating Counterterrorism Performance. A Comparative Study* (London/New York: Routledge, 2011).

<sup>8</sup> Awol Kassim Allo, 'The 'Show' in the 'Show Trial'. Contextualizing the Politicization of the Courtroom', in: *Barry Law Review*, Vol. 15, Fall 2010, pp. 41-72.



with putting terrorists on trial? What does the 'show' element in terrorism trials mean? What kind of performative strategies are adopted in court, to what end and with what result? A typology of the show element in terrorism trials is developed, to gain a better insight into how terrorism trials matter socially and politically, apart from the legal questions raised. This paper is not intended as a contribution to legal theory, but written as a historic-political perspective on the phenomenon of terrorism trials in modern day democracies.

## Why the Unease?

In the US, after President Barack Obama emphasised his preference for trials in federal civilian courts and promised to close down the Guantanamo military tribunals in 2009, congressional interference caused the president to retreat from this decision. Early March 2011, the White House announced that it will resume military trials for detainees at Guantanamo Bay, Cuba. 'I strongly believe that the American system of justice is a key part of our arsenal in the war against al-Qaida and its affiliates, and we will continue to draw on all aspects of our justice system – including (federal) courts – to ensure that our security and our values are strengthened,' Obama stated.<sup>9</sup> Yet, congressional concern relating to the security risks involved in these terrorism trials, given that detainees will have to be transferred to and tried in the 'homeland', prevailed.<sup>10</sup> Cheney's objection to such trials has already been mentioned above. In the *Wall Street Journal*, columnist James Taranto also invoked the association of a 'show trial', although he was more nuanced: 'These trials will differ from an ordinary show trial in that the process will be fair even though the verdict is predetermined.' However, even if it would be a fair trial with just proceedings, it would nevertheless contain an element of show: 'The answer seems to be that the administration is conducting a limited number of civilian trials of high-profile terrorists for show, so as to win "credibility" with the international left.'<sup>11</sup>

Taranto hit the spot: even with legality intact, terrorism trials are highly likely to turn into a show, a spectacle, because the prosecution and/or the defendants will adopt performative strategies.

As indicated above, the outcome of the first trial against Guantanamo 'ghost prisoner' Ahmed Khalfan Ghailani sparked off a similar debate. Not the final verdict as such, but the use of civilian courts in combating terrorism became heavily contested. The opposition argued that terrorists should never be given civilian trials, but should be treated and detained as military prisoners. The administration, on the contrary, claimed that the system had shown that a terrorist could be convicted even after a judge excluded evidence tainted by coercive interrogations during the Bush administration and by acquitting the defendant from numerous other charges. The sentence meted out – 20 years – was probably even stiffer than a military court could have given.

In response to this case, Jack Goldsmith, a high ranking Justice Department official during the Bush administration, argued that the verdict showed that terrorism suspects should be held without any trial at all, not even a military one. Indefinite military detention, he said, 'is a tradition-sanctioned, Congressionally authorised, court-blessed, resource-saving, security-preserving, easier-than-trial option for long-term terrorist incapacitation. And this morning it looks more appealing than ever'.<sup>12</sup> Since the attacks of 9/11, this new line of thinking became dominant amongst executives and was reinvigorated after every new attack and through military campaigns in Afghanistan and Iraq.<sup>13</sup>

This tendency to resort to other measures rather than criminal law is not solely reserved for US officials. In the Netherlands, for instance, the government also arranged for other measures in dealing with terrorism than through criminal law alone. Dutch government officials may pick and choose whether they apply intelligence measures (observation, hindering), immigration law, control orders and other administrative law instruments (or a combination thereof), before deciding if a criminal investigation should be pursued.<sup>14</sup>

The explanation for this unease regarding civilian terrorism trials is twofold. First of all, one has to consider the element of risk in relation to the outcome of the trial. From the executive's

<sup>9</sup> 'New Military Trials at Guantanamo Bay Could Include 9/11 Suspects', *Fox News*, 8 March 2011; 'Obama billigt neue Militärverfahren in Guantánamo', *dpa*, 16 March 2011.

<sup>10</sup> *Ibid.*

<sup>11</sup> James Taranto, 'Obama's Show Trials', *The Wall Street Journal*, 13 November 2009, available at: <http://online.wsj.com/article/SB10001424052748703683804574533833220552624.html>.

<sup>12</sup> Charlie Savage, 'Ghailani Verdict Reignites Debate Over the Proper Court for Terrorism Trials', *New York Times*, 18 November 2010.

<sup>13</sup> Committee on the Evaluation of Counterterrorism Policy (Suyver Committee), *Naar een integrale evaluatie van antiterrorisme maatregelen [Towards an Integrated Evaluation of Counterterrorism Policies]*. Report no. IBIS-13174. (The Hague: Dutch Government, May 2009), pp. 16-23.

<sup>14</sup> Dutch Government, *Antiterrorisme Maatregelen in Nederland in het Eerste Decennium de 21e Eeuw [Counterterrorism Measures in the Netherlands in the First Decade of the 21st Century]*. Report no. 04126-6359. (The Hague: Dutch Government, January 2011), pp. 87/91.



perspective – often dominated by national security considerations – adjudication is a risky business. Terrorist suspects can be acquitted, sometimes not because they are innocent, but because certain crucial evidence is deemed inadmissible, as was the case in the Ghailani trial. This risk cannot be excluded, at least not at the cost of turning the trial into a huge farce for the government. This element of uncertainty runs against the grain of the principal goal of counter-terrorism actors: eliminating the terrorist threat. Thus, the executive's rationale behind an *a la carte* treatment of terrorists lies not in contempt for criminal law, but in the priority given to other (legal) obligations, such as protecting the right to life and security of the citizens. This weighing of rights is known as the balance or proportionality response thesis; notable politicians and scholars such as Michael Ignatieff assume that in order to protect security, public interest must be weighed against human rights. If this means that the rights of terror suspects are suspended or restricted, then this is an unfortunate side-effect of protecting national security.<sup>15</sup> Critics such as the 2009 Eminent Jurists Panel in its report on Terrorism, Counter-terrorism and Human Rights, however contend that this suspension of terrorists' rights normalises the state of exception – thus one-dimensionally enhancing executive competence – and pleaded for reasserting the value of the criminal justice system, especially in the case of citizens.<sup>16</sup>

A second explanation for a government's difficulty with relying on criminal law in dealing with terrorists, is the fact that prosecution of terrorist tends to end in court and may turn into a 'political show'. The main functions of criminal law are exerting social control, settling disputes and confirming society's norms.<sup>17</sup> Counter-terrorism verdicts, however, do not necessarily reflect such an impartial truth, nor do they affirm society's shared values. Many terror suspects stem from minority groups that oppose an oppressive government and fight exclusion; they surely will not perceive criminal law or its implementation by the judiciary as neutral or legitimate at all. Their (perception of) truth cannot simply be 'tried away'. Take for example the trial against Nelson Mandela.

During the Apartheid regime in South-Africa, Nelson Mandela, who publicly supported violent political struggle, was labelled a terrorist partly due to his conviction in 1964 for conspiracy. Although the trial ended in a legal victory for the prosecution, it brought political disaster to the regime. This is exactly what governments fear: Although criminal law might serve immediate political ends (detaining political opponents by sentencing them as terrorists), the intermediate and long term political effects can be unforeseeable and potentially devastating. This way, the element of risk once again enters the courtroom. The trial against Mandela became a show of injustice; its reverberations undermined the political credibility and legitimacy of the Apartheid regime.<sup>18</sup>

The recent events ending in the killing of Osama bin Laden underscore the salience of these two points. Indeed, governments are in most cases at unease with staging major terrorism trials, both because of the security risks and the show element involved. At the same time, this show element is sometimes consciously used by the prosecuting authorities themselves as an opportunity for staging a performance of rule of law, of retribution, of demonstrating to the world what justice means and how it is performed. Under the right conditions of legality and the right performative strategies, terrorism trials (like any other trial) can result in a triumph of justice. The next paragraphs will discuss how the actors involved in a trial might adopt performative strategies, aimed at convincing the audience(s) of their story of (in)justice and thereby achieving their end. But first, it is necessary to explore what the show element in terrorism trials entails and how this element relates to the concept of 'show trials', a category loaded with heavy historical associations.

## A Brief Excursion to the 'Show Element' in Criminal Trials

Law is broader than a mere summary of legal norms and principles; it incorporates amongst other things social norms, values, power relations and social processes. Moreover, by applying law, one sets in motion a communicative process. 'Law cannot any more be correctly understood within a paradigm of one-dimensional rationality. [...] The dramatic rise of complexity, both of law and of society, has made such a scheme obsolete',

<sup>15</sup> Ignatieff, M. *The Lesser Evil: Political ethics in an age of terror* (Princeton, Princeton University Press, 2004), p. 46; Cf. also Asworth, Andrew, 'Security, Terrorism and the Value of Human Rights' in: Goold, B.J. and Lazarus, L. (Eds). *Security and Human Rights* (Hart Publishing, Oxford and Portland, Oregon, 2007), pp. 207-209/224.

<sup>16</sup> ICJ, *Assessing Damage, Urging Action*, Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism and Human Rights, (International Commission of Jurists, Geneva, 2009), pp.156-157/165-167.

<sup>17</sup> Vago, S. *Law & Society*. London: Inc., Upper Saddle River, New Jersey, Pearson Education. 2009, p. 19-21.

<sup>18</sup> Linder, O.D. 'The Nelson Mandela (Rivonia) Trial: An account', website <http://law2.umkc.edu/faculty/projects/ftrials/mandela/mandelaaccount.html> (accessed 18 March 2011).



according to legal scholar Mark Van Hoecke.<sup>19</sup> Legal theorists of the twentieth century held that facts and norms could be separated, but this positivist view of the law has been under attack from all sides now.<sup>20</sup> Modern times with its modern, multi-layered, complex and vulnerable societies have made apparent the weak points of a pure positivist approach to the law.<sup>21</sup> Law is not (solely) about sifting facts from opinions or about establishing objective truth, but about social control, communication and perception of social norms. Trials are the instances in which law can be seen in action by the broader public. Trials communicate that law is not just in the books but is implemented in practice. From a narrow perspective, courts interpret and apply legal rules. Yet by doing so, they contribute to concepts of justice and socialisation of the general public and by enforcing the law they are linked to the state's legitimacy as well as the elaboration of policy goals.<sup>22</sup> Trials thus communicate publically and ceremonially to society what it wants its norms and principles to be.<sup>23</sup>

The law in action *is* a communicative process, but at the same time also *offers* a framework to interpret human actions and communication. Trials are the medium through which this communication takes place: 'communication between legislators and citizens, between courts and litigants, between the legislator and the judiciary, communication between contracting parties, communication within a trial'.<sup>24</sup> More importantly, exactly this communicational aspect, within the confines of the court and amongst the legal actors involved, serves as the 'ultimate safeguard for a "correct" interpretation and adjudication of the law', and thus legitimises it.<sup>25</sup>

Since this communicational process is the principal foundation underlying the legitimacy of the justice applied, a trial is heavily protected against political interference and manipulation. A fair trial is a basic human right, not only protected by criminal law, but also by international and constitutional law. The principle of fair trial is recognised in numerous international treaties, such as the Universal Declaration of Human Rights (Article 10 UDHR), the

International Covenant on Civil and Political Rights (Article 14 ICCPR) and European Convention on Human Rights (Article 6 ECHR). Among others, the fair trial principle ensures the right of an individual to be informed of the measures taken, to be informed about the case against him or her, the right to be heard within a reasonable amount of time, the right to a fair and public hearing by a competent and independent review mechanism, the right to counsel with respect to all proceedings and the right to have his or her conviction and sentence reviewed by a higher tribunal according to the law. International law does recognise adaptations in criminal justice for reasons of national security.<sup>26</sup> However, deviations from the ordinary practice of adjudication must always be temporary and meet legality, necessity and proportionality standards.<sup>27</sup> The right to a fair trial ensures individuals both protection against each other – trespassers should be brought to justice and should receive a trial – and against the state, since the trial should also be fair. In short, citizens require protection against both state and non-state actors.<sup>28</sup>

The relevance of this normative framework that guards the right to a fair trial can only be understood against the context of its mirror image: the historical reminiscence of the Stalinist (and to a lesser extent national-socialist) show trials that are considered the exact opposite of fair trials. 'Show trials' and 'political trials' are often mixed up in public discourse. The overriding characteristic of a classical show trial in the Stalinist sense is 1) the total exclusion of the element of chance and/or risk from the trial and 2) the predominant function of the trial as a tool in educating the population and confirming ideological rule. Sometimes, trials are not strictly Stalinist, in the sense that they do not primarily serve to demonstrate, invoke, create and confirm totalitarian rule. However, we do call them *political* as soon as the executive powers use criminal law predominantly to further their political agenda. Otto Kirchheimer's *Political Justice* defines political trials as attempts by regimes to control opponents by using legal procedure for political ends.<sup>29</sup> The authorities deploy criminal law to maintain the balance of power; they eliminate

<sup>19</sup> Mark van Hoecke, *Law as Communication* (Oxford/Portland Oregon: Hart Publishing, 2002), p. 10.

<sup>20</sup> *Ibid.*, p. 8.

<sup>21</sup> *Ibid.*, p. 10.

<sup>22</sup> H. Bredemeier quoted in Cotterrell, R., *The Sociology of Law: An Introduction*, London: Butterworths, 1992, p. 89-92.

<sup>23</sup> Edward A. Ross quoted in Mathieu Deflem, *Sociology of Law: Visions of a Scholarly Tradition*, Cambridge, Cambridge University Press, p. 102.

<sup>24</sup> Van Hoecke, *Law as Communication*, p. 7.

<sup>25</sup> *Ibid.*

<sup>26</sup> See for example Article 6 ECHR.

<sup>27</sup> OHCHR (Office of the High Commissioner for Human Rights) (2008), *Human Rights, Terrorism and Counter-Terrorism*. Factsheet No.32, GE.08-41872, July 2008, Geneva/ New York: Office of the United Nations High Commissioner for Human Rights/ United Nations, pp.28-29.

<sup>28</sup> Turner, B.S., 'Outline on a Theory of Human Rights', *Sociology*, Vol.27. No.3, 1993, pp. 489-512.

<sup>29</sup> Otto Kirchheimer, *Political justice. The Use of Legal Procedure for Political Ends* (Princeton University Press: Princeton, 1961).



political opponents by reducing their oppositional voice to a legal/illegal dichotomy. Here, justice only serves political powers, not its own ends.

However, this type of state-controlled show trial, is not the association that was invoked by the American comments on the Ghailani case; the show element in the trial they referred to was the danger that the terrorists suspects would dominate the courtroom with their narratives of injustice, thereby turning the trial into a ‘terrorist show’ once again – the first time being the attack they perpetrated. Additionally, there is even a third type of show imaginable: a show in which the authorities demonstrate, through the way in which sentences are meted out, that modern democracies are fully capable of demonstrating a show of justice in a positive sense. The Nuremberg trials may be regarded as a modern model for how a trial can be a performance of justice, since these trials revealed the evil of the holocaust, established a historical narrative that exists today and is accepted by the public and the world; they created a collective memory, fixed responsibility in Germany and set standards for future conduct of states and people. Indeed, the Nuremberg trial was *the* example of a convincing performance by democratic societies in using criminal law – rather than war or brutal force – to deal with war criminals and terrorists. Hence, the concept of show trial could refer to totally different types of politicised trials, normatively charged in completely different ways. In the words of legal scholar Awol Kassim Allo, ‘[w]hat counts is not that a trial is labelled a ‘show trial’, it is, rather the end that the ‘show’ serves.<sup>30</sup> This is at the core this paper: what performative strategies are used by the actors in court to convince an audience of a specific narrative of (in)justice.

## Performative Strategies in Court: What Kind of Show Have Terrorism Trials to Offer?

It has been stated by various experts that terrorism is communication.<sup>31</sup> Terrorism expert Brian Jenkins argued, as early as 1975, that ‘terrorism is theatre’.<sup>32</sup> Peter Waldmann added to these observations the statement that most terrorists explicitly want theatre, since they are bent on

provoking state power.<sup>33</sup> With their deeds, terrorists communicate visions of justice and injustice, visions on the rearrangement of power relations and attempts to rebalance them. However, counter-terrorism is communication too.<sup>34</sup> The office of the prosecutor has a story to tell as well. After an attack, or an attempted one, perpetrators are often brought to trial. In the courtroom, all parties involved in the drama are brought together. Within the narrow confinements of this stage, injustices are addressed, retribution is demanded and justice is carried out – at least in theory. Sometimes, terrorists are tried behind the scenes, in closed courts; in some cases, trials are so heavily politicised or even tampered with that they resemble more the classic show trial in the Stalinist sense than an actual display of justice.<sup>35</sup>

The question that hence has to be answered is: What strategies are the agents in this drama following and what legal, political and social consequences do these strategies have? Does politicising the trial, putting on a show, ruling out the risky elements in it or inciting the masses help to convince the target audience of your mission, your sense of justice? Does it placate the population, restore social peace, prevent further radicalisation? Is that what a terrorism trial is all about? Or could it also involve the blocking of an audience for the sake of security? This would make it a non-performative trial from the public’s perspective, but a very performative one from the terrorists’ point of view. Following the provocation-repression theory,<sup>36</sup> a trial ruled by the prosecution without much oversight could provide terrorists with new proof of state oppression, with injustice frames to recruit new members and start new rounds of violence. Given these comments on the relevance of the show element in terrorism trials, a definition of performativity will now be introduced, understood as discursive efforts, actions etc. to construct social realities,<sup>37</sup> as applied to terrorism trials:

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<sup>33</sup> Cf. P. Waldmann, *Terrorismus: Provokation der Macht* (Hamburg: Murrmann Verlag, 2005); Richardson, *What terrorists want* (New York 2006).

<sup>34</sup> Cf. Beatrice de Graaf, *Evaluating Counterterrorism Performance. A Comparative Study* (London/Routledge 2011), pp. 8-10.

<sup>35</sup> *Ibid*, chapter 9, ‘Terrorists on trial: the courtroom as a stage’.

<sup>36</sup> ‘By attacking the establishment and the security forces, the insurgents provoke the state into mass repression which alienates the general public, and increases support for the rebels’, as Hewitt defines it. Christopher Hewitt, *Consequences of Political Violence* (Aldershot et al.: Dartmouth, 1993), p. 61.

<sup>37</sup> J.L. Austin, *How To Do Things with Words* (Cambridge, MA: Harvard UP, 1962); Malcolm Coulthard, *An Introduction to Discourse Analysis* (2<sup>nd</sup> edition), New York: Longman, 1985; Judith Butler, *Excitable Speech: A Politics of the Performative* (New York: Routledge, 1997). Cf. also De Graaf, *Evaluating Counterterrorism Performance*, p. 11-13.

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<sup>30</sup> Allo, ‘The ‘Show’ in the ‘Show Trial’’, p. 72.

<sup>31</sup> Alex P. Schmid and Janny de Graaf, *Violence as Communication. Insurgent Terrorism and the Western News Media* (London: SAGE, 1982), p. 175.

<sup>32</sup> Brian M. Jenkins, ‘International Terrorism: A New Mode of Conflict’, in: David Carlton and Carlo Schaerf (eds.), *International Terrorism and World Security* (London: Croom Helm, 1975), p. 16.



Performativity in terrorism trials concerns acts or strategies adopted by the parties with a stake in the trial to try to convince their target audience(s) in (and outside) the courtroom of their narrative(s) of (in)justice.<sup>38</sup>

Performance is an act, a process and a product at the same time; it provides consolidation of norms, re-enactment of identity and the transformation of these norms and identities. Performances are role plays, in which not only the individual but the community at large is involved. Interestingly, in courtrooms, performance takes place in a direct manner, in the art and form of an Aristotelian drama: unity of time, place, and action. But it also transcends this place. The performances of the actors have a bearing on a broader audience, on the political context, on our culture and legal system as a whole, in three ways. First, theatre produces *mimesis*: a re-enactment of the offence, in the hope of uncovering what actually happened. However, the courtroom play should not only be conceived as *mimesis*, but as *poiesis* as well, e.g. *making* not *faking*. Performances, like a driving test, a wedding, an examination or a defence in court, create identities, assert claims to selfhood and are part and parcel of confirming and producing social relations. The truth is not out there to uncover, but has to be created in the courtroom. Moreover, apart from *faking* and *making*, performances also amount to *breaking* and *remaking*. Some narratives are upheld, others are disputed. And in the end, a new one emerges. This is called *kinesis*: movement, motion, fluidity. Performance can transgress existing boundaries, break structures and remake social and political rule. They intervene and make anew.<sup>39</sup>

Through a trial, the members of the community participate in talk that is incessant, escalating and divisive. People will be induced, seduced to take sides, are with or against the rule breaker. Only then is redress possible, employing procedures to repair or remedy the breach. Legal, judicial machinery often plays this role. This is the most reflexive or self-conscious part of the social drama unfolding in the courtroom. Trials not only involve re-establishment of the truth or stock taking of the harm done; they also contain moments of liminality, a 'betwixt and between'<sup>40</sup> of suspended

knowledge about the outcome of the social drama. Courtroom verdicts – guilty or not guilty – are exemplary of liminal moments in the redress-phase of social drama. If the repair works, the rule breaker is removed, or reintegrated into the community. However, life has changed. Every social drama alters society to a certain extent. These alterations might not be permanent, but merely temporary mutual accommodation of interests. If this does not work, community splits or breaks apart into factions. This could be defined as a schism. In large scale complex communities, continuous failure of regressive institutions may develop into a revolutionary situation, in which one of the contending parties generates a program of societal change.<sup>41</sup>

The outcome of the trial depends on the performative strategies adopted in court and their relative dominance. These strategies could be portrayed on a gliding scale. On the one end of the axis, the terrorists try to run the show, they attempt to politicise the trial, try to introduce their concept of justice and narrative of injustice and attempt to overrule or put to their own use the existing legal order. On the other end of the axis, the prosecution and the authorities try to rule out the element of risk and of acquittal, try to turn the trial into a display of political power and a way of educating the masses, try to intimidate the terrorist constituencies and try to use the trial as an instrument for wielding security politics. In between, defendants, their lawyers and the state have to share persuasive power, are dependent on the role of the victims, their constituencies. Right in the middle of this partisan axis, the judge or jury sits and applies the legal rules in an objective manner. The agents involved can enhance their performativity by setting the stage, altering the legal script, play the media, manipulate the news, issue statements and declarations of their own. Authorities can issue new laws, provisions or build in more security measures.

This definition does not imply a measure of success. The difficulty with performativity is that it is a strategy, an attempt to convince. The actual outcome of this performance, the way it actually mobilises or incites the masses or target audiences is hard to measure. The outcome depends, for example, on a number of other factors. One major element of uncertainty in establishing the effect of a performative strategy is the level of media coverage, of national public attention devoted to

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<sup>38</sup> Historically, this definition should only be applied to the modern period of the late 19<sup>th</sup> century and onwards, when the modern state developed a monopoly of violence, a modern criminal law system and penal code came into existence and mass media emerged.

<sup>39</sup> Elizabeth Bell, *Theories of Performance* (Los Angeles: SAGE Publication, 2008), p. 12-15.

<sup>40</sup> Bell, p. 108.

<sup>41</sup> Bell, p. 108-109.



the trial.<sup>42</sup> This can be invoked by the agents directly involved in the trial, but media attention is an autonomous factor in its own right. Distal and proximate context, historical experiences, media logics of that specific time and place, other hypes or trends on the political agenda, influence the way a trial is covered and reported about. The communicative aspect in terrorism and counterterrorism also pertains to terrorism trials, but media coverage is an essential condition for that. Although the media of course can have an independent agenda or independent interests, they are not considered an autonomous factor, as they are no actors in the court. They are mainly channels of communication which, however, are not only passively used by actors.

Like other political trials or mediated ordinary criminal trials (for example the OJ Simpson trial), terrorism trials can thus also be considered a show, or, to put it more accurate, as a dramaturgical play. This is not to say that terrorism trials are in all regards fundamentally different from other politicised trials, media trials or dramatic criminal trials. However, for terrorists and counter-terrorists, the contest over and presentation of narratives of justice and injustice are especially important. Compared to ordinary criminals, terrorists challenge the political rule or present contentious and violent views of justice and repression. Before the performative strategies of the actors involved are discussed, however, it must be emphasised that they can only be acted out within a given set of dramaturgical conditions.

The first element in a stage play is the script, which should provide for a plot and for the different narratives and story lines to be heard. The initial script is triggered by the suspect's crime, and drafted by the charge(s) brought against the accused. Criminal law functions as the set of guiding principles, dictating how this script should be written. Are intelligence reports accepted as evidence in court? Can witnesses give testimony behind closed doors? The script, or the 'director's clues', provide for these legal rules of the game. Through altering these rules, the authorities can affect the outcome of the trial. At the same time, such manipulations with the rules of adjudication during the trial 'spoil' the game and turn it into a show of risk justice, undermining confidence in the law.

Secondly, an important question with regard to this dramaturgical element is the nature of the

script: is it a script within a civil law or within a common law system? In other words, is the trial inquisitorial in nature, or adversarial? Does the defence need to convince a jury, or is it the judge who composes and weighs the material? Another structural element that matters is the amount of evidence needed to be presented in court, which impacts on the length of the trial. In the Netherlands, for example, the charges, evidence, and defence reactions are mainly exchanged and worked out on paper before the actual trial starts.

Third, the way the stage is set also affects the unfolding of the drama. Does a trial take place in the normal court building, or are the defendants transported to a fortified location, where the visitors have to go through heavy security? Are the defendants placed in regular benches or locked in cages, as was the usage in the Italian criminal trials? The courtroom/building can thus enhance or mitigate the dramatic nature of the trial as well.

Fourthly, the play itself is performed by actors, who adopt different strategies, which will be discussed below. Actors are the prosecution, defence, judges, witnesses and sometimes the victims. The play will develop through a contest between the prosecution and defence over the writing of the script. Each will offer their own script as the truth and arrange their performance to advance this truth. Judges may both be the directors and audience, depending on the type of criminal justice system a country has adopted.

Lastly, every play needs an audience. In terrorism trials, like in other trials, the audience is constituted by the judge (in a civil law system) or jury (in a common law system), but also by the public in the courtroom and the public outside these confines. What the public sees and hears is however filtered or controlled by the media's reporting of the trial, which gives the media an important mediating part in the play as well.

Within these dramaturgical frames, the terrorism trial will unfold, resulting in different types of a show, depending on the relative success of the performative strategies adopted by the various actors.

## A Typology of Terrorism Trials

Based on the definition of performative strategies in terrorism trials, a horizontal axis of politicisation may be drawn: from the left pole of terrorist domination to the right pole of state influence on the trial. The vertical axis, starting in the zero middle point of not much politicisation from either the terrorists or the prosecution/authorities, depicts the level of media attention generated by the trial.

<sup>42</sup> Media in this sense covers all communicative media, including the media of the "terrorists" or their constituency (pamphlets, grey literature, internet etc.).



Based on a number of cases researched, this could produce the following typology:

- A *not-so-dramatic show* where everyone complies with the existing rule of law, such as in the Dutch Piranha and Hofstad group cases. This trial would be positioned in the centre of the horizontal axis and low on the vertical axis. The actors refrain from adopting performative strategies.
- A *show, run by the terrorists and their lawyers*, which generates a lot of media attention and inspires new rounds of violence by terrorist sympathisers. The Stammheim trial in the final stage would be an example of such a performative attempt by the defendants.
- A *show, run by the executive and the prosecution*, on the extreme right pole exemplified by the classical Stalinist show trials. Here, the prosecution dominates the show, sometimes even hand-in-glove with the judge or jury. This show can also be a non-show like trial, closed from the public or the media, but organised by the state to serve security as a priority (but with a great performative power in a negative sense in the perception of the defendants and their sympathisers). The trial might however also be staged as a virtual show: the trial serves as a tool of risk justice, the crimes under consideration deal with conspiracies and preparations rather than constitute concrete attacks.
- A trial may turn into a *media show* – not run so much by the terrorists or the prosecution, but dramatised in the media, often through resonance with public feelings of vengeance and outrage – often helped by *side shows* staged by audiences and groups outside the courtroom (victims, sympathisers, etc.).
- A *performance of justice*: a show where the trial reveals injustice, where the verdict educates the public about the importance of the rule of law in a democratic society, creates a collective memory and sets standards for future conduct of states and people. This show is run by the judge/jury, but the performative strategy is based on a (perceived) neutral application of the law, not on partisan politicisation or risk justice.

Before turning into a veritable media show, within all other types, variation is of course possible as to the level of politicisation, the level of media coverage, the level of public attention and the extent of side shows being organised during the trials.

## First Type: The Not-so-dramatic Show

On The first type of trial is not that dramatic at all. A terrorist trial does not always have to be a social drama. It can be a show trial in the positive sense of the word: a quiet demonstration of justice, where law in action serves to communicate grievances and retribution and where a catharsis and mutual understanding is reached in the end. There are indeed instances when terrorism trials created only little spectacle. In the Netherlands, the trial against the Moluccan activists who raided and occupied the Indonesian Ambassador's residence in 1970 in order to further their separatist cause, killing a police officer in this process, proceeded as smoothly as possible. The defendants pleaded guilty, complied with the court and raised only one moral question: they wanted their plight to be heard. They wanted to tell their story of expulsion from the Moluccan islands, the perceived promise made by the Dutch authorities to lobby for their independence from Indonesia and underline the discrimination they suffered in Dutch postcolonial society.<sup>43</sup> In this instance, the terrorists did address a social grievance, but both the judge and the general audience were receptive to that narrative and acknowledged it in their reactions. The judge, a former colonial officer, paid homage to the fate of the Moluccans, their plight after 1950 and their loss of homeland. This in turn appeased the defendants and made them compliant with the Dutch rule of law. They accepted their sentence without protests – a sentence that was considered lenient.<sup>44</sup> If there was a show at all, it demonstrated the Moluccans tragic faith and society's feelings of guilt towards it. The law was violated, yes; a person was even killed. Nevertheless, there was no clash of moralities. On the contrary, the Moluccan activists appealed to the shared history with the Dutch population, invoked their parents' loyal duties to the Queen and demanded the government to live up to its own standards and promises.<sup>45</sup>

Another example of remarkable little theatre was offered by the latest hearings in the Hofstad group case, staged late 2010. When the trial started, following the murder of Theo van Gogh in

<sup>43</sup> P. Bootsma, *De Molukse acties. Treinkapingen en gijzelingen 1970-1978* (Amsterdam: Boom, 2000).

<sup>44</sup> Interview with Henk Droessen, the lawyer of the South Moluccan youngsters who were tried for their actions in 1970 and 1975, Roermond, 14 March 2008; 11 May 2011, Utrecht; M. Rasser, 'The Dutch Response to Moluccan Terrorism, 1970-1978', in: *Studies in Conflict and Terrorism*, Vol. 28 (2005), No. 6, p. 481-492.

<sup>45</sup> A.P. Schmid, J.F.A. de Graaf, F. Bovenkerk, L.M. Bovenkerk-Teerink, L. Brunt: *Zuidmoluks terrorisme, de media en de publieke opinie* (Amsterdam: Uitgeverij Intermediair, 1982); See also Beatrice de Graaf and Froukje Demant, 'How to Counter Radical Narratives: Dutch Deradicalization Policy in the Case of Moluccan and Islamic Radicals', in: *Studies in Conflict & Terrorism*, Vol. 33 (2010), No. 5, p. 408-428.



November 2004, the defendants, who all belonged to a group around Van Gogh's murderer Mohammed Bouyeri and who were charged with participation in a terrorist organisation and inciting hatred, refused every form of cooperation with the court. They argued that, first of all, the man-made Dutch judicial system was not in line with the divine rule of law and violated *hakimiyat Allah* (the sovereignty of God). Secondly, they claimed that public and political pressure prevented them from getting a fair hearing in any case. In the heated and anxious climate of the months following November 2004, this second complaint had some merit. Government officials proclaimed a 'war' against Dutch terrorists, public vigilance campaigns against terrorist attacks were launched, radicalised Muslims were spotted everywhere and revenge-fuelled attacks were committed against mosques and other Muslim sites.<sup>46</sup> The seven suspects were arrested and charged with being part of a terrorist and criminal organisation, engaging in inciting hatred and preparing for terrorist attacks. In 2006, they were convicted on the counts of attempting to murder police officers, on the possession of hand grenades and on membership of a terrorist organisation. One suspect, Jason W., who threw the hand grenade, was sentenced to 15 years in prison.<sup>47</sup>

However, years passed without any jihadist attack, and the Dutch political and social climate changed. In 2008, the Court of Appeal in The Hague acquitted the Hofstad group members on the count of membership of a criminal terrorist organisation.<sup>48</sup> The hearings in 2010 went ahead almost unnoticed, until Jason Walters stood up to announce his faith in the Dutch democratic system and the rule of law. He demonstrated his abandonment of extremist behaviour by conforming to the norms in court, wearing ordinary clothes and sporting a modern haircut. 'I am certain that I will receive a fair trial', he stated at the end of the pre-trial hearing in the High-Security Court in Amsterdam on 16 July 2010.<sup>49</sup> Although this story is only one instance of a terrorist's public conversion, it provides a valuable insight: a change

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<sup>46</sup> 'Zalm: we zijn in oorlog! Regering: terrorisme met wortel en tak uitroeien', *Algemeen Dagblad*, 6 November 2004; 'Terroristen met dubbele nationaliteit raken Nederlands paspoort kwijt. Kabinet verklaart de oorlog aan terreur', *Het Parool*, 6 November 2004; 'Overheid wil meer armslag: anti-terreurmaatregelen', *Trouw*, 6 November 2004.

<sup>47</sup> The Hague Court, verdict, 10 March 2006.

<sup>48</sup> Court of Appeal in the Hague, verdict, 23 January 2008, LJN: BC2576. Gerechtshof 's-Gravenhage, 2200189706. [http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BC2576&u\\_ljn=BC2576](http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=BC2576&u_ljn=BC2576)

<sup>49</sup> The author was attended the hearing; cf. also 'Jason werkt nu wel mee aan proces', *De Volkskrant*, 17 July 2010.

of times, demonstration of reflective justice and a terrorist conversion caused the trial to normalise. The charge of membership of a terrorist organisation was reconfirmed, but the trial hardly presented a show anymore: no party involved tried to turn it into a drama of conflicting moralities.

Another example of a rather non-dramatic case is the trial against the first and only Dutch female terrorism suspect, Soumaya S. On 15 March 2011, the Dutch Attorney-General submitted an advisory opinion to the Supreme Court that stated that the verdict against Soumaya S., who in 2005 had been arrested and convicted for participating in a terrorist organisation, had to be annulled. Soumaya S. had already been sentenced for carrying an Agram 2000 machine gun, but had been put on trial a second time for being a member of a terrorist group. This last ruling is likely to be overturned – erasing the only convicted female terrorist from Dutch history.<sup>50</sup> Strangely enough, almost no attention has been paid to all of this. No front page newspaper heading, interviews with disgruntled politicians or disappointed public prosecutor were seen nor heard in the national media. No audience outside or inside the courtroom applauded nor rallied against this verdict. No public outrage was discernable. This terrorism trial thus ended with a sizzle, rather than with a bang.

As has been stated above, the non-dramatic character of this trial can partly be explained by the brevity of the trial, the inquisitorial nature of the criminal law system, and the lack of historical examples. There is no repertoire of contentious terrorism trials in Dutch history. Nor were there enough sympathisers willing to stage side shows, probably due to the lack of organisation of and support for home grown jihadist terrorism in the years after 2004 within the Dutch Muslim community.

## Second Type: The Terrorists Are Running the Show

Such instances like the Moluccan trials in the 1970s, where terrorists remain within the boundaries set by the court proceedings and share society's moral values and principles, where the magistrates and general public act subdued and are receptive to the terrorists' story, are rare. They mostly depend on the lethality of the attacks, the duration of the terrorism campaign and on the historical context in which the terrorists operate. Irenic exchanges in court are an exception, rather

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<sup>50</sup>Hoge Raad (High Council), 'Conclusie advocaat-generaal in terrorismezaken', The Hague, 15 March 2011.



than the rule. More often than not, terrorists challenge and contest society's moral principles in court. This is the second type of terrorism trial: the show as staged by the terrorist suspects, where the *suspects and their lawyers* play their version of events. Of course, they already made the first hit. With the terrorist attack – given they are not arrested for preparatory actions *post facto* – they moved to centre stage and forced themselves in the limelight of public opinion already. With this attack, they conditioned the behaviour of states, tried to dictate terms to them and carried out their own primitive form of justice first. Now, they are confined to the narrow boundaries of the courtroom, but stand once more on the stage to be tried themselves.

A major example of an intended show trial staged by terrorists can be found in the history of the Red Army Faction (RAF) in Germany. One of the largest successes of the founders of the RAF – Andreas Baader, Gudrun Ensslin, Ulrike Meinhof and Jan-Carl Raspe – was that, together with their lawyers, they succeeded in presenting their trial, that lasted from May 1975 until April 1977, as a political one, conjuring up an image of political justice in Germany, portraying themselves as political warriors – and in the end – as the ultimate martyrs for the revolution's cause. As such, a terrorist show trial departs from the classical Stalinist show trial: not the authorities, but the terrorists made a show out of it. As Jacco Pekelder and Klaus Weinbauer stipulated, lawyers sought the direct confrontation with the other parties involved in the justice system and carried out a 'political defence': 'More than attacking the actual accusations against their clients these *Linksanwälte* seemed to aim at undermining the legitimacy of the trial and the justice system that had produced it'.<sup>51</sup> Although in a strict sense justice prevailed, the West-German judiciary damaged its own image of impartiality by reacting so nervously during the trial. The RAF-suspects used the court to stage their own play, which served their own (violent) political aims. They used the long drawn out period in which the Stammheim trial unravelled to mobilise a second and third tier of eager recruits, who initiated a second round of violence aimed at liberating their leaders from jail. When this backfired, climaxing in the raid on the Landshut airplane in Mogadishu in October 1977, the Stammheim prisoners opted for their final act: they committed suicide, but staged it as politicicide by the

<sup>51</sup> Jacco Pekelder and Klaus Weinbauer, 'Terrorists on Trial at Stammheim: the 'Theatre of Political Justice' in the working, draft paper on behalf of the NIAS Research Theme Group 'Terrorists on Trial', Wassenaar/The Netherlands, 2011.

German authorities. With this final act of vengeance, they wrote their own ending to the state's judicial script and turned it upside down. Subsequently, in the eye of (international) public opinion, not the terrorists, but the West-German authorities were put on trial. Hence, with the indispensable use of the media, they were able to fully appropriate the trial for their own ends and turn it into a veritable show – one with a presence that lasts until today.<sup>52</sup>

### Third Type: The State Is Running the Show

Nevertheless, in a lot of other cases, terrorism trials are an instrument of the state's performance, the third type of terrorist show trial. Authorities bring terrorists to justice in order to show that the threat is under control. Terrorism trials are a show in the sense that the executive strives to placate society that the perpetrators are caught, that law and order are secured and that there is no need for terror anymore. Sometimes, the substantive and procedural law is amended to suit security preferences. The executive selects a particular legal tool to ensure that the risk of acquittal is minimal. Hence, the authorities might resort to rewriting the script as well: they wait until the curtain of the criminal law trial falls and stage their final act behind the scenes. The acquitted suspect is either expelled from the country or made subject to permanent surveillance and control orders once he or she leaves the court building.<sup>53</sup> One could argue that the Guantanamo tribunals were a type of trial where the government one-sidedly ran and ruled the show, without much media present.

A variation within this type of state-dominated performance is the virtual show, where the prosecution turns terrorism trials into a virtual trial because they more and more often take place *before* an alleged terrorist attack has been carried out. Contrary to what Foucault stated, it is not the case that 'law recedes'.<sup>54</sup> In fact, as Louise Amoore stipulates, 'as risk advances [...] law itself authorizes a specific and particular mode of risk management' which entails that '[e]vidence, the judgement of the expert witness, and the legal subject as bearer of

<sup>52</sup> Cf. Ulf G. Stuberger, *Die Tage von Stammheim. Als Augenzeuge beim RAF-Prozess* (München: F.A. Herbig Verlagsbuchhandlung, 2007); Christopher R. Tenfelde, *Die Rote Armee Fraktion und die Strafjustiz. Anti-Terror-Gesetze und ihre Umsetzung am Beispiel des Stammheim-Prozesses* (Osnabrück: Julius Jonscher Verlag, 2009); Pieter H. Bakker Schut, *Stammheim. Der Prozeß gegen die Rote Armee Fraktion* (Kiel: Neuer Malik Verlag, 1986).

<sup>53</sup> Cf. also Marieke De Goede, 'The Politics of Preemption and the War on Terror in Europe', in: *European Journal of International Relations*, Vol 14 (2008) No. 1, p. 161-185.

<sup>54</sup> M. Foucault, *Security, Territory, Population: Lectures at the Collège de France 1977-1978*. Translated by G. Burchell (New York: Palgrave Macmillan, 2007), p. 99.



rights are all reoriented in a risk regime that acts pre-emptively and authorizes with indefinite and indeterminate limits.<sup>55</sup> Competences, provisions and measures are adapted to make sure the judges (are likely to) render a conviction; either by using criminal law, or via administrative or immigration law (control orders, administrative rule or alien's rights).

Those trials that involve suspects arrested based on preparatory actions, on allegations, suspicions or intentions are *virtual* or 'what if' trials. An act is put under judicial scrutiny that may only exist in an imagined future – as (re-)constructed by the prosecuting authorities. Conspiracy trials, thought crime, inciting to hatred: such crimes divert from the *habeas corpus* principle and invoke possible deeds in the future, based on thoughts and/or allegations only. Depending on the assessment of preparatory evidence, the moment of culpability and the moment of the actual deed are severed. The relationship between offence and punishment becomes much more indirect. Pre-emption and pre-mediation replace retribution and *habeas corpus* inquiries, thereby challenging basic human rights standards. Rather than assessing different versions of the 'truth' about an incident, judges have to deal with techniques of imagining a possible future. Premediation and security imagination replace responsibility for concrete actions. Terrorism trials serve to placate virtual threats; they have become instruments in risk management. The sword of justice has been 'securitised'. Deterrence, retribution for present dangers or restoration of social peace – the main functions of criminal law – give way to a secondary function: meting out sentences to pre-empt future risks. The trial becomes a theatre of imagined terrorist futures.<sup>56</sup>

#### Fourth Type: The Media Is Running the Show

Terrorism trials may turn into a show trial through the media and because the audience at large considers these trials a spectacle. Going back to the pre-modern age, trials always were very much theatre shows. The perpetrator was put on a scaffold, receiving bodily punished in full view of all the spectators. The aim of this performance was not carrying out worldly justice, but demonstrating the fate of sinners. A direct *memento mori* and a

demonstration of how the gates of hell would open for anyone that trespassed against divine and human rule. Trials were a theatre of horror. Since those days, trials lost at least some if not most of their dramatic quality. They became a theatre of common sense and civility. Trials became a theatre of objectivity, prudence and standardised procedures. However, terrorism and war criminal trials have the tendency to slip back into pre-modern theatres of terror. Hannah Arendt wrote about the trial of Eichmann and concluded that he was tried more for the suffering of the Jewish people than for his individual deeds.<sup>57</sup> In the public opinion, as voiced by the media, terrorists should be punished for the fear and shock they inflicted upon society. In this way, adjudication based on concrete acts, individually attributed, disappears behind the horizon of public outrage. The trial becomes a show of public vengeance and outrage and terrorists are in most cases already sentenced by the media, leaving the judges hardly any room to manoeuvre, let alone to issue milder verdicts or even acquittals in danger of being (virtually) lynched themselves.<sup>58</sup>

A media show can also be created through side shows, as staged by groups outside the courtroom. The audience – including the victims – has to make sense of the competing narratives as well. They sit and listen; or, as a Greek *chorus*, they comment. They sometimes have their own agendas. Sympathisers to the defendants might stage side shows, organise picket lines outside the court building, submit petitions and protest in the media against their treatment. Victims might organise themselves and protest against perceived lenience. Prisoners may initiate hunger strikes and defendants might raise an (international) lobby to support their cause, like the IRA did in the Bobby Sands case. The defendants may inspire or even appeal to their comrades and followers outside the courtroom to act on their behalf and initiate new rounds of violence, directed at putting pressure on the state, blackmailing the authorities to release the suspects or taking vengeance on the judges, as happened in Germany and Italy in the 1970s where second and third generations terrorists 'punished' judicial representatives for the verdict being issued against their leaders.

<sup>55</sup> Louise Amoore, 'Risk before Justice: When the Law Contests Its Own Suspension', in: *Leiden Journal of International Law*, Vol. 21 (2008), pp. 847-861, here: p. 850.

<sup>56</sup> For an analysis of premediation as a new security technique, cf: Marieke de Goede, 'Beyond Risk: Premediation and the Post-9/11 Security Imagination', in: *Security Dialogue*, Vol. 39 (2008) No. 2-3, p. 155-176.

<sup>57</sup> Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (New York: Viking Press, 1963).

<sup>58</sup> Cf. for effects of media coverage about terrorism: Gabriel Weimann, 'The Theater of Terror: Effects of Press Coverage', in: *Journal of Communication* Vol. 33 (Winter 1983), No. 1, p. 38-45; Brigitte L. Nacos and Oscar Torres-Reyna, *Fuelling Our Fears. Stereotyping, Media Coverage, and Public Opinion of Muslim Americans* (Lanham et al.: Rowman and Littlefield, 2007).



## Fifth Type: A Performance of Justice

The fifth type involves a show where the trial reveals injustice, where the verdict educates the public about the importance of the rule of law in a democratic society, creates a collective memory and sets standards for future conduct of authorities and people. This show is run by the judge/jury, whose performative strategy is based on a (perceived) neutral application of the law, in their refusal to accommodate to partisan politicisation or risk injustice. Amongst the competing narratives of (in)justice, the *judges* have to try to re-establish an accurate version of the facts and interpret and apply the law to it. They have to probe deep into different narratives, different testimonies and accounts to discover the various motives and intentions behind the terrorist actions. From this point of view, judges have first of all an obligation to establish a thorough, accurate and wide account of the facts pertaining to the incident before the court. Secondly, they have to reveal the underlying motives and strategies, and relate them to the context in which the incident happened. In carrying out such a penetrating inquiry, they can make a valuable contribution to the general understanding of the facts and the background. They more or less can write history. They may hear the victims, speak on behalf of a terrorised population and give them back their agency.

Of course, re-establishing the truth is an especially troublesome endeavour when it concerns a preventive arrest, based on preparatory actions only. Judges are not there to make up for the authorities' shortcoming or failures in gathering enough compelling evidence; they do not have to justify them. They have to settle the issue that falls under their jurisdiction, have to throw new light on the affair,<sup>59</sup> which is difficult when an offence only exists as a *possibility*. Carrying out justice in a situation of security risks, of allegations, presumptions and crime-by-association runs the danger of turning the trial into a virtual show. The judges will be damned by an enraged public opinion and security officials if they acquit the suspects, and damned by equally outraged religious or ethnic minorities if they sentence the terrorists based on political or religious convictions alone.

When the judges manage to keep the balance, a trial can become performative in itself. The verdict will not only be perceived as legally justified, the narrative of guilt and injustice writes history, changes existing norms and impacts values in society. As a nexus of terrorism violence, law

enforcement and public opinion, terrorism trials offer an ideal opportunity to showcase justice in progress and demonstrate how terrorist suspects are dealt with by the laws of the land.

A performance of justice moreover could repair the information asymmetry that allowed terrorists to engage their terrorist constituencies and could undermine the narrative that armed groups utilise to attract support. Most importantly, terrorism trials are the platforms where victims may regain their voice and where their fate, as a consequence of the terrorist's offence, is put centre stage. In the words of Tom Parker, policy director for Terrorism, Counterterrorism and Human Rights at Amnesty International USA, it is time to redress the balance and to use victim narratives to confront the violence of armed groups. Parker specifically addresses human rights defenders and NGOs, but the same contention could be made pertaining to terrorism trials: such trials offer a powerful platform for revealing and challenging the terrorists' narratives by confronting them with the messages of horror, pain and destruction they inflicted upon their victims.<sup>60</sup>

## A Performance of Justice

When does a terrorism trial become a show of justice? Performativity depends on the interplay between strategies of actors and audiences' receptiveness, and is conditioned and facilitated by the proximate and distal context of the trial. When is an audience most receptive to these strategies, and whose idea of justice or whose injustice frames will prevail? We have demonstrated that terrorism trials in the majority of the types involve show elements. We would like to argue, however, that they have to be theatre as well – in the sense that they present a performance of justice. As stated above: 'What counts is not that a trial is labelled a 'show trial', it is, rather the end that the 'show' serves.<sup>61</sup> The trial is the nexus where countervailing narratives meet, where moralities confront each other and where society addresses, confirms and possibly repairs a fundamental breach. A trial can demonstrate that trespassers will be convicted and that victims are heard. It may restore the balance of power and repairs the information asymmetry caused by the terrorist's hold over their constituents. The trial and the verdict can undermine the terrorist's claim to justice and reveal

<sup>59</sup> Cassese, *Terrorism*, p. 138.

<sup>60</sup> Cf. Tom Parker, 'Redressing the Balance: How human rights defenders can use victim narratives to confront the violence of armed groups', draft., 2011. Tom Parker is Policy Director for Terrorism, Counterterrorism and Human Rights at Amnesty International USA.

<sup>61</sup> Allo, 'The 'Show' in the 'Show Trial'', p. 72.



the horror and destruction they inflicted upon their victims and upon society. In this sense, it is important that as many people as possible are able to watch the spectacle unfold.

The question thus is: when will a terrorism trial be considered a performance of justice in the eyes of the public, and according to the law? First of all, the authorities should stick to the script. In a structural sense, the script does of course depend on the nature of the criminal law system; whether it is an inquisitorial or an adversarial system, whether evidence should be presented in the courtroom in full length, or can be dealt with on paper, before the trial starts. Nevertheless, in both the civil law and common law systems, performative strategies matter. Judges in particular have the responsibility to take care that a trial does not end up in a 'Pirandello play', where each actor follows his own account of things, where the most powerful one decides upon the truth and where the spectator is left totally powerless to judge what the underlying narrative, let alone the truth about the plot is. Normality should be preserved as much as possible. The executive should refrain completely from tampering with legal rules during the trial; it should pay extraordinary heed not to be perceived as exerting political control over the proceedings.

Secondly, terrorism trials should not be based on premeditation, virtualities, or seen as a tool of risk management. Magistrates and prosecutors have to make sure the trial does not develop into a show of security and risk management, like the trial at Stammheim did, or as the military tribunals in Guantanamo have done. The insatiable desire for security should not dominate justice; underlying political conflicts cannot be solved through security measures alone. Judicial catharsis should not be sacrificed to risk management.

Thirdly, transparency counts. In the case of the Indonesian trial against Abu Bakar Ba'asyir, which is currently under way, the court decided to relocate the hearings from the South Jakarta district court to the larger Agriculture Ministry's compound in Central Jakarta, to provide more room for the expected swell of people. Against critics who feared that this decision would turn the trial into a media circus, the court contended that an open prosecution, visible to as many spectators as possible, demonstrated justice in progress, underscored confidence in the state's counter-terrorism efforts and showed how new laws were put in practice. Thus, the trial would support

Indonesia's rule of law *vis-à-vis* extremist challenges.<sup>62</sup>

Fourthly, a trial should leave room for countervailing narratives of truth and injustice. Judges should make sure that the transformation of a political conflict into a legal dispute takes into account all the narratives. Amongst all these competing narratives of justice/injustice, the judges have to try to re-establish an accurate version of the facts and interpret and apply the appropriate law to it. They have to probe deep into different narratives, different testimonies and accounts to discover the various motives and intentions behind the terrorist actions. From this point of view, judges have first of all an obligation to establish a thorough, accurate and wide account of the facts pertaining to the incident before the court. Secondly, they have to reveal the underlying motives and strategies, and relate them to the context in which the incident happened. In carrying out such a penetrating inquiry, they can make a valuable contribution to our understanding of the facts and the background. They more or less can write history. They may hear the victims, speak on behalf of terrorised population and give them back their agency. Responding to this with unemotional adjudication subsequently provides the best meta-narrative of social and legal resilience thinkable. In this sense, the judges have to be aware of side shows too, were sympathisers, victims, other target audiences voice their version of justice.

Judge Cassese's reflections on the Achille Lauro Affair support this argument. In his seminal discussion of the lessons the international community of states could draw from this incident, Cassese points to the fact that there are long-term, mid-term and short-term policy objectives involved in dealing with terrorism. In the short run, governments might give preference to order and stability, viewing terrorism as an essential attack on that order and choosing to deal with this attack with repressive military or intelligence means only. However, he argues, terrorism might also reflect a 'desire for social change, innovation and the adaptation of international relations to changing needs, even when, alas, these are expressed in such perverted and destructive ways'.<sup>63</sup> In the mid-term and long-term, intransigence to or even denial of this political narrative might alienate the terrorists' broader constituencies from the political system they are operating in. This is not to say that the terrorists' narrative should be accepted or even

<sup>62</sup> Sulastris Osman, 'Indonesia's trials and tribulations: The Case of Abu Bakar Ba'asyir', *RSIS Commentary*, nr. 15, 10 February 2011.

<sup>63</sup> Antonio Cassese, *Terrorism, Politics and Law. The Achille Lauro Affair* (Princeton: Princeton University Press, 1989), p. 131.



agreed upon, but it should be countered and responded to rather than silenced by repressive means only. Judges or juries can have a role in unveiling these minority narratives by paying attention to the deeper motives or social grievances; not to view these as legitimate or rightful 'root causes' for terrorism. On the contrary, revealing these motives might even serve to mete out life long sentences for engaging in acts of terrorism. But revealing these narratives of social change does justice to the political conflict at hand. Denying or *only* criminalising these narratives and reducing the trial to a mere dichotomy of legal/illegal narrows reality and could in the end both backfire against the 'order and stability' paradigm of the executive and undermine criminal law's legitimacy in the eyes of minorities.

When these conditions are met, a trial will offer a platform on which narratives of injustice confront each other. A trial metes out justice not only to the acts of terrorism suspects, but also to their intentions, their motives and their legitimations. It reveals what ideas terrorists have to offer on questions of rights and righteousness. If an attack has taken place, or if suspects are arrested in a context of heavy political conflicts, law

cannot fix this situation of political division. But glossing over the competing narratives, storing them away in indefinite detention does not serve to solve these conflicts either. Not bringing terrorists to justice out of short term security considerations might in fact further deepen the political antagonisms. If the terrorists only represent a tiny faction within a social movement, or even if they represent hardly anyone at all, letting them tell their story in court might just expose this narrative as the hysterical, nihilistic or illegitimate argument it is.

After shocking incidents of terror and destruction, society needs to regain balance. Terrorism trials can help to repair the damage, to prevent a schism to unfold and to assist the immediate victims of terrorism attacks and society at large to come to terms with loss, grievances and grieve. An open and transparent trial is crucial for re-establishing what happened and why, and serve to institutionalise the need for vengeance and retribution. Inevitably, terrorism trials are show trials, staging a social drama, revealing narratives of injustice and grievances, but they have a judicial catharsis to offer – to all actors and audiences involved. Only then the curtain can fall.

## About the author

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**Why Do Some Terrorist Attacks Receive More Media Attention Than Others?**

*Forthcoming in Justice Quarterly*

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## MEDIA COVERAGE OF TERRORISM

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**Author contributions.** E.K. contributed to the conceptualization of the project and its empirical strategy, oversaw the data collection, cleaning and coding efforts, conducted the analyses, and wrote the methodology, results, discussion, and conclusions. A.B. wrote the literature review, contributed to the theory, and assisted with data collection, cleaning, and coding. A.L. contributed to the conceptualization of this research, including methodological elements of data sourcing, inclusion criteria, and variables.

**Why Do Some Terrorist Attacks Receive More Media Attention Than Others?**

**Abstract**

Terrorist attacks often dominate news coverage as reporters seek to provide the public with information. Yet, not all incidents receive equal attention. Why do some terrorist attacks receive more media coverage than others? We argue that perpetrator religion is the largest predictor of news coverage, while target type, being arrested, and fatalities will also impact coverage. We examined news coverage from LexisNexis Academic and CNN.com for all terrorist attacks in the United States between 2006 and 2015 (N=136). Controlling for target type, fatalities, and being arrested, attacks by Muslim perpetrators received, on average, 357% more coverage than other attacks. Our results are robust against a number of counterarguments. The disparities in news coverage of attacks based on the perpetrator's religion may explain why members of the public tend to fear the "Muslim terrorist" while ignoring other threats. More representative coverage could help to bring public perception in line with reality.

Keywords: terrorism; media; news coverage

Word Count: 10,871

### Introduction

On February 6, 2017, President Trump stated that media neglect to report some terrorist attacks.<sup>4</sup> His administration released a list of purportedly underreported attacks. The list included attacks that occurred in many countries and the perpetrators were overwhelmingly Muslim. Reporters and academics were quick to dismiss President Trump's claim and demonstrate that these attacks were covered, often extensively.<sup>5</sup> As we will show here, it turns out that President Trump was correct: media do not cover some terrorist attacks at all, while others receive disproportionate coverage. This project addresses the question: Why do some terrorist attacks<sup>6</sup> receive more media coverage than others?

Media are naturally drawn to covering ongoing or potential conflicts, especially those which are shocking or sensational (Tuman, 2010). Research has demonstrated that terrorism is most effective at spreading fear when given widespread media coverage (Powell, 2011). Most research on media coverage of terrorism has focused on framing and its impact on public opinion (Norris, Kern & Jost, 2003; Powell, 2011; Ruigrok & Atteveldt, 2007). While framing impacts perceptions, the underlying assumption here is that coverage exists in the first place. A few studies have focused on the *quantity* of media coverage rather than the context. From this small body of research, it is clear that incident-level factors can impact the amount of media coverage that terrorist attacks receive (Chermak & Gruenewald, 2006; Nacos, 2002; Persson, 2004). Weimann

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<sup>4</sup> [https://www.washingtonpost.com/news/politics/wp/2017/02/06/president-trump-is-now-speculating-that-the-media-is-covering-up-terrorist-attacks/?utm\\_term=.b23ffe5a9113](https://www.washingtonpost.com/news/politics/wp/2017/02/06/president-trump-is-now-speculating-that-the-media-is-covering-up-terrorist-attacks/?utm_term=.b23ffe5a9113)

<sup>5</sup> <https://www.theatlantic.com/politics/archive/2017/02/trump-centcom-media-terror-cover-up/515823/>  
<http://time.com/4489405/americans-fear-of-foreign-terrorists/>

<sup>6</sup> In the current study, the definitional criteria for what constitutes terrorism have been established in the development of the Global Terrorism Database (GTD) by the National Consortium for the Study of Terrorism and Responses to Terrorism. According to the GTD Codebook, terrorism is “the threatened or actual use of illegal force and violence by a non-state actor to attain a political, economic, religious, or social goal through fear, coercion, or intimidation.” Additional details about the definition of terrorism used in the GTD are available at <http://www.start.umd.edu/gtd/using-gtd/>. See Schmid (2015) for a more detailed discussion of the challenges related to defining terrorism, along with consideration of over 250 definitions that have been applied over time.

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and Brosius (1991) also found that perpetrator nationality impacts the amount of media coverage that international terrorist attacks receive. Yet, these works are largely focused on the pre-9/11, pre-digital media age factors that may impact the extent and nature of coverage disparities. Additionally, these studies do not focus on perpetrator religion as a key predictor of coverage in the context of domestic terrorism.

The amount of coverage that an incident receives increases public awareness, while signifying that the event is worthy of public attention. Media frames matter, but can only have influence if they reach an audience. To understand the reach of coverage, we must examine *how much* media covers terrorist attacks in addition to examining *how* terrorism is covered. The present study addresses two gaps in the literature: 1) factors that explain differences in the *quantity* of media coverage that terrorist attacks receive post-9/11 and in the digital media age, and 2) how perpetrator religion impacts these coverage disparities.

We examined media coverage of terrorist attacks in the United States to understand why some receive *more* coverage than others. Our paper is organized as follows: First, we engage with the literature on media coverage of violence, crime, and terrorism, and discuss factors that impact why some events receive more coverage than others. Following this, we discuss our methodological approach to examining media coverage of terrorism, our sample, and our analyses. Lastly, we conclude with the results of this study, how they pertain to policy and public perception, and avenues for future research.

### **Media Coverage**

#### **Why Media Coverage Matters**

Most of the information we get about the world outside of our local context comes from the media. As such, media play a vital role in how we form ideas about people, places, and things which we

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have not personally experienced (McCombs, 2003). Media attention lends legitimacy to the voices and frames—the conceptions and organizations of information that help us understand the world around us—that are chosen to be featured (Bekkers, Beunders, Edwards, & Moody, 2011). Media coverage also amplifies incidents and ideas by providing a platform to spread certain positions and perspectives to a broader audience (Bekkers, et al., 2011). This platform is further expanded by members of the public disseminating media amongst themselves (Nacos, 2002). In a recent study, King, Schneer and White (2017) found that media coverage of subjects of the researchers' choosing significantly increased online discussion of that topic immediately and this effect persisted for nearly a week. People also discuss news media content in various forums, resulting in further—not necessarily accurate—analysis of the information provided.

The rapid spread of information—regardless of its veracity—is especially common when focusing events occur. A focusing event is a sudden, attention-grabbing event that draws public awareness to an issue (Kingdon, 1995). In addition to being attention-grabbing and easy to politicize, focusing events are also relatively uncommon, reveal a cause of harm or potential harm, and are depicted as being particular to certain areas or groups (Kingdon, 1995). When something becomes a focusing event, debates and discussions surrounding certain policy topics markedly increase and receive greater media attention (Kingdon, 1995). Media coverage does not necessarily determine how we feel about these issues, but it sets the tone for which issues we discuss and how we discuss them (McCombs, 2003).

Particularly when discussing an issue that people do not directly experience, media creates a perspective for viewers that may be incongruent with reality (Gerbner, 1998). Media are primarily responsible for providing information, and thus frames, to the public in the aftermath of a terrorist attack (Altheide, 1987). There is clear evidence that media coverage impacts public

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perception across a host of topics including civic engagement (McCarthy, McPhail & Smith, 1996), mental health issues (Stack, 2003), and national security threats (Slone, 2000). Further, both news media (Graziano, Schuck & Martin, 2010; Miller & Davis, 2008; Weitzer & Tuch, 2005) and entertainment media (Callanan & Rosenberger, 2011; Donahue & Miller, 2006; Donovan & Klahm, 2015; Eschholz, Blackwell, Gertz & Chiricos, 2002; Kearns & Young, 2017) impact the public's views of crime and justice. When people do not have direct experience with a topic—as is almost always the case for terrorism—media depictions are especially impactful (Adoni & Mane, 1984). Moreover, media is primarily responsible for providing information to the public, who use that information to contextualize and understand terrorism.

When news media spends time on an issue, this suggests to the public that the topic is valid and important for understanding the world around them. The amount of attention that a story gets is an indicator of its importance (McCombs, 2003). The “CNN effect”—whereby media influences politics and government during conflict and natural disasters—suggests that media framing can impact public opinion and potentially sway policy decisions (Gilboa, 2005). Exposure to media coverage of terrorist attacks is positively correlated to perceived personal risk for being victimized, fear of others (Nellis & Savage, 2012), and short-term anxiety levels (Slone, 2000). Media are especially impactful at setting public discourse and, as a result, influencing public opinion in regard to limiting or protecting personal freedoms and civil liberties, as they feature and prioritize certain political viewpoints and narratives over others (Guasti & Mansfeldova, 2013; Hall, 2012; Norris et al., 2003). Political organizations use media to set the priorities of the public (Chermak 2003), which means that biases in media reporting can have real world consequences. In short, media coverage influences public opinion and perceptions of the world, which can, in turn, influence how the public perceives relevant people, policies, and groups.

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### **Media Coverage of Violence**

In the United States, violent crime has been declining steadily for the past twenty years,<sup>7</sup> yet public perceptions of violent crime do not reflect this.<sup>8</sup> In fact, as the violent crime rate in the United States decreases, people still perceive that it is increasing (Gramlich, 2017). Media may influence this disparity in perceptions of violence. For example, homicides receive a disproportionate amount of news coverage relative to both the actual risk of being victimized and the frequency of the crime (Sorenson, Manz & Berk, 1998; Paulsen, 2003; Peelo, Francis, Soothill, Pearson & Ackery, 2004). Violence, broadly construed, is one of the most prominent topics in the news media, and enjoys something of a privileged position, yet it is rare in day to day life for much of the audience. Slone (2000) argues that media influence increases as actual experience with a problem decreases, which could explain this discrepancy between real and perceived violent crime rates. Taking this into account, perhaps it is unsurprising that half of Americans are concerned that they or a family member will be the victim of a terrorist attack, despite the actual risk being miniscule (Jones & Cox, 2015).

Of course, media covering a topic does not necessarily indicate its subjective (or, indeed, objective) relevance for a given individual or the public at large. An event may be attention-grabbing, but lose relevance quickly. For a topic to maintain relevance it must receive ongoing coverage by the media for approximately one to eight weeks (Coleman, McCombs, Shaw & Weaver, 2009). The perceived relevance of an incident fades as time passes without the media referring to it (Coleman, et al., 2009). Given the current “infotainment” format of news media, stories are selected for coverage based on how much attention they can potentially attract (Xiang

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<sup>7</sup> [https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/violent-crime/violent-crime-topic-page/violentcrimemain\\_final](https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/violent-crime/violent-crime-topic-page/violentcrimemain_final)

<sup>8</sup> <http://www.pewresearch.org/fact-tank/2016/11/16/voters-perceptions-of-crime-continue-to-conflict-with-reality/>

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& Sarvary, 2007). Coverage of violence fills that role, while also potentially providing useful information to the viewer.

### **Media Coverage of Terrorism**

While some terrorist attacks are sensationalized and extensively covered, the majority receive little to no media attention (Chermak & Gruenewald, 2006). An issue's relevance influences the amount of media coverage that it receives (McCarthy et al., 1996). Some terrorist attacks may be deemed more relevant than others due to their inherently political, attention-grabbing nature and potential to be a focusing event. Terrorism lends itself to being used as a focusing event, as it is uncommon and can raise awareness of potential weak points in national security. To give a few recent examples, media coverage of Dylann Roof's terrorist attack against the congregation of the Emanuel African Methodist Episcopal Church sparked fierce debates about the Confederate Flag and gun control policy in the United States. Robert Lewis Dear's attack on a Planned Parenthood facility was used to argue that promoting misleading information could have deadly consequences. In short, these attacks are used as focusing events, shifting the public discourse to political topics secondary to terrorism itself and often facilitating or inspiring new policy.

Brian Jenkins (1974, p.4) stated that "terrorism is theater," a metaphor reflecting that perpetrators engage in violence to communicate with an audience. Media coverage of attacks amplifies a group's messaging and sensationalizes the event (Picard, 1993). In this respect, media and terrorist groups have a mutually reinforcing relationship. Yet, media do not cover all terrorism equally. Focusing on terrorism in the United States between 1980 and September 10<sup>th</sup>, 2001, Chermak and Gruenewald (2006) found that attacks received more coverage if there were casualties, if it was a hijacking, if an airline was targeted, or if domestic groups were involved. In this study, perpetrator identity was not considered as a factor that would impact the amount of

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coverage an attack receives. Even minor attacks may receive coverage if the target, location, or groups involved are of high symbolic or political significance to the public (Nacos, 2002). Further, evidence suggests that a terrorist attack will receive less coverage if it is framed as a crime (Persson, 2004). Whether an attack is framed as terrorism or a crime is complicated by the fact that there is no one accepted definition of terrorism to rely on, even among experts (Schmid, 2015; Spaaij & Hamm, 2015). Indeed, there are myriad potential factors that can impact why a particular terrorist attack receives more news coverage than others. We are interested in how the following factors influence the amount of news coverage that a given terrorist attack will receive: who committed the attack, what the target was, and how many people were killed.

### *Who is the perpetrator?*

Events are more newsworthy if they can be typified as reflecting current beliefs and social structure, and can be scripted in ways that reinforce stereotypes (Lundman, 2003). Consistent with the social identity perspective (Tajfel & Turner, 1986), media in the predominantly white, Christian United States may portray members of this in-group in a more favorable way than people who are not members of the majority race or religion. In the context of entertainment media, such as *24* or *Homeland*, we generally see Muslim or Arab actors portraying terrorists while white actors play the hero (Alsultany, 2012). In fact, Shaheen (2012) found clear evidence that most Arab movie characters are portrayed as dangerous stereotypes—as sub-human or villains—while Arab protagonists often have surprisingly Caucasian features. Similarly, in news media, perpetrators of terrorism are disproportionately non-white (Gilliam & Iyengar, 2000).

While perhaps not intentional, it seems unlikely that disparities in entertainment media coverage based on race and religion are coincidental. Media coverage may explain public perceptions of terrorism and identity. Evidence suggests that, to Americans, there is an implicit

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association between terrorism, people of Middle Eastern descent, and Islam (Alsultany, 2012; Gottschalk & Greenberg, 2008; Park, Felix, & Lee, 2007; Saleem & Anderson, 2013). In the United Kingdom, Muslims—particularly those who are foreign-born—are increasingly viewed as a national security threat (Allouche & Lind, 2010). Huff and Kertzer (2017) found that members of the public are more likely to consider an attack terrorism when the perpetrator is Muslim. Similarly, when presented with news stories about real crimes, incidents committed by Muslims were more likely to be labeled as terrorism and were also judged more harshly (West & Lloyd, 2017).

Turning to media coverage of terrorism and identity, similar patterns emerge. Dixon and Williams (2015) found that Muslims were vastly overrepresented in broadcast media coverage of terrorism. Similarly, in two prominent Australian newspapers, news stories about Middle Eastern people often focused on terrorism, asylum seekers, and cultural practices that are alien to Western cultures (Akbarzadeh & Smith, 2005). Even in cases where the depictions of Muslims were sympathetic or neutral, media still positioned stories almost exclusively in ways that emphasized their otherness and dealt with the topic of terrorism (Akbarzadeh & Smith, 2005).

Media may frame terrorism as a specifically Muslim problem because that is a dominant narrative (Sultan, 2016). Domestic terrorism is often portrayed as a minor threat committed by mentally ill perpetrators, whereas terrorism influenced by radical interpretation of Islam is framed as a hostile outside force (Powell, 2011). If the perpetrators were Muslim and the victims Christian, the innocence and goodness of the victims and their spirituality will often be presented in juxtaposition with Islam (Powell, 2011). When the perpetrator(s) of a terrorist attack are members of an out-group or “other,” we should expect to see more media coverage. Since discussions of

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terrorism and counterterrorism often overly focus on Muslim perpetrators,<sup>9</sup> we expect the following:

*H1: Terrorist attacks will receive more media coverage when the perpetrator is Muslim than when the perpetrator is not Muslim*

While we expect that the perpetrator's identity will be the strongest predictor of the amount of media coverage an attack receives, we anticipate other factors will have significant influence as well. Perpetrators of terrorist attacks may be apprehended, killed, or escape capture or identification. Perpetrators who are arrested provide more opportunities for media coverage as they are charged, stand trial, and, if found guilty, sentenced. Accordingly, we expect the following:

*H2: Terrorist attacks will receive more media coverage when the perpetrator is arrested than the perpetrator is not arrested*

*What is the target?*

The relative sociological relationship between a victim and offender influence the way in which law is applied for punishment (Black, 1976). Stemming from this dyadic perspective, the target type may influence media coverage of violence. In a study of international terrorism, attacks against politically significant targets received more coverage (Zhang, Shoemaker & Wang, 2013). Members of the public are also more inclined to label an attack as "terrorism" when the target is governmental (Authors, 2017). In so far as terrorism is a tactic to influence politics, attacks on governmental facilities or employees may generate increased media coverage. From this, we expected that:

*H3: Terrorist attacks will receive more media coverage when the target is a governmental facility or employee(s) than when the target is non-governmental*

*How many people were harmed?*

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<sup>9</sup> [https://www.start.umd.edu/pubs/START\\_ECDB\\_IslamistFarRightHomicidesUS\\_Infographic\\_Feb2017.pdf](https://www.start.umd.edu/pubs/START_ECDB_IslamistFarRightHomicidesUS_Infographic_Feb2017.pdf)

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The adage “if it bleeds it leads” suggests that news coverage focuses on violent or gory stories (Miller & Albert, 2015). When more people are killed in an attack, this can increase the shock value to viewers and increase fear of terrorism (Zhang et al., 2013). Therefore, when there is more death and destruction, we should see more coverage (Nacos, 2002). As Chermak and Gruenewald (2006) found in a study of media coverage on domestic terrorism pre-9/11, at least one casualty led to both an increase in the number of articles written about that attack and the length of those article. Media may cover higher fatality count attacks more because death is both newsworthy and draws readers in. We expect that:

*H4: Terrorist attacks will receive increased media coverage as the number of fatalities caused by the attack increases.*

### *Alternative explanations*

There are many potential idiosyncratic factors that impact media coverage of an event. We identify five testable counterarguments. First, white homicide victims receive more media coverage than minority victims (Gruenewald, Chermak, & Pizarro, 2013). Drawing from the disparities in homicide coverage, the discussion on out-groups, and the societal position of the victim(s), it is also possible that attacks against an out-group receive less media coverage. Second, symbolism can be important in terrorism. Certain dates, such as Hitler’s birthday and the anniversary of 9/11, attract more violence.<sup>10</sup> When attacks occur within close proximity to these symbolic dates, they may receive more media coverage. Third, we may expect to see less media coverage when responsibility for the attack is unknown (Weimann & Brosius 1991; Weimann & Winn 1994). Fourth, we may expect to see more coverage when the individual(s) responsible are connected with a larger group that uses terrorism. Lastly, when classifying whether or not a violent

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<sup>10</sup> [https://www.washingtonpost.com/local/the-strange-seasonality-of-violence-why-april-is-the-beginning-of-the-killing-season/2016/04/03/4e05d092-f6c0-11e5-9804-537defcc3cf6\\_story.html?utm\\_term=.ca9fc4cd77e8](https://www.washingtonpost.com/local/the-strange-seasonality-of-violence-why-april-is-the-beginning-of-the-killing-season/2016/04/03/4e05d092-f6c0-11e5-9804-537defcc3cf6_story.html?utm_term=.ca9fc4cd77e8)

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incident is terrorism there can be insufficient or contradicting information that makes it difficult to make a definitive determination. If experts question whether or not an incident should be considered terrorism, members of the media may have similar difficulties. It is possible that classification differences can explain variation in coverage, potentially resulting in ambiguous cases receiving less media attention. We tested our argument on why some attacks received more media coverage than others against these alternatives. Additionally, some factors, such as a major event occurring at the same time to crowd out the news cycle, are difficult to operationalize and model. Whether or not a manhunt occurred plausibly could impact coverage of a terrorist attack. Unfortunately, it is infeasible to operationalize a manhunt in a consistent way across attacks.<sup>11</sup>

### Methods

#### Data

The data for this study consisted of media coverage for terrorist attacks in the United States between 2006 and 2015,<sup>12</sup> as listed in the GTD.<sup>13</sup> While the GTD lists 170 terrorist attacks during this ten-year span, several of the attacks were perpetrated by the same individual(s), and thus are reported together in media. We collapsed multiple attacks with the same perpetrator(s) into a single terrorism episode to avoid counting the same articles numerous times. In total, there were 136 terrorism episodes in the United States during this time.

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<sup>11</sup> If this were binary, it would assume an hours-long foot search and a month-long hunt through the wilderness are the equivalent. If we count duration, then that implies the few days-long search for the Tsarnaev brothers that shut down Boston is less meaningful than the 48-day search for Eric Frein through the Pennsylvania wilderness. Given the diversity of what a manhunt can entail, we do not think it is advisable to control for this in a regression model.

<sup>12</sup> Starting in 2006, an increasing percentage of Americans used the Internet as their main source of news. <http://www.pewresearch.org/fact-tank/2013/10/16/12-trends-shaping-digital-news/> Since the news sources used for this study include both print and online newspaper articles, we started our analysis in 2006. In years prior to 2006, we may see fewer articles overall since print was more common and is subject to space constraints.

<sup>13</sup> The Global Terrorism Database is a systematic and unbiased source that codes terrorism at the incident-level around the world from 1970 to 2016. The GTD is the most comprehensive and complete dataset available on terrorism. At the time of data collection, 2015 was the most recent year of data released by the GTD.

## MEDIA COVERAGE OF TERRORISM

To measure media coverage, we focused on two sources: LexisNexis Academic and CNN.com<sup>14</sup> LexisNexis Academic searches through the full text of thousands of news publications. For the purpose of this study, we limited the search results to newspaper coverage<sup>15</sup> from US-based sources between the date of the attack and the end of 2016.<sup>16</sup> LexisNexis searches news articles from national sources such as *The New York Times*, *Wall Street Journal*, *The Washington Post*, and *USA Today*, as well as local newspapers from around the country. To supplement these results, we searched CNN.com's archives to obtain additional news coverage that is solely in digital format. For each incident, we searched for the perpetrator(s) (if known), the location, and other key words about the attack. In this initial stage, our goal was over-inclusion of potential articles. From this, we culled the final list to only include articles where the attack, perpetrator(s), or victim(s) were the primary focus. We removed the following types of articles most frequently: lists of every attack of a given type; political or policy-focused articles where the attack or perpetrators were an anecdote to a larger debate, such as abortion or gun control;<sup>17</sup> and discussion of vigils held in other locations. In total, we included 3,541 news articles in our dataset. A full list of terrorism episodes and the amount of coverage each received can be found in the appendix. The dataset generated and analyzed for the current study is available from the corresponding author on reasonable request.

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<sup>14</sup> While we wanted to include searches from sources across the political spectrum, such as Fox News and Huffington Post, neither has a searchable archive going back to 2006 and email requests for archive access were not answered.

<sup>15</sup> It is beyond our current scope to conduct a systematic study of television and radio coverage from both national and local stations across a decade span. Furthermore, broadcast media have a fixed amount of airtime so coverage disparities should be exacerbated. Including TV and radio coverage in our study would likely bias the results in favor of larger or more sensational events that dominate news coverage.

<sup>16</sup> By the end of 2016, all known perpetrators had either pled guilty or gone to trial with the exception of Robert Lewis Dear. Dear is currently not competent to stand trial, so we expect occasional coverage of this going forward. Otherwise, we do not expect any ongoing coverage of the incidents, perpetrators, or victims listed in this dataset.

<sup>17</sup> For example: Dylann Roof's attack sparked debate about the Confederate Flag and gun control; Robert Lewis Dear's attack led to discussion about gun control and abortion rights; the Boston Bombing increased discussions about immigration; and, the San Bernadino attack generated a discussion about immigration, gun control, and Apple refusing to unlock the perpetrator's iPhone.

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### **Variables**

#### *Dependent variable*

The outcome variable for all hypotheses was the number of news stories about the incident. We added the number of relevant articles from LexisNexis Academic and CNN.com to yield the total number of articles for each terrorism series. National media outlets may cover terrorism differently than outlets primarily focused on a local audience. To examine differences in coverage by audience, we also estimate models with the total number of articles from major sources<sup>18</sup> only (35.6% of the articles) and with the total number of articles from other sources only (64.4% of the articles). The key independent variables fall into three categories: perpetrator-level factors, target type, and casualties.<sup>19</sup> Information to code these variables came from news reports and the GTD.

#### *Independent variables*

Three binary perpetrator-level variables were coded: perpetrator Muslim, perpetrator arrested, and unknown perpetrator. When there were multiple perpetrators, we coded the variable as 1 if any of the perpetrators fell into a category. When the perpetrator was unknown, we coded

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<sup>18</sup> There are five major, national media outlets in our dataset: *CNN.com*, *The New York Times*, *Wall Street Journal*, *The Washington Post*, and *USA Today*.

<sup>19</sup> All variables were double coded, inconsistencies in coding were discussed, and final codes were agreed upon for all variables in each incident. In a few instances where coding could be disputed, we estimated models both ways and the results were unchanged.

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both perpetrator Muslim and perpetrator arrested as a 0.<sup>20</sup> In the present dataset, the individual person(s) responsible for the attacks is unknown 40.4% of the time.<sup>21</sup>

Three binary target type variables were coded: law enforcement/governmental target, Muslim target,<sup>22</sup> and minority target. We measured fatalities as the number of people killed—excluding the perpetrator(s)—in each terrorism series.<sup>23</sup> Lastly, we included a binary indicator to denote whether or not the attack occurred near a symbolically significant event in the United States as a control for another factor that could increase the amount of coverage that an attack receives. If an attack occurred within a week of Hitler’s birthday (April 20<sup>th</sup>), 4<sup>th</sup> of July, September 11<sup>th</sup>, or

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<sup>20</sup>In terrorism, the perpetrator is often unknown so treating these as missing data and dropping the incidents is not appropriate. We recognize that for incidents where the perpetrator is unknown, it is possible that some were committed by Muslims but there is no way to know this. Essentially, there are three categories of perpetrator: Perpetrator Known & Muslim; Perpetrator Known & Not Muslim; and Perpetrator Unknown. Even when the individual perpetrator is unknown, we often know the group responsible so “perpetrator unknown” is not a theoretically sound category on its own, though we account for these incidents in robustness checks. In the models reported, we collapsed Perpetrator Unknown and Perpetrator Known & Not Muslim into a single category (0) and compared to Perpetrator Known & Muslim (1). To ensure that our results are not an artifact of whether or not the perpetrator is known, we also estimated all models where Perpetrator Unknown or Perpetrator Known & Muslim are collapsed into a single category (0) and compared to Perpetrator Known & Not Muslims (1) Across all models reported in the main text and the appendix, attacks where the perpetrator is known and not Muslim do not receive a significantly different amount of news coverage. In contrast, incidents where the perpetrator is known and Muslim receive significantly more coverage in all models. These findings give us additional confidence in our conclusions.

<sup>21</sup> This is common for terrorism: approximately 13% of incidents globally are claimed (Kearns, Conlon & Young 2014) and 40% are attributed to a particular group (GTD, 2016). Even when the individual perpetrator is unknown, we often know the group or movement responsible. For example, attacks claimed by the Animal Liberation Front still send a clear message even in the absence of an arrest or identification of the individual(s) responsible. Thus, simply considering attacks where the perpetrator is unknown is not appropriate in terrorism studies. Instead, we control for unknown responsibility in two ways. First, we created a dummy variable for incidents where neither the perpetrator nor group are known. Second, we created a dummy variable for incidents where the perpetrator, group, and motive are all unknown.

<sup>22</sup> We include the 2012 Sikh temple shooting in Oak Creek, Wisconsin and the 2015 attack on the Sikh bus driver in Los Angeles in this calculation. Evidence suggests that these attacks were Islamophobia-inspired and the perpetrators were unaware of the difference between Sikhs and Muslims.

<sup>23</sup> The number of people wounded may also impact the amount of coverage that an attack receives. The vast majority (96.3%) of attacks wounded fewer than 10 people. Five attacks had more than 10 wounded: the Austin IRS attack, San Bernadino, Fort Hood, the West Texas Explosion, and the Boston Bombing. While casualties likely impact coverage, injuries are not of the same magnitude as fatalities. If we were to include the counts of both, this would assume that fatalities and casualties have the same impact on media coverage and that the relationship is linear. Rather, to account for the non-linear relationship between casualties and coverage, we logged the number wounded. The correlation between the number of fatalities and the log of number wounded is 0.63 so including both variables in a model introduces concerns of multicollinearity. We created an additive variable (number killed plus log of number wounded) to bluntly account for the impact of casualties on coverage, though this measure is difficult to substantively interpret. As shown in the appendix (Models A1-A20), results are substantively and significantly similar across all models.

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Christmas (December 25<sup>th</sup>), this was coded as 1. When there were multiple incidents in a terrorism series, this was coded as 1 if any of the events take place within a week of a significant date.

On average, each of the 136 terrorism incidents was covered in 26 news articles. However, the distribution is highly skewed. Over one quarter of the incidents received no coverage from the sources that we searched while other attacks received disproportionate coverage. In the present dataset, Muslims perpetrated 12.5% of the attacks yet received 50.4% of the news coverage. The perpetrator was arrested in about half (47.1%) of the incidents. Attacks targeted law enforcement or government 20.6% of the time. On average, less than one person was killed per attack, though this again is highly skewed with the vast majority of attacks (81.6%) having no fatalities. See Table 1 for descriptive information about each variable.

[TABLE 1 HERE]

### Results

Negative binomial regression models<sup>24</sup> are most appropriate<sup>25</sup> since the dependent variable is a non-negative count of news articles per attack. In Table 2, we display the results of six models. As expected in hypothesis 1, Model 1 shows that attacks by Muslims receive significantly more coverage than attacks by non-Muslims. Of course, factors other than the perpetrator's religion impact the amount of coverage the attack receives. As Model 2 shows, all of our hypotheses are supported. If the perpetrator is Muslim, we see 357% more news stories about the attack. Model 2 also shows a 287% increase in coverage when the perpetrator is arrested, a 211% increase if the

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<sup>24</sup> All models are estimated with bootstrapped standard errors to minimize the impact of outliers with the small number of observations. Akaike Information Criterion (AIC) and Bayesian Information Criterion (BIC) are presented to compare model fit where lower values suggest greater congruence with the true model. The extent to which one model is preferred to another depends on the magnitude of difference between model fit statistics (Raftery, 1995). Models discussed in text have either a weak or positive difference between alternatives.

<sup>25</sup> A high proportion (N=36, 26.5%) of the attacks in these data did not receive any news coverage. Thus zero-inflated negative binomial regression models were also estimated. Vuong tests of the zero-inflated negative binomial versus a standard negative binomial indicate that the negative binomial models are preferred.

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target is governmental, and a 46% increase per fatality, on average. Models 3 through 6 include variables to test counterarguments about the target type, significant dates, and the perpetrator being unknown, but the fundamental results remain unchanged.

[TABLE 2 HERE]

We suggested five possible alternative explanations for the amount of news coverage that a terrorist attack receives. First, it is possible that some targets receive less media coverage than others. When the target is an out-group member—such as a Muslim target or a minority target in general—the attack may receive less coverage. As we see, however, neither targeting Muslims (Models 3 and 5) nor minorities (Models 4 and 6) impact coverage. Second, when an attack occurs in close temporal proximity to a significant date, the attack may receive more coverage. Yet, Models 3 through 6 show that symbolic timing does not impact the amount of coverage that an attack receives. Third, when the perpetrating individual(s) or group is unknown, this may impact coverage. In Models 3 and 4, we see that attacks where both the individual(s) and group responsible are unknown received about 70% less coverage. In these models, the other variables remain significant but the impact is reduced for all factors except the number of fatalities. Fourth, all models reported were estimated to account for attacks connected with a larger group. As shown in the appendix (Models A21-A40), incidents connected to a group do not receive more coverage and accounting for this factor does not impact the effect of other variables on coverage.

Differences in coverage may be explained by whether or not there is doubt about classifying the attack as terrorism. To test this, we estimated the models reported in Table 2 with only cases where there is “essentially no doubt as to whether the incident is an act of terrorism” (GTD Codebook, p. 14)<sup>26</sup>. As shown on Table 3, our results largely hold. One exception is that

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<sup>26</sup> Descriptive statistics for each variable are relatively unchanged, as shown in the appendix.

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targeting the government is no longer significant, though this is unsurprising since the vast majority of those attacks are clearly terrorism. For the variables that remain significant, the magnitude of each's impact on the outcome is similar and the effect of a Muslim perpetrator is stronger.

[TABLE 3 HERE]

Across this ten-year period, two terrorist attacks dominated news coverage. The Boston Marathon and Fort Hood attacks together account for over a quarter of media coverage on terrorism (13.4% and 11.9%, respectively). Hyper-salient events like this drive media coverage and may also be driving our results.<sup>27</sup> To test this, we estimated all models with these two cases excluded. As shown on Table 4, our hypotheses are still supported. The magnitude of our main predictor—the perpetrator being Muslim—was slightly stronger with 369% more coverage when these two attacks are removed from the analyses (Model 14). The impact of the other key variables remains roughly the same.

[TABLE 4 HERE]

Furthermore, Table 5 shows that when we remove the Boston Marathon bombing and the Fort Hood shooting *and* only include cases where there is no doubt that it is terrorism, the results remain unchanged. Again, the magnitude increased to an expected 405% more coverage when the perpetrator is Muslim (Model 20). In this model, the impact of a perpetrator being arrested is slightly lower and the impact of each additional fatality is slightly higher.

[TABLE 5 HERE]

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<sup>27</sup>The next most covered attack, Faisal Shahzad's attempted bomb in Times Square, received less than half the coverage of these. By the statistical definition, 17% of the cases are outliers due to the skewed distribution of coverage. Yet, there is not a sound argument for dropping all of these observations from the dataset since this is the reality of media coverage for these attacks.

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We estimated the models previously discussed by disaggregated the outcome variable to compare results between major and non-major sources. Figure 1 compares the results of our main model across: 1) the whole sample, 2) only non-major sources, and 3) only major sources. Across source type, whether or not the perpetrator was arrested, whether or not the attack targeted government or law enforcement, and the number of fatalities have approximately the same impact on coverage (Models A41-A60). Importantly, there is no meaningful difference in the impact of these three independent variables by source type. However, we see clear differences in the extent to which a Muslim perpetrator generates additional media coverage. Across the whole sample, attacks receive 357% more coverage on average when the perpetrator is Muslim. Among non-major sources, the expected increase in coverage is 228% whereas the increase in coverage among major sources is 758%. Across the 24 main models reported in text, incidents perpetrated by a Muslim receive between 1.81 and 4.93 times more coverage from major sources relative to non-major sources.

[FIGURE 1 HERE]

In sum, we find strong evidence to support all of our hypotheses. Attacks receive significantly more coverage when: the perpetrator is Muslim, the perpetrator is arrested, the target is law enforcement or government, and there are more fatalities. While most factors have a similar impact on the extent of additional media coverage between major and non-major sources, attacks by Muslims received drastically more coverage in national media sources than in sources focused on more local audiences.

### **Discussion**

The motivating questions for this project were whether there are quantitative differences in the amounts of coverage, and why some terrorist attacks receive more media coverage than others. Research on media and terrorism has largely focused on framing within articles and the impact

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this has on public opinion (Norris et al., 2003; Powell, 2011; Ruigrok & Attevelt, 2007). Since some attacks are not covered at all while others receive the bulk of media coverage, the quantity of articles is also important for public perception of terrorism. In a study using pre-9/11 data, attack-level factors impacted coverage but the perpetrator's identity was not included among them (Chermak & Gruenewald, 2006). To our knowledge, this is the first post-9/11 and digital media age study focused on the *quantity* of coverage that terrorist attacks receives. Additionally, this is the first study to explicitly examine how perpetrator religion impacts coverage across such a wide range of terrorism cases.

Myriad factors may impact why a particular terrorist attack receives more coverage than another. By modeling coverage over all terrorist attacks in the United States during a ten-year period, we are able to identify trends in coverage. As we see here, perpetrator religion matters for the *quantity* of coverage that an attack receives. We found clear evidence that terrorist attacks perpetrated by Muslims receive drastically more media coverage than attacks by non-Muslims. This finding is consistent with the literature on social identity (Tajfel & Turner, 1986) that highlights in-group and out-group dynamics whereby people who are perceived as “others” are portrayed and perceived more negatively. Research has shown similar media bias against Muslims and Arabs in the context of entertainment media (Shaheen, 2012). Our findings clearly show that similar biases against Muslims exist in media coverage of terrorism. In part, this may explain why people implicitly connect terrorism and Islam (Park et al., 2007; Saleem & Anderson, 2013) and view Muslims as a threat to national security (Allouche & Lind, 2010). Coverage disparities may also explain why people are more likely to consider an incident to be “terrorism” when the perpetrator is Muslim (Huff & Kertzer, 2017), which can create a feedback loop that perpetuates biases in both media coverage and public perception.

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Each of our other hypotheses were supported. Specifically, when a perpetrator of an attack is arrested we find significantly more coverage. This may be driven in part by the fact that an arrest is a newsworthy event in its own right, and especially so when linked to a terrorist attack. If indeed “terrorism is theatre” as Jenkins (1974) posits, then an arrest made in a terrorism case provides another opportunity to spark audience interest, thereby extending the show.

We also find that attacks against the government receive more coverage. Terrorism inherently has a political dimension. As such, attacks that target the government send a clearer signal about intent, which may result in media coverage. However, this result is inconsistent with Chermak and Gruenewald’s (2006) finding that pre-9/11 attacks against government targets received less coverage when contrasted with airline hijackings. Consistent with Chermak and Gruenewald’s (2006) analyses, the number of fatalities in a given attack has a significant impact on the extent of coverage. Because fatal events tend to be covered more in general, we anticipated that higher numbers of casualties would generate additional focus in instances of terrorism as well.

Across most of the models, the variables testing other counterarguments were not significant. Attacks that targeted either Muslims specifically or minorities in general did not receive less media coverage. Although Moeller (2009, p. 70) notes “coverage of victims, the dead and the survivors, is not egalitarian,” the current findings do not suggest a clear distinction in coverage based on whether an attack primarily targeted members of a minority group. While minority homicide victims receive less media coverage (Gruenewald et al., 2013), our results may suggest that terrorism coverage is more strongly driven by other factors. It is also possible that target identity impacts coverage in certain media outlets but not others, though this is beyond the scope of the present study. Further, we found that incidents that occurred near significant dates did not receive more coverage. While it stands to reason that the symbolic value of particular dates

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might add context or additional interest to coverage of an attack thereby generating more coverage, this was not supported. Surprisingly and contradicting previous scholarship (Weimann & Brosius, 1991; Weimann & Winn, 1994), there was no difference in the amount of coverage for attacks connected to a larger group versus those without this connection. While attacks connected to larger groups automatically have name recognition, our results show that this does not drive coverage. In some models, attacks received less coverage when neither the perpetrator nor group responsible were known, though the other key variables were still significant.

In sum, our results and the robustness of our models demonstrate the strength of the conclusion that media give disproportionate coverage to terrorism when the perpetrator is Muslim, though other factors also matter. We find that the identity of a perpetrator as Muslim has primacy as the key driver of the amount of coverage, relative to each of the other factors. Thus, the findings reported here empirically establish perpetrator religion as the most substantial element of what drives overall coverage.

We demonstrate that our findings are robust against a number of alternative explanations. In all of the models we estimated, attacks where the perpetrator was Muslim received significantly more media coverage. This result was strengthened when we only included incidents that clearly met all criteria on the definition of terrorism. Similarly, our results were strengthened when we excluded the Boston Marathon bombing and the Fort Hood shooting. This demonstrates that the two most high-profile events in the dataset were not driving our results. Somewhat surprisingly, Muslim perpetrated attacks receive the most coverage—by far—from major, national news sources. The five major sources in our study provided over a third (35.6%) of the articles we analyzed. Taken together, this suggests that sources with the broadest readership make up a sizeable proportion of terrorism coverage in the United States and this coverage tends to focus on

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attacks by Muslims. It is not clear—and beyond the scope of the project to determine—what impact this has on public perceptions of terrorism. Yet, it is reasonable to think that coverage disparities may help explain why people are more likely to define violence as “terrorism” when the perpetrator is Muslim (Authors, 2017; Huff & Kertzer, 2018). To date, research on terrorism media coverage has not examined differences in the amount of coverage that attacks receive based on the source. As the present study suggests, however, these differences do exist between national and local outlets.

When people think about terrorism, events like the Boston Marathon bombing and the Fort Hood shooting are what come to mind. This is not surprising considering that these two incidents received over a quarter of the coverage in the U.S. over the last decade. Yet, so much is missed. Based on fatalities, there are a few attacks in the dataset that received less coverage than we would expect. Wade Michael Page’s attack on the Sikh Temple in Wisconsin killed 6 people and it only received 2.6% of the total coverage. Frazier Glenn Miller’s attack on a synagogue in Kansas killed 3 people and it only received 2.2% of the coverage. Dylann Roof killed 9 people in an African-American church in Charleston and received 5.1% of the coverage. These attacks have two things in common: the perpetrator was a white man and the targets were both religious and minority groups. These instances highlight disparity in media coverage of terrorism.

### **Conclusions**

#### **Limitations and Future Directions**

From the present study, we see that characteristics of a terrorist attack and its perpetrator(s) impact the amount of coverage that it receives from media. When something is covered more extensively, it is in the public’s eye more often. This can connote significance and can skew public perceptions. While our findings are clear and robust, they are not without limitation. First, our study is limited to

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print and online media. Since broadcast media has space constraints with air time, it is reasonable to expect that coverage disparities would be further exacerbated in television and radio coverage. To explore this, future research could replicate our project with broadcast coverage. Second, our dataset is limited to the United States so the extent to which our findings are generalizable more broadly is unclear. In the future, we plan to conduct similar analyses in other countries to address concerns with generalizability. Third, we are focused on terrorism and media coverage since 2006. As we have discussed, there are methodological reasons to limit our study of print and online media coverage to this timeframe. Exploring these differences using print media only or using select broadcast media over a longer time-span is another avenue for future research. Finally, some media outlets may selectively cover certain attacks more than others in a way that reflects the ideological perspective of the news organization. If this occurs, we would see uneven coverage of attacks both within and across news sources. In such cases, the source of coverage and select factors of interest (i.e., targeting a minority group) may interact in ways that provide a finer-grained perspective on how *particular* news organizations cover and label such attacks, rather than the aggregate level of coverage across *many* news organizations. While this level of analysis is beyond the scope of the current research, it presents an interesting avenue for future research.

Beyond just the quantity of coverage, it is also important to analyze the content of what is said. Research on media frames and terrorism reporting tends to focus on a few key events, such as the London and Madrid bombings (Ruigrok & Attevelt, 2007). Insights derived from such work help us to understand media coverage, but limit our ability to compare how numerous different attacks are framed. Powell (2011) focused on media coverage of 11 terrorist attacks in the US from 9/11 through 2009 and found qualitative differences in how attacks are framed based on the perpetrator's identity. One of her selection criteria for inclusion, however, is that the attack was reported on as "terrorism"

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in media. However, media might be reticent to use the term “terrorist” to describe some attackers relative to others, particularly to the extent that the term carries the connotation of making a value judgment (Maguire, 2007).

### **Policy Implications**

When President Trump asserted that the media does not cover some terrorist attacks enough,<sup>28</sup> he was correct. However, his assertion that attacks by Muslim perpetrators received less coverage is unsubstantiated. All attacks in this study are considered terrorism by experts and should be covered as such. Yet, media do not cover these events equally. Even when controlling for other factors that may impact coverage, attacks perpetrated by Muslim receive a disproportionate amount of media coverage. In the present data, Muslims perpetrated 12.5% of the attacks yet received half of the news coverage.

The way in which media frames an issue can impact public perception (Tversky & Kahneman, 1981). Whether the disproportionate coverage is a conscious decision on the part of journalists or not, this stereotyping reinforces cultural narratives about what and who should be feared. By covering terrorist attacks by Muslims dramatically more than other incidents, media frame this type of event as more prevalent. These findings help explain why half of Americans fear that they or someone they know will be a victim of terrorism<sup>29</sup> and implicitly link terrorism and Islam (Saleem & Anderson, 2013). Reality demonstrates, however, that these fears are misplaced.

One way to combat misplaced fears about terrorism is to change the public narrative on terrorism to cover attacks more evenly and based on consistently applied criteria. A robust body

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<sup>28</sup> [https://www.washingtonpost.com/news/politics/wp/2017/02/06/president-trump-is-now-speculating-that-the-media-is-covering-up-terrorist-attacks/?utm\\_term=.b23ffe5a9113](https://www.washingtonpost.com/news/politics/wp/2017/02/06/president-trump-is-now-speculating-that-the-media-is-covering-up-terrorist-attacks/?utm_term=.b23ffe5a9113)

<sup>29</sup> <http://www.gallup.com/poll/4909/terrorism-united-states.aspx>

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of research shows that media coverage impacts perceptions across a range of issues (Callanan & Rosenberger, 2011; McCarthy et al., 1996; Stack, 2003), including terrorism and security threats (Norris et al., 2003; Slone, 2000). While we see media's impact broadly, this connection is particularly strong for topics with which people lack direct experience (Gerbner, 1998). We see that people think crime rates are going up when the opposite is true, and that media coverage likely drives this incorrect perception. From this, it is reasonable to expect that media coverage of terrorism has a similar impact on the public. When attacks perpetrated by Muslims receive drastically more coverage, audiences may think these attacks are more common and become more afraid of Muslim terrorists. This misperception can create a feedback loop of incorrect information fueling prejudice and discrimination. Moreover, such misperceptions may prevent the acknowledgment and addressing of other pressing security threats that have a factually rooted basis.

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## MEDIA COVERAGE OF TERRORISM

Table 1. Descriptive Statistics (N=136)

<b>Variable</b>	<b>Frequency (N)</b>	<b>Mean (SD)</b>	<b>Median</b>	<b>Range</b>
<i>Dependent Variable</i>				
Articles Per Incident	—	26.0 (62.3)	3.5	0 - 460
Articles Per Incident (from NYT, WSJ, WaPo, USA Today, or CNN)	—	9.28 (28.1)	0	0 - 256
Articles Per Incident (from all other media outlets)	—	16.8 (36.9)	3	0 - 277
<i>Independent Variables</i>				
Perpetrator Muslim	12.5% (N=17)	—	—	—
Perpetrator & Group Unknown	26.5% (N=36)	—	—	—
Perpetrator, Group & Motive Unknown	6.6% (N=9)	—	—	—
Perpetrator Arrested	47.1% (N=64)	—	—	—
Target LE/Government	20.6% (N=28)	—	—	—
Number Killed	—	0.7 (2.4)	0	0 - 15
Number Wounded (log)	—	0.4 (0.9)	0	0 - 5.0
Signification Date	13.2% (N=18)	—	—	—
Target Muslim	15.4% (N=21)	—	—	—
Target Minority	33.1% (N=45)	—	—	—

## MEDIA COVERAGE OF TERRORISM

Table 2. News Coverage by Terrorism Episode (N=136)

	Model 1	Model 2	Model 3	Model 4	Model 5	Model 6
Perpetrator Muslim	<b>1.96***</b> (0.41) [611%]	<b>1.52***</b> (0.42) [357%]	<b>1.20**</b> (0.39) [233%]	<b>1.14**</b> (0.41) [214%]	<b>1.47**</b> (0.49) [334%]	<b>1.34**</b> (0.47) [283%]
Perpetrator Arrested		<b>1.35***</b> (0.27) [287%]	<b>0.85*</b> (0.36) [135%]	<b>0.96**</b> (0.35) [162%]	<b>1.32***</b> (0.32) [273%]	<b>1.40***</b> (0.28) [307%]
Target Law Enforcement/ Government		<b>1.13**</b> (0.42) [211%]	<b>0.79*</b> (0.36) [121%]	<b>0.77*</b> (0.38) [116%]	<b>1.04*</b> (0.40) [182%]	<b>0.94*</b> (0.41) [156%]
Number Killed		<b>0.38**</b> (0.12) [46%]	<b>0.34**</b> (0.11) [40%]	<b>0.34**</b> (0.13) [41%]	<b>0.39**</b> (0.14) [48%]	<b>0.40**</b> (0.12) [49%]
Significant Date			0.14 (0.31) [15%]	0.08 (0.33) [8%]	-0.12 (0.34) [-12%]	-0.16 (0.35) [-15%]
Target Muslim			-0.46 (0.31) [-37%]		-0.40 (0.37) [-33%]	
Target Minority				-0.42 (0.28) [-35%]		-0.53 <sup>†</sup> (0.31) [-41%]
Perpetrator & Group Unknown			<b>-1.23**</b> (0.44) [-71%]	<b>-1.16**</b> (0.45) [-69%]		
Perpetrator, Group & Motive Unknown					-0.21 (3.36) [-19%]	-0.30 (0.82) [-26%]
AIC	968.9632	923.6827	919.5945	919.0597	928.4819	926.8268
BIC	977.7011	941.1586	945.8084	945.2736	954.6958	953.0407

Negative binomial regression models. Constants not reported.

Coefficients are presented with bootstrapped standard errors in parentheses.

Percent change in expected count reported in brackets.

<sup>†</sup>p < 0.10. \*p < 0.05. \*\*p < 0.01. \*\*\*p < 0.001.

## MEDIA COVERAGE OF TERRORISM

Table 3. News Coverage by Terrorism Episode when all GTD Terrorism Criteria Met (N=113)

	Model 7	Model 8	Model 9	Model 10	Model 11	Model 12
Perpetrator Muslim	<b>2.07***</b> (0.47) [694%]	<b>1.58***</b> (0.40) [384%]	<b>1.29**</b> (0.49) [264%]	<b>1.23**</b> (0.46) [242%]	<b>1.49**</b> (0.47) [344%]	<b>1.38**</b> (0.47) [298%]
Perpetrator Arrested		<b>1.28***</b> (0.28) [261%]	<b>0.88*</b> (0.36) [141%]	<b>1.00*</b> (0.40) [172%]	<b>1.23**</b> (0.36) [243%]	<b>1.32***</b> (0.35) [274%]
Target Law Enforcement/ Government		0.58 (0.37) [79%]	-0.38 (0.40) [46%]	0.37 (0.40) [45%]	0.48 (0.42) [62%]	0.42 (0.41) [52%]
Number Killed		<b>0.41**</b> (0.13) [50%]	<b>0.37**</b> (0.12) [45%]	<b>0.38**</b> (0.14) [46%]	<b>0.42**</b> (0.14) [52%]	<b>0.43**</b> (0.14) [53%]
Significant Date			0.23 (0.40) [26%]	0.18 (0.40) [19%]	0.11 (0.41) [12%]	0.07 (0.39) [7%]
Target Muslim			-0.55 (0.36) [-42%]		-0.47 (0.49) [-38%]	
Target Minority				-0.51 (0.35) [-40%]		-0.58 (0.36) [-44%]
Perpetrator & Group Unknown			<b>-0.97*</b> (0.42) [-62%]	-0.87 <sup>†</sup> (0.47) [-58%]		
Perpetrator, Group & Motive Unknown					0.05 (6.14) [5%]	-0.04 (6.48) [-4%]
AIC	797.3354	758.7131	758.2688	757.5781	763.54	761.9215
BIC	805.5176	775.0775	782.8153	782.1246	788.0865	786.468

Negative binomial regression models. Constants not reported.  
Coefficients are presented with bootstrapped standard errors in parentheses.  
Percent change in expected count reported in brackets.

<sup>†</sup>p < 0.10. \*p < 0.05. \*\*p < 0.01. \*\*\*p < 0.001.

## MEDIA COVERAGE OF TERRORISM

Table 4. News Coverage by Terrorism Episode without Boston Bombing or Fort Hood (N=134)

	Model 13	Model 14	Model 15	Model 16	Model 17	Model 18
Perpetrator Muslim	<b>1.43***</b> (0.34) [317%]	<b>1.54**</b> (0.47) [369%]	<b>1.22*</b> (0.50) [239%]	<b>1.16*</b> (0.48) [220%]	<b>1.50**</b> (0.51) [348%]	<b>1.38**</b> (0.44) [298%]
Perpetrator Arrested		<b>1.35***</b> (0.28) [286%]	<b>0.88*</b> (0.36) [142%]	<b>0.99*</b> (0.39) [170%]	<b>1.33***</b> (0.30) [280%]	<b>1.42***</b> (0.29) [314%]
Target Law Enforcement/ Government		<b>1.18**</b> (0.39) [224%]	<b>0.86*</b> (0.40) [136%]	<b>0.83*</b> (0.36) [130%]	<b>1.09*</b> (0.44) [198%]	<b>1.00*</b> (0.40) [170%]
Number Killed		<b>0.42*</b> (0.18) [53%]	<b>0.37*</b> (0.15) [45%]	<b>0.38*</b> (0.15) [46%]	<b>0.43**</b> (0.16) [54%]	<b>0.44**</b> (0.16) [55%]
Significant Date			0.03 (0.34) [3%]	-0.02 (0.33) [-2%]	-0.20 (0.33) [-18%]	-0.23 (0.36) [-21%]
Target Muslim			-0.45 (0.35) [-36%]		-0.40 (0.38) [-33%]	
Target Minority				-0.43 (0.28) [-35%]		-0.53 <sup>†</sup> (0.29) [-41%]
Perpetrator & Group Unknown			<b>-1.16**</b> (0.41) [-69%]	<b>-1.09*</b> (0.48) [-66%]		
Perpetrator, Group & Motive Unknown					-0.15 (3.46) [-14%]	-0.24 (1.67) [-21%]
AIC	934.58	890.3033	886.9415	886.3227	894.95	893.2618
BIC	943.2736	907.6904	913.022	912.4033	921.0305	919.3424

Negative binomial regression models. Constants not reported.  
Coefficients are presented with bootstrapped standard errors in parentheses.  
Percent change in expected count reported in brackets.

<sup>†</sup>p < 0.10. \*p < 0.05. \*\*p < 0.01. \*\*\*p < 0.001.

## MEDIA COVERAGE OF TERRORISM

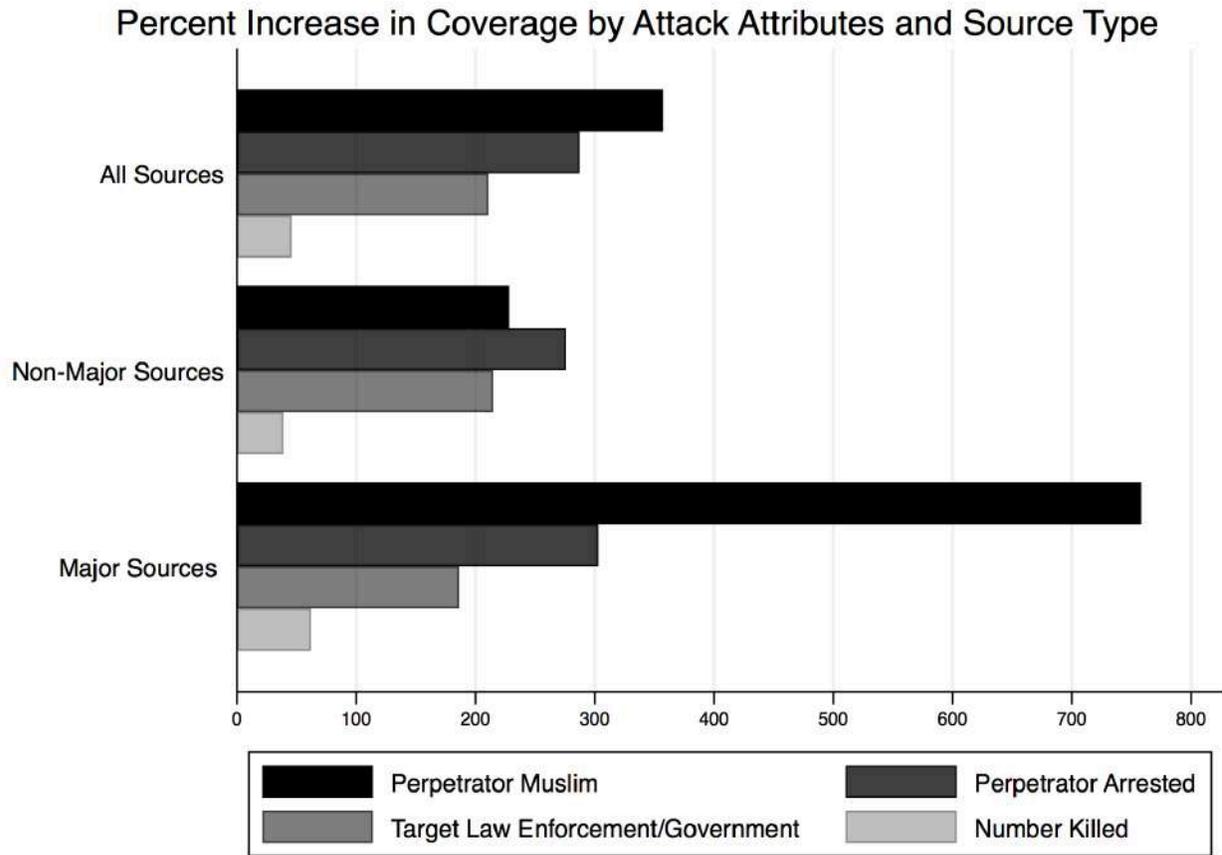
*Table 5. News Coverage by Terrorism Episode when all GTD Terrorism Criteria Met without Boston Bombing or Fort Hood (N=111)*

	Model 19	Model 20	Model 21	Model 22	Model 23	Model 24
Perpetrator Muslim	<b>1.54***</b> (0.38) [366%]	<b>1.62***</b> (0.41) [405%]	<b>1.34**</b> (0.49) [284%]	<b>1.28**</b> (0.44) [261%]	<b>1.55**</b> (0.49) [373%]	<b>1.44**</b> (0.48) [324%]
Perpetrator Arrested		<b>1.27***</b> (0.31) [257%]	<b>0.91*</b> (0.39) [149%]	<b>1.03**</b> (0.39) [181%]	<b>1.25***</b> (0.34) [250%]	<b>1.34***</b> (0.33) [281%]
Target Law Enforcement/ Government		0.62 <sup>†</sup> (0.36) [86%]	0.45 (0.42) [56%]	0.43 (0.39) [54%]	0.54 (0.41) [72%]	0.47 (0.40) [61%]
Number Killed		<b>0.47**</b> (0.17) [60%]	<b>0.42**</b> (0.15) [53%]	<b>0.44**</b> (0.15) [55%]	<b>0.48**</b> (0.17) [62%]	<b>0.49*</b> (0.20) [63%]
Significant Date			0.14 (0.39) [15%]	0.09 (0.36) [10%]	0.05 (0.39) [5%]	0.01 (0.37) [1%]
Target Muslim			-0.53 (0.38) [-41%]		-0.46 (0.40) [-37%]	
Target Minority				-0.52 (0.36) [-40%]		-0.58 <sup>†</sup> (0.34) [-44%]
Perpetrator & Group Unknown			<b>-0.90*</b> (0.44) [-59%]	-0.80 <sup>†</sup> (0.43) [-55%]		
Perpetrator, Group & Motive Unknown					0.11 (6.62) [12%]	0.02 (6.34) [2%]
AIC	762.952	725.4446	725.7583	724.8874	730.2868	728.5586
BIC	771.0806	741.7018	750.1441	749.2732	754.6726	752.9444

Negative binomial regression models. Constants not reported.  
Coefficients are presented with bootstrapped standard errors in parentheses.  
Percent change in expected count reported in brackets.  
<sup>†</sup>p < 0.10. \*p < 0.05. \*\*p < 0.01. \*\*\*p < 0.001.

# MEDIA COVERAGE OF TERRORISM

Figure 1. Percent Increase in Coverage by Attack Attributes and Source Type (N=136)



## MEDIA COVERAGE OF TERRORISM

### **Appendix**

*Table A1. News Coverage by Attack*

(see Excel spreadsheet)

## MEDIA COVERAGE OF TERRORISM

*Table A2. Descriptive Statistics for Terrorism Episodes when all GTD Terrorism Criteria Met (N=113)*

<b>Variable</b>	<b>Frequency (N)</b>	<b>Mean (SD)</b>	<b>Median</b>	<b>Range</b>
<i>Dependent Variable</i>				
Articles Per Incident	—	27.0 (66.8)	3	0 - 460
Articles Per Incident (from NYT, WSJ, WaPo, USA Today, or CNN)	—	10.2 (30.5)	0	0 - 256
Articles Per Incident (from all other media outlets)	—	16.8 (38.9)	3	0 - 277
<i>Independent Variables</i>				
Perpetrator Muslim	15.0% (N=17)	—	—	—
Perpetrator & Group Unknown	25.7% (N=29)	—	—	—
Perpetrator, Group & Motive Unknown	4.4% (N=5)	—	—	—
Perpetrator Arrested	45.1% (N=51)	—	—	—
Target LE/Government	21.2% (N=24)	—	—	—
Number Killed	—	0.7 (2.2)	0	0 - 14
Number Wounded (log)	—	0.4 (0.8)	0	0 - 4.9
Signification Date	12.4% (N=14)	—	—	—
Target Muslim	15.0% (N=17)	—	—	—
Target Minority	31.0% (N=35)	—	—	—

## MEDIA COVERAGE OF TERRORISM

Table A3. News Coverage by Terrorism Episode, with alternative operationalization of casualties (N=136)

	Model A1	Model A2	Model A3	Model A4	Model A5
Perpetrator Muslim	<b>1.36**</b> (0.44) [290%]	<b>1.10*</b> (0.49) [199%]	<b>1.04*</b> (0.52) [184%]	<b>1.33*</b> (0.52) [280%]	<b>1.22**</b> (0.44) [240%]
Perpetrator Arrested	<b>1.35***</b> (0.28) [286%]	<b>0.88*</b> (0.37) [142%]	<b>0.97**</b> (0.33) [164%]	<b>1.33***</b> (0.32) [280%]	<b>1.40***</b> (0.33) [304%]
Target Law Enforcement/ Government	<b>1.05**</b> (0.39) [185%]	<b>0.76*</b> (0.36) [113%]	0.73 <sup>†</sup> (0.38) [108%]	<b>0.99*</b> (0.44) [169%]	<b>0.90*</b> (0.40) [145%]
Number Killed + Log Wounded	<b>0.31***</b> (0.08) [36%]	<b>0.27**</b> (0.09) [31%]	<b>0.28***</b> (0.08) [32%]	<b>0.31***</b> (0.09) [36%]	<b>0.32***</b> (0.09) [38%]
Significant Date		0.07 (0.32) [7%]	0.03 (0.36) [3%]	-0.16 (0.39) [-15%]	-0.18 (0.32) [-16%]
Target Muslim		-0.35 (0.32) [-30%]		-0.28 (0.41) [-24%]	
Target Minority			-0.35 (0.27) [-29%]		-0.44 (0.32) [-36%]
Perpetrator & Group Unknown		<b>-1.17**</b> (0.41) [-69%]	<b>-1.11*</b> (0.49) [-67%]		
Perpetrator, Group & Motive Unknown				-0.15 (4.48) [-14%]	-0.24 (2.75) [-21%]
AIC	919.5436	916.4742	916.0118	924.7762	923.3711
BIC	937.0196	942.6881	942.2257	950.9901	949.585

Negative binomial regression models. Constants not reported.

Coefficients are presented with bootstrapped standard errors in parentheses and are in bold if significant.

Percent change in expected count reported in brackets.

<sup>†</sup>p < 0.10. \*p < 0.05. \*\*p < 0.01. \*\*\*p < 0.001.

## MEDIA COVERAGE OF TERRORISM

*Table A4. News Coverage by Terrorism Episode when all GTD Terrorism Criteria Met, with alternative operationalization of casualties (N=113)*

	Model A6	Model A7	Model A8	Model A9	Model A10
Perpetrator Muslim	<b>1.46**</b> (0.45) [332%]	<b>1.22*</b> (0.47) [237%]	<b>1.18*</b> (0.46) [226%]	<b>1.40**</b> (0.43) [305%]	<b>1.32**</b> (0.46) [276%]
Perpetrator Arrested	<b>1.28***</b> (0.32) [261%]	<b>0.91*</b> (0.38) [148%]	<b>1.01**</b> (0.37) [174%]	<b>1.25***</b> (0.34) [247%]	<b>1.32***</b> (0.35) [274%]
Target Law Enforcement/ Government	0.44 (0.35) [55%]	0.28 (0.37) [32%]	0.29 (0.37) [33%]	0.35 (0.36) [42%]	0.32 (0.36) [38%]
Number Killed + Log Wounded	<b>0.34***</b> (0.08) [40%]	<b>0.31**</b> (0.09) [36%]	<b>0.31***</b> (0.08) [37%]	<b>0.34***</b> (0.09) [41%]	<b>0.35***</b> (0.10) [42%]
Significant Date		0.20 (0.41) [22%]	0.14 (0.38) [16%]	0.12 (0.38) [12%]	0.08 (0.38) [8%]
Target Muslim		-0.47 (0.39) [-38%]		-0.39 (0.43) [-32%]	
Target Minority			-0.37 (0.36) [-31%]		-0.43 (0.34) [-35%]
Perpetrator & Group Unknown		<b>-0.90*</b> (0.44) [-60%]	-0.83 <sup>†</sup> (0.49) [-56%]		
Perpetrator, Group & Motive Unknown				0.08 (7.31) [9%]	0.03 (7.03) [3%]
AIC	753.8595	754.2013	754.1748	758.9512	758.1872
BIC	770.2238	778.7478	778.7213	783.4977	782.7337

Negative binomial regression models. Constants not reported.

Coefficients are presented with bootstrapped standard errors in parentheses and are in bold if significant.

Percent change in expected count reported in brackets.

<sup>†</sup>p < 0.10. \*p < 0.05. \*\*p < 0.01. \*\*\*p < 0.001.

## MEDIA COVERAGE OF TERRORISM

*Table A5. News Coverage by Terrorism Episode without Boston Bombing or Fort Hood, with alternative operationalization of casualties (N=134)*

	Model A11	Model A12	Model A13	Model A14	Model A15
Perpetrator Muslim	<b>1.45**</b> (0.52) [326%]	<b>1.18*</b> (0.50) [225%]	<b>1.13*</b> (0.49) [208%]	<b>1.42**</b> (0.45) [313%]	<b>1.30**</b> (0.49) [269%]
Perpetrator Arrested	<b>1.36***</b> (0.31) [291%]	<b>0.93**</b> (0.35) [153%]	<b>1.02*</b> (0.40) [176%]	<b>1.36***</b> (0.31) [288%]	<b>1.42***</b> (0.31) [314%]
Target Law Enforcement/ Government	<b>1.06*</b> (0.44) [190%]	<b>0.80*</b> (0.35) [122%]	<b>0.76*</b> (0.36) [115%]	<b>1.01*</b> (0.41) [174%]	0.90 <sup>†</sup> (0.47) [147%]
Number Killed + Log Wounded	<b>0.36**</b> (0.11) [43%]	<b>0.31**</b> (0.10) [37%]	<b>0.32**</b> (0.11) [38%]	<b>0.36**</b> (0.11) [43%]	<b>0.37**</b> (0.11) [45%]
Significant Date		0.05 (0.34) [5%]	0.01 (0.34) [1%]	-0.16 (0.39) [-14%]	-0.17 (0.33) [-16%]
Target Muslim		-0.35 (0.34) [-29%]		-0.29 (0.35) [-25%]	
Target Minority			-0.37 (0.29) [-31%]		-0.47 (0.33) [-37%]
Perpetrator & Group Unknown		<b>-1.09*</b> (0.43) [-66%]	<b>-1.02*</b> (0.48) [-64%]		
Perpetrator, Group & Motive Unknown				-0.09 (1.67) [-9%]	-0.19 (3.67) [-17%]
AIC	886.2738	884.312	883.6645	891.5244	889.9159
BIC	903.6608	910.3925	909.7451	917.6049	915.9964

Negative binomial regression models. Constants not reported.

Coefficients are presented with bootstrapped standard errors in parentheses and are in bold if significant.

Percent change in expected count reported in brackets.

<sup>†</sup>p < 0.10. \*p < 0.05. \*\*p < 0.01. \*\*\*p < 0.001.

## MEDIA COVERAGE OF TERRORISM

*Table A6. News Coverage by Terrorism Episode when all GTD Terrorism Criteria Met without Boston Bombing or Fort Hood, with alternative operationalization of casualties (N=111)*

	Model A16	Model A17	Model A18	Model A19	Model A20
Perpetrator Muslim	<b>1.56**</b> <b>(0.48)</b> [376%]	<b>1.33**</b> <b>(0.47)</b> [276%]	<b>1.28*</b> <b>(0.52)</b> [261%]	<b>1.50**</b> <b>(0.54)</b> [347%]	<b>1.42**</b> <b>(0.45)</b> [313%]
Perpetrator Arrested	<b>1.29***</b> <b>(0.31)</b> [263%]	<b>0.95**</b> <b>(0.36)</b> [159%]	<b>1.05*</b> <b>(0.43)</b> [187%]	<b>1.26***</b> <b>(0.33)</b> [253%]	<b>1.34***</b> <b>(0.37)</b> [280%]
Target Law Enforcement/ Government	0.42 (0.34) [52%]	0.27 (0.37) [32%]	0.27 (0.40) [32%]	0.34 (0.38) [40%]	0.30 (0.35) [35%]
Number Killed + Log Wounded	<b>0.41***</b> <b>(0.10)</b> [50%]	<b>0.37**</b> <b>(0.11)</b> [45%]	<b>0.38***</b> <b>(0.09)</b> [46%]	<b>0.41***</b> <b>(0.11)</b> [51%]	<b>0.42***</b> <b>(0.10)</b> [52%]
Significant Date		0.21 (0.40) [23%]	0.16 (0.39) [17%]	0.14 (0.42) [16%]	0.11 (0.44) [11%]
Target Muslim		-0.46 (0.39) [-37%]		-0.39 (0.46) [-32%]	
Target Minority			-0.39 (0.35) [-32%]		-0.45 (0.39) [-36%]
Perpetrator & Group Unknown		-0.80 <sup>†</sup> (0.47) [-55%]	-0.72 (0.45) [-52%]		
Perpetrator, Group & Motive Unknown				0.15 (6.93) [16%]	0.09 (7.21) [10%]
AIC	720.2493	721.4975	721.2439	725.2698	724.3359
BIC	736.5065	745.8833	745.6297	749.6556	748.7217

Negative binomial regression models. Constants not reported.

Coefficients are presented with bootstrapped standard errors in parentheses and are in bold if significant.

Percent change in expected count reported in brackets.

<sup>†</sup>p < 0.10. \*p < 0.05. \*\*p < 0.01. \*\*\*p < 0.001.

## MEDIA COVERAGE OF TERRORISM

Table A7. News Coverage by Terrorism Episode, including measure for known group affiliation (N=136)

	Model A21	Model A22	Model A23	Model A24	Model A25
Perpetrator Muslim	<b>1.55***</b> (0.42) [370%]	<b>1.32*</b> (0.51) [273%]	<b>1.24*</b> (0.52) [246%]	<b>1.50**</b> (0.48) [349%]	<b>1.38**</b> (0.44) [297%]
Perpetrator Arrested	<b>1.36***</b> (0.27) [289%]	<b>0.84*</b> (0.36) [131%]	<b>0.96**</b> (0.32) [162%]	<b>1.32***</b> (0.31) [273%]	<b>1.42***</b> (0.32) [312%]
Target Law Enforcement/ Government	<b>1.12**</b> (0.39) [207%]	0.70 <sup>†</sup> (0.38) [102%]	0.69 <sup>†</sup> (0.39) [99%]	<b>1.00*</b> (0.45) [172%]	<b>0.89*</b> (0.40) [144%]
Number Killed	<b>0.37**</b> (0.13) [45%]	<b>0.31*</b> (0.13) [36%]	<b>0.32**</b> (0.10) [37%]	<b>0.38**</b> (0.13) [46%]	<b>0.39**</b> (0.13) [47%]
Known Group	-0.13 (0.36) [-12%]	-0.49 (0.41) [-39%]	-0.47 (0.41) [-38%]	-0.20 (0.35) [-18%]	-0.26 (0.37) [-23%]
Significant Date		0.18 (0.35) [19%]	0.11 (0.41) [11%]	-0.10 (0.40) [-10%]-	-0.15 (0.32) [-14%]
Target Muslim		-0.53 <sup>†</sup> (0.32) [-41%]		-0.44 (0.42) [-36%]	
Target Minority			-0.47 <sup>†</sup> (0.27) [-37%]		-0.57 <sup>†</sup> (0.33) [-44%]
Perpetrator & Group Unknown		<b>-1.34**</b> (0.42) [-74%]	<b>-1.25*</b> (0.52) [-72%]		
Perpetrator, Group & Motive Unknown				-0.26 (3.54) [-23%]	-0.36 (2.78) [-31%]
AIC	925.5687	920.126	919.6467	930.2168	928.4033
BIC	945.9572	949.2525	948.7733	959.3434	957.5298

Negative binomial regression models. Constants not reported.

Coefficients are presented with bootstrapped standard errors in parentheses and are in bold if significant.

Percent change in expected count reported in brackets.

<sup>†</sup>p < 0.10. \*p < 0.05. \*\*p < 0.01. \*\*\*p < 0.001. **3**

## MEDIA COVERAGE OF TERRORISM

Table A8. News Coverage by Terrorism Episode when all GTD Terrorism Criteria Met, including measure for known group affiliation (N=113)

	Model A26	Model A27	Model A28	Model A29	Model A30
Perpetrator Muslim	<b>1.60***</b> (0.41) [394%]	<b>1.37**</b> (0.49) [292%]	<b>1.29**</b> (0.45) [263%]	<b>1.52**</b> (0.52) [355%]	<b>1.40**</b> (0.50) [307%]
Perpetrator Arrested	<b>1.29***</b> (0.33) [264%]	<b>0.87*</b> (0.35) [138%]	<b>1.01**</b> (0.34) [174%]	<b>1.24***</b> (0.34) [244%]	<b>1.34***</b> (0.33) [280%]
Target Law Enforcement/ Government	0.57 (0.38) [77%]	0.30 (0.39) [35%]	0.31 (0.39) [36%]	0.45 (0.40) [57%]	0.38 (0.39) [47%]
Number Killed	<b>0.40**</b> (0.14) [49%]	<b>0.34**</b> (0.12) [40%]	<b>0.35**</b> (0.12) [42%]	<b>0.41**</b> (0.14) [50%]	<b>0.42**</b> (0.13) [52%]
Known Group	-0.11 (0.33) [-11%]	-0.45 (0.42) [-36%]	-0.40 (0.36) [-33%]	-0.19 (0.40) [-17%]	-0.21 (0.41) [-19%]
Significant Date		0.27 (0.39) [30%]	0.19 (0.36) [21%]	0.13 (0.42) [13%]	0.07 (0.43) [8%]
Target Muslim		-0.64 (0.40) [-47%]		-0.51 (0.47) [-40%]	
Target Minority			-0.54 (0.33) [-42%]		-0.61 <sup>†</sup> (0.37) [-46%]
Perpetrator & Group Unknown		<b>-1.09*</b> (0.50) [-66%]	<b>-0.97*</b> (0.46) [-62%]		
Perpetrator, Group & Motive Unknown				-0.004 (6.11) [-0.4%]	-0.09 (7.09) [-9%]
AIC	760.6306	759.0815	758.5581	765.3155	763.6192
BIC	779.7223	786.3554	785.832	792.5894	790.893

Negative binomial regression models. Constants not reported.

Coefficients are presented with bootstrapped standard errors in parentheses and are in bold if significant.

Percent change in expected count reported in brackets.

<sup>†</sup>p < 0.10. \*p < 0.05. \*\*p < 0.01. \*\*\*p < 0.001.

## MEDIA COVERAGE OF TERRORISM

*Table A9. News Coverage by Terrorism Episode without Boston Bombing or Fort Hood, including measure for known group affiliation (N=134)*

	Model A31	Model A32	Model A33	Model A34	Model A35
Perpetrator Muslim	<b>1.57**</b> (0.46) [380%]	<b>1.34*</b> (0.62) [281%]	<b>1.27*</b> (0.54) [254%]	<b>1.53**</b> (0.58) [363%]	<b>1.42**</b> (0.53) [313%]
Perpetrator Arrested	<b>1.36***</b> (0.27) [288%]	<b>0.87*</b> (0.37) [139%]	<b>1.00**</b> (0.37) [171%]	<b>1.33***</b> (0.31) [280%]	<b>1.43***</b> (0.31) [319%]
Target Law Enforcement/ Government	<b>1.17**</b> (0.39) [221%]	<b>0.78*</b> (0.37) [118%]	0.76 <sup>†</sup> (0.40) [114%]	<b>1.06*</b> (0.44) [190%]	<b>0.95*</b> (0.40) [159%]
Number Killed	<b>0.42*</b> (0.16) [52%]	<b>0.35**</b> (0.12) [42%]	<b>0.36*</b> (0.14) [43%]	<b>0.42*</b> (0.17) [53%]	<b>0.43**</b> (0.16) [54%]
Known Group	-0.09 (0.38) [-9%]	-0.43 (0.43) [-35%]	-0.42 (0.40) [-34%]	-0.16 (0.39) [-14%]	-0.22 (0.42) [-19%]
Significant Date		0.09 (0.38) [9%]	0.02 (0.36) [2%]	-0.18 (0.36) [-16%]	-0.21 (0.36) [-19%]
Target Muslim		-0.52 <sup>†</sup> (0.30) [-41%]		-0.43 (0.40) [-35%]	
Target Minority			-0.47 (0.30) [-38%]		-0.57 <sup>†</sup> (0.30) [-44%]
Perpetrator & Group Unknown		<b>-1.26**</b> (0.48) [-72%]	<b>-1.18*</b> (0.45) [-69%]		
Perpetrator, Group & Motive Unknown				-0.19 (2.81) [-17%]	-0.29 (2.40) [-25%]
AIC	892.245	887.8346	887.2319	896.7967	894.9642
BIC	912.5299	916.813	916.2103	925.7751	923.9426

Negative binomial regression models. Constants not reported.

Coefficients are presented with bootstrapped standard errors in parentheses and are in bold if significant.

Percent change in expected count reported in brackets.

<sup>†</sup>p < 0.10. \*p < 0.05. \*\*p < 0.01. \*\*\*p < 0.001.

## MEDIA COVERAGE OF TERRORISM

*Table A10. News Coverage by Terrorism Episode when all GTD Terrorism Criteria Met without Boston Bombing or Fort Hood, including measure for known group affiliation (N=111)*

	Model A36	Model A37	Model A38	Model A39	Model A40
Perpetrator Muslim	<b>1.63**</b> (0.51) [412%]	<b>1.41**</b> (0.53) [311%]	<b>1.34*</b> (0.55) [282%]	<b>1.58**</b> (0.48) [383%]	<b>1.46**</b> (0.50) [333%]
Perpetrator Arrested	<b>1.28***</b> (0.34) [259%]	<b>0.90*</b> (0.35) [147%]	<b>1.04**</b> (0.37) [184%]	<b>1.26**</b> (0.36) [251%]	<b>1.35***</b> (0.33) [286%]
Target Law Enforcement/ Government	0.62 (0.40) [85%]	0.38 (0.41) [46%]	0.38 (0.39) [46%]	0.52 (0.43) [68%]	0.44 (0.42) [56%]
Number Killed	<b>0.47**</b> (0.16) [60%]	<b>0.40**</b> (0.15) [49%]	<b>0.42**</b> (0.16) [52%]	<b>0.47**</b> (0.17) [60%]	<b>0.48*</b> (0.21) [62%]
Known Group	-0.07 (0.37) [-6%]	-0.38 (0.47) [-32%]	-0.35 (0.42) [-29%]	-0.14 (0.44) [-13%]	-0.18 (0.42) [-16%]
Significant Date		0.18 (0.47) [20%]	0.12 (0.41) [13%]	0.06 (0.41) [6%]	0.02 (0.38) [2%]
Target Muslim		-0.61 (0.42) [-46%]		-0.49 (0.50) [-39%]	
Target Minority			-0.55 (0.36) [-43%]		-0.62 <sup>†</sup> (0.37) [-46%]
Perpetrator & Group Unknown		<b>-1.00*</b> (0.47) [-63%]	-0.88 <sup>†</sup> (0.47) [-59%]		
Perpetrator, Group & Motive Unknown				0.07 (7.08) [8%]	-0.03 (6.51) [-3%]
AIC	727.4156	726.8947	726.1247	732.1616	730.3527
BIC	746.3823	753.99	753.22	759.2569	757.448

Negative binomial regression models. Constants not reported.

Coefficients are presented with bootstrapped standard errors in parentheses and are in bold if significant.

Percent change in expected count reported in brackets.

<sup>†</sup>p < 0.10. \*p < 0.05. \*\*p < 0.01. \*\*\*p < 0.001.

## MEDIA COVERAGE OF TERRORISM

Table A11. News Coverage by Terrorism Episode – Comparing Major and Non-Major Media outlets (N=136)

	Model A41		Model A42		Model A43		Model A44		Model A45	
	Major	Non-Major	Major	Non-Major	Major	Non-Major	Major	Non-Major	Major	Non-Major
Perp. Muslim	<b>2.15***</b> (0.53) [758%]	<b>1.19**</b> (0.38) [228%]	<b>1.92***</b> (0.51) [579%]	<b>0.89*</b> (0.36) [144%]	<b>1.96**</b> (0.58) [611%]	<b>0.81*</b> (0.38) [124%]	<b>2.20**</b> (0.64) [807%]	<b>1.12*</b> (0.45) [208%]	<b>2.15**</b> (0.66) [759%]	<b>0.99*</b> (0.43) [168%]
Perp. Arrested	<b>1.39***</b> (0.35) [303%]	<b>1.32***</b> (0.27) [276%]	<b>1.00*</b> (0.40) [171%]	<b>0.81*</b> (0.36) [126%]	<b>1.07**</b> (0.39) [190%]	<b>0.92*</b> (0.35) [150%]	<b>1.43***</b> (0.39) [319%]	<b>1.27***</b> (0.32) [256%]	<b>1.50***</b> (0.38) [347%]	<b>1.35***</b> (0.30) [286%]
Target LE/ Gvmt	<b>1.05*</b> (0.42) [186%]	<b>1.15**</b> (0.44) [215%]	0.74 <sup>†</sup> (0.41) [109%]	<b>0.81*</b> (0.36) [126%]	0.77 <sup>†</sup> (0.42) [117%]	<b>0.77*</b> (0.38) [116%]	<b>0.96*</b> (0.41) [160%]	<b>1.05*</b> (0.41) [187%]	<b>0.91*</b> (0.46) [149%]	<b>0.94*</b> (0.46) [156%]
Number Killed	<b>0.48**</b> (0.16) [62%]	<b>0.33**</b> (0.11) [39%]	<b>0.43**</b> (0.15) [55%]	<b>0.30**</b> (0.10) [34%]	<b>0.43*</b> (0.17) [54%]	<b>0.30**</b> (0.12) [35%]	<b>0.50**</b> (0.19) [65%]	<b>0.34*</b> (0.13) [41%]	<b>0.50**</b> (0.16) [64%]	<b>0.35**</b> (0.11) [42%]
Sig. Date			-0.31 (0.54) [-27%]	0.21 (0.31) [24%]	-0.40 (0.53) [-33%]	0.16 (0.33) [17%]	-0.55 (0.53) [-42%]	-0.03 (0.35) [-3%]	-0.61 (0.57) [-45%]	-0.07 (0.36) [-7%]
Target Muslim			-0.65 (0.43) [-48%]	-0.38 (0.32) [-31%]			-0.60 (0.46) [-45%]	-0.33 (0.37) [-28%]		
Target Minority					-0.27 (0.45) [-23%]	-0.46 (0.28) [-37%]			-0.44 (0.44) [-35%]	-0.55 (0.37) [-42%]
Perp. & Group Unknown			<b>-1.34*</b> (0.56) [-74%]	<b>-1.21**</b> (0.43) [-70%]	<b>-1.24*</b> (0.57) [-71%]	<b>-1.16*</b> (0.45) [-69%]				
Perp., Group & Motive Unknown							-0.32 (4.75) [-27%]	-0.24 (3.53) [-22%]	-0.36 (6.00) [-30%]	-0.35 (3.27) [-30%]
AIC	591.522	852.725	589.286	849.245	590.434	847.940	594.831	857.948	595.074	855.75
BIC	608.998	870.201	615.500	875.459	616.648	874.154	621.045	884.162	621.288	881.964

Negative binomial regression models. Constants not reported.  
Coefficients are presented with bootstrapped standard errors in parentheses.  
Percent change in expected count reported in brackets.

<sup>†</sup>p < 0.10. \*p < 0.05. \*\*p < 0.01. \*\*\*p < 0.001.

## MEDIA COVERAGE OF TERRORISM

Table A12. News Coverage by Terrorism Episode when all GTD Terrorism Criteria Met – Comparing Major and Non-Major Media outlets (N=113)

	Model A46		Model A47		Model A48		Model A49		Model A50	
	Major	Non-Major	Major	Non-Major	Major	Non-Major	Major	Non-Major	Major	Non-Major
Perp. Muslim	<b>2.13***</b> (0.51) [742%]	<b>1.28**</b> (0.37) [259%]	<b>1.81**</b> (0.61) [512%]	<b>1.02*</b> (0.47) [178%]	<b>1.87**</b> (0.63) [552%]	<b>0.93*</b> (0.42) [152%]	<b>2.06***</b> (0.52) [682%]	<b>1.20**</b> (0.43) [231%]	<b>2.05**</b> (0.65) [675%]	<b>1.06*</b> (0.43) [189%]
Perp. Arrested	<b>1.30**</b> (0.40) [267%]	<b>1.26***</b> (0.27) [254%]	<b>0.93*</b> (0.42) [153%]	<b>0.86*</b> (0.35) [136%]	<b>1.07*</b> (0.43) [193%]	<b>0.95*</b> (0.41) [159%]	<b>1.32**</b> (0.43) [273%]	<b>1.19**</b> (0.37) [230%]	<b>1.43***</b> (0.40) [316%]	<b>1.26**</b> (0.36) [252%]
Target LE/Gvmt	0.43 (0.40) [54%]	0.62 (0.38) [85%]	0.17 (0.41) [19%]	0.43 (0.41) [54%]	0.25 (0.43) [29%]	0.38 (0.40) [46%]	0.32 (0.50) [38%]	0.51 (0.41) [67%]	0.36 (0.49) [43%]	0.42 (0.40) [52%]
Number Killed	<b>0.50**</b> (0.17) [64%]	<b>0.36**</b> (0.12) [44%]	<b>0.46**</b> (0.17) [58%]	<b>0.33**</b> (0.12) [39%]	<b>0.46*</b> (0.19) [59%]	<b>0.34**</b> (0.12) [41%]	<b>0.52**</b> (0.19) [68%]	<b>0.37**</b> (0.13) [45%]	<b>0.52**</b> (0.19) [68%]	<b>0.38**</b> (0.12) [47%]
Sig. Date			0.03 (0.65) [4%]	0.29 (0.39) [33%]	-0.12 (1.83) [-12%]	0.25 (0.39) [28%]	-0.14 (0.59) [-13%]	0.20 (0.41) [22%]	-0.27 (1.64) [-24%]	0.16 (0.39) [18%]
Target Muslim			-1.07 (1.43) [-66%]	-0.38 (0.37) [-32%]			-0.98 <sup>†</sup> (0.56) [-62%]	-0.33 (0.50) [-28%]		
Target Minority					-0.39 (0.55) [-32%]	-0.54 (0.35) [-42%]			-0.50 (0.55) [-39%]	-0.61 <sup>†</sup> (0.36) [-46%]
Perp. & Group Unknown			<b>-1.08*</b> (0.51) [-66%]	<b>-0.94*</b> (0.43) [-61%]	-0.92 (0.61) [-60%]	-0.88 <sup>†</sup> (0.46) [-58%]				
Perp., Group & Motive Unknown							0.16 (6.88) [17%]	-0.02 (5.69) [-2%]	0.17 (6.01) [19%]	-0.14 (5.99) [-13%]
AIC	498.871	694.514	498.406	694.780	500.815	692.912	501.890	699.816	503.288	697.297
BIC	515.236	710.878	522.953	719.326	525.362	717.459	526.437	724.362	527.834	721.843

Negative binomial regression models. Constants not reported.

Coefficients are presented with bootstrapped standard errors in parentheses.

Percent change in expected count reported in brackets.

<sup>†</sup>p < 0.10. \*p < 0.05. \*\*p < 0.01. \*\*\*p < 0.001.

## MEDIA COVERAGE OF TERRORISM

*Table A13. News Coverage by Terrorism Episode without Boston Bombing or Fort Hood – Comparing Major and Non-Major Media outlets (N=134)*

	Model A51		Model A52		Model A53		Model A54		Model A55	
	Major	Non-Major	Major	Non-Major	Major	Non-Major	Major	Non-Major	Major	Non-Major
Perp. Muslim	<b>2.22***</b> (0.62) [816%]	<b>1.21**</b> (0.41) [237%]	<b>1.95**</b> (0.75) [603%]	<b>0.92*</b> (0.46) [150%]	<b>1.99**</b> (0.64) [633%]	0.83 <sup>†</sup> (0.45) [130%]	<b>2.26***</b> (0.65) [854%]	<b>1.16*</b> (0.48) [219%]	<b>2.20***</b> (0.55) [805%]	<b>1.03*</b> (0.42) [180%]
Perp. Arrested	<b>1.39***</b> (0.38) [302%]	<b>1.33***</b> (0.28) [277%]	<b>1.03*</b> (0.42) [181%]	<b>0.85*</b> (0.36) [133%]	<b>1.09*</b> (0.44) [199%]	<b>0.95*</b> (0.40) [159%]	<b>1.45***</b> (0.38) [327%]	<b>1.29***</b> (0.30) [264%]	<b>1.51***</b> (0.39) [355%]	<b>1.37***</b> (0.29) [295%]
Target LE/ Gvmt	<b>1.11**</b> (0.42) [204%]	<b>1.19**</b> (0.40) [229%]	0.82 <sup>†</sup> (0.44) [128%]	<b>0.88*</b> (0.40) [140%]	<b>0.86*</b> (0.39) [136%]	<b>0.83*</b> (0.37) [129%]	<b>1.03*</b> (0.44) [180%]	<b>1.11*</b> (0.45) [202%]	<b>0.99*</b> (0.45) [168%]	<b>0.99*</b> (0.41) [169%]
Number Killed	<b>0.55*</b> (0.23) [73%]	<b>0.37*</b> (0.17) [45%]	<b>0.47*</b> (0.21) [60%]	<b>0.33*</b> (0.14) [39%]	<b>0.47*</b> (0.21) [60%]	<b>0.34*</b> (0.14) [40%]	<b>0.54**</b> (0.21) [72%]	<b>0.38*</b> (0.15) [47%]	<b>0.54**</b> (0.21) [72%]	<b>0.39**</b> (0.14) [48%]
Sig. Date			-0.47 (0.64) [-38%]	0.12 (0.35) [13%]	-0.56 (0.59) [-43%]	0.07 (0.34) [7%]	-0.66 (0.63) [-48%]	-0.10 (0.34) [-10%]	-0.72 (0.76) [-51%]	-0.13 (0.35) [-12%]
Target Muslim			-0.63 (0.51) [-47%]	-0.37 (0.36) [-31%]			-0.60 (0.51) [-45%]	-0.33 (0.40) [-28%]		
Target Minority					-0.26 (0.46) [-23%]	-0.46 (0.29) [-37%]			-0.43 (0.45) [-35%]	-0.55 <sup>†</sup> (0.29) [-43%]
Perp. & Group Unknown			<b>-1.27*</b> (0.54) [-72%]	<b>-1.15**</b> (0.42) [-68%]	-1.18 <sup>†</sup> (0.61) [-69%]	<b>-1.09*</b> (0.49) [-67%]				
Perp., Group & Motive Unknown							-0.25 (4.46) [-22%]	-0.18 (3.04) [-17%]	-0.29 (5.37) [-26%]	-0.29 (1.55) [-25%]
AIC	560.702	822.478	558.689	819.829	559.748	818.457	563.667	827.640	563.904	825.405
BIC	578.089	839.865	584.769	845.909	585.828	844.537	589.748	853.720	589.985	851.485

Negative binomial regression models. Constants not reported.  
Coefficients are presented with bootstrapped standard errors in parentheses.  
Percent change in expected count reported in brackets.

<sup>†</sup>p < 0.10. \*p < 0.05. \*\*p < 0.01. \*\*\*p < 0.001.

## MEDIA COVERAGE OF TERRORISM

*Table A14. News Coverage by Terrorism Episode when all GTD Terrorism Criteria Met without Boston Bombing or Fort Hood – Comparing Major and Non-Major Media outlets (N=131)*

	Model A56		Model A57		Model A58		Model A59		Model A60	
	Major	Non-Major	Major	Non-Major	Major	Non-Major	Major	Non-Major	Major	Non-Major
Perp. Muslim	<b>2.20***</b> (0.52) [804%]	<b>1.32***</b> (0.37) [274%]	<b>1.89**</b> (0.61) [560%]	<b>1.08*</b> (0.47) [194%]	<b>1.95**</b> (0.56) [600%]	<b>0.98*</b> (0.41) [167%]	<b>2.14**</b> (0.69) [750%]	<b>1.26**</b> (0.43) [254%]	<b>2.13***</b> (0.61) [739%]	<b>1.13*</b> (0.45) [208%]
Perp. Arrested	<b>1.29**</b> (0.41) [264%]	<b>1.26***</b> (0.32) [252%]	<b>0.98*</b> (0.45) [167%]	<b>0.89*</b> (0.38) [145%]	<b>1.11*</b> (0.44) [205%]	<b>0.99*</b> (0.39) [169%]	<b>1.35**</b> (0.42) [286%]	<b>1.21***</b> (0.34) [236%]	<b>1.44**</b> (0.44) [324%]	<b>1.28***</b> (0.33) [260%]
Target LE/Gvmt	0.48 (0.42) [62%]	0.65 <sup>†</sup> (0.37) [92%]	0.26 (0.46) [30%]	0.49 (0.42) [63%]	0.34 (0.45) [40%]	0.43 (0.39) [54%]	0.40 (0.47) [50%]	0.57 (0.42) [76%]	0.43 (0.52) [53%]	0.46 (0.39) [59%]
Number Killed	<b>0.58**</b> (0.22) [78%]	<b>0.43**</b> (0.16) [53%]	<b>0.52**</b> (0.18) [68%]	<b>0.38**</b> (0.15) [47%]	<b>0.53*</b> (0.21) [70%]	<b>0.40**</b> (0.14) [49%]	<b>0.59**</b> (0.21) [80%]	<b>0.44**</b> (0.16) [55%]	<b>0.59*</b> (0.30) [81%]	<b>0.45*</b> (0.17) [56%]
Sig. Date			-0.08 (2.22) [-8%]	0.21 (0.40) [24%]	-0.25 (2.05) [-22%]	0.18 (0.37) [20%]	-0.22 (0.77) [-20%]	0.14 (0.39) [15%]	-0.36 (0.64) [-30%]	0.12 (0.38) [12%]
Target Muslim			-1.06 (1.16) [-65%]	-0.37 (0.39) [-31%]			-0.97 <sup>†</sup> (0.52) [-62%]	-0.32 (0.42) [-28%]		
Target Minority					-0.40 (0.53) [-33%]	-0.56 (0.37) [-43%]			-0.50 (0.53) [-39%]	-0.62 <sup>†</sup> (0.36) [-46%]
Perp. & Group Unknown			<b>-0.98*</b> (0.49) [-63%]	-0.88 <sup>†</sup> (0.47) [-58%]	-0.83 (0.53) [-56%]	-0.81 <sup>†</sup> (0.45) [-55%]				
Perp., Group & Motive Unknown							0.24 (6.77) [28%]	0.04 (6.55) [4%]	0.25 (6.81) [29%]	-0.09 (6.25) [-8%]
AIC	468.252	664.330	468.275	665.400	470.483	663.400	471.101	669.703	472.411	667.092
BIC	484.509	680.587	492.661	689.786	494.869	687.785	495.487	694.088	496.797	691.478

Negative binomial regression models. Constants not reported.  
Coefficients are presented with bootstrapped standard errors in parentheses.  
Percent change in expected count reported in brackets.

<sup>†</sup>p < 0.10. \*p < 0.05. \*\*p < 0.01. \*\*\*p < 0.001.

## News Broadcasters Association

### Specific Guidelines for Reporting Court Proceedings

In addition to the Specific Guidelines Covering Reportage dated 10<sup>th</sup> February 2009, the News Broadcasters Association hereby frames the following guidelines to be called the “Specific Guidelines for Reporting Court Proceedings”

1. A news report in relation to a proceeding pending in a Court, Tribunal or other judicial forum shall be neutral and balanced, giving the version of all, or substantially of all, parties to the proceedings.
2. In reporting any Court proceedings, whether in a civil or criminal matter, a news channel shall not identify itself with, or project or promote, the stand of any one contesting party to the dispute.
3. Conjectures and speculation shall be avoided in news reports relating to proceedings pending in a Court, Tribunal or other judicial forum.
4. Except where a Court, Tribunal or other judicial forum conducts proceedings *in-camera* or expressly directs otherwise, it shall be open to a news channel to report on pending judicial proceedings provided the report so broadcast is an accurate, authentic and correct version of what has transpired in Court ; and is fair and reasonable to the contesting parties.

Provided however, that no news channel shall broadcast anything:

- (i) Which is in the nature of a running commentary or continuing debate (including oral comments made by the Court, Counsel, litigants or witnesses during Court proceedings) which do not form part of the record, when proceedings are pending in the Court, Tribunal or other judicial forum;
- (ii) Which purports to report a journalist’s or the news channel’s own opinion, conjectures, reflections, comments or findings on issues that are *sub judice* or which tend to be judgmental in relation to the subject matter that is pending in a Court, Tribunal or other judicial forum;
- (iii) Which is a comment on the personal character, culpability or guilt of the accused or the victim; or
- (iv) Which otherwise interferes or tends to interfere with, or obstructs or tends to obstruct, the course of justice in connection with any civil or criminal proceeding pending in a Court, Tribunal or other judicial forum;

- (v) Which may amount to contempt of Court;
5. No news in relation to any proceedings pending or concluded in a Court, Tribunal or other judicial forum shall be broadcast unless the reporter and/or editor have adequately ascertained the accuracy, authenticity and correctness of what is reported, preferably from Court records, or at the very least, by being personally present during such proceedings. In addition to the reporter's responsibility, the executive head of the editorial operations of the news channels shall also be accountable for the accuracy, authenticity and correctness of what is broadcast in relation to proceedings pending or concluded in a Court, Tribunal or other judicial forum.
  6. After registration of a First Information Report (FIR) in respect of any crime, a news channel shall not broadcast any report that may evaluate, assess or otherwise give their own conclusions upon, or in relation to, ongoing investigation or evidence collected or produced before a Court, Tribunal or other judicial forum.
  7. While a news channel may, in public interest, make a fair comment on any judicial act, including any Order or judgment rendered by a Court, Tribunal or other judicial forum, a news channel shall not cast personal aspersions upon, or impute improper motives, personal bias or lack of integrity or ability to a judge or member of a Tribunal or other Authority ; nor shall a news channel report anything that may scandalize a Court or the judiciary as a whole.
  8. News channels shall eschew suggestive guilt by association and shall not name or otherwise identify family members, relatives or associates of an accused or convict, unless such reference is directly relevant to the subject matter of the report.
  9. A news channel shall report upon any proceedings pending in any Court, Tribunal or other judicial forum, in a manner so as to clearly distinguish between "facts" (as then available in the public domain) and the "allegations" being made by parties to such proceedings.

Place : New Delhi

Dated : September 15, 2010

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# **Counter-Terrorism Laws and the Media: National Security and the Control of Information**

Lawrence McNamara

Liberal democracies presently struggle with the need to balance the demands of national security with traditional commitments to media freedom. The enactment of counter-terrorism laws since 2001 has seen the state expand its ability to control information. This article examines that expansion, drawing on interviews with journalists and lawyers to consider the potential and actual effects of the laws. It argues that the strongest, most direct effects relate to the reporting of court proceedings. The laws have not yet, it seems, had a chilling effect, but they have brought about apprehension and caution. Even if not causally affecting the flow of information, the laws remain an important part of the context in which information is controlled or limited by other means. When viewed side by side, the combination of these effects suggests that the degree of control over information does not necessarily correspond with the presence or degree of legal regulation.

Liberal democracies are faced with a task that is presently very troubling: they must balance traditional commitments to media freedom with the secrecy and closure that is often demanded by national security needs. On the one hand, there must be access to information and an ability to publish without fear of prosecution. At its best, the media plays the role of watchdog—the fourth estate that holds all branches of government to account. On the other hand, the state and its citizens have a legitimate interest in national security. That interest will at times demand that information is not made available to the media, publication will be restricted or prevented, and the criminal law will be used to enforce these limits on media freedom.

In general terms, two main legal strategies are employed to limit media freedom. First, there are laws designed to prevent the media obtaining information. Secondly, there are laws aimed at preventing publication so that, in the event information is obtained, the media cannot disseminate that information. As well as creating direct obstacles, the fact that there will be penalties for breaching the laws may have a chilling effect on the media. That is, media organisations may engage in a form of self-censorship by erring on the side of caution, especially when making decisions about what should and should not be published. Together, though in different ways, these strategies limit the extent to which the public finds out about the activities of the state or of its individual or corporate citizens.

Neither of the legal strategies is new but since 2001 they can be found more readily in Australian counter-terrorism laws. Media organisations have argued that these laws restrict the ability of the media to investigate and report on matters of public interest.<sup>1</sup> The Australian Press Council has expressed concern that the laws shield governments from public scrutiny.<sup>2</sup> Similar arguments can be found in the *Report of the Independent Audit of the State of Free Speech in Australia* which was commissioned by a coalition of Australian media organisations under the campaign umbrella of 'Australia's Right to Know'.<sup>3</sup> In the scholarly literature there is preliminary analysis that supports those claims.<sup>4</sup>

Against that background, this article explores how the tension between media freedom and national security is presently balanced. It considers especially how the new laws directly affect the media in so far as the state prevents publication or access to information and contrasts this with the ways that the laws are relevant to the control of information even in the absence of formal prohibitions or restrictions on publication.

Three different dimensions of control will be examined, each with a decreasingly significant role for the law. Part one considers the most overt controls which occur in the judicial process and under which there are express restrictions on access to information and publication. Part two turns to less easily-identified limitations and restrictions that result from self-censorship. Part three looks at how control is exercised at the very periphery of the legal framework where legislation does not always have a direct effect but forms part of the context in which information is controlled. Each of these, it will be argued, is a matter of significant concern but, importantly, it will be suggested that the degree of control over information does not necessarily correspond with the presence or degree of legal regulation.

The analysis draws substantially on a series of semi-structured interviews with journalists and lawyers which sought to ascertain and analyse the ways the media is actually being affected by the laws, considering this especially

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<sup>1</sup> Media, Entertainment and Arts Alliance [MEAA], Submission to the Senate Legal and Constitutional Committee, Inquiry into the Provisions of the Anti-Terrorism Bill (No. 2) 2005, Submission 198 (November 2005); Australian Broadcasting Corporation [ABC], Submission to the Senate Legal and Constitutional Committee, Inquiry into the Provisions of the Anti-Terrorism Bill (No. 2) 2005, Submission 196 (11 November 2005).

<sup>2</sup> Jack Herman (ed.), *State of the News Print Media in Australia 2007: Supplement to the 2006 Report* (Sydney: Australian Press Council, 2007), pp. 59-64.

<sup>3</sup> Australia's Right to Know, *Report of the Independent Audit into the State of Free Speech in Australia* (Sydney: Australia's Right to Know, 2007) esp. pp. 155-9, 162-4.

<sup>4</sup> Chris Nash, 'Freedom of the Press in the New Australian Security State', *University of New South Wales Law Journal*, vol. 28, no. 2 (2005), pp. 900-8.

in light of the potential effect of the laws.<sup>5</sup> Participants were identified through the literature, the news media, and formal and informal interviews and conversations with journalists, lawyers and academics in the field. The interviewees were ten journalists who were regularly reporting on the issues and nine lawyers. These were media lawyers (some in-house counsel and some from firms) who provide advice and make judgments about what can or cannot be published, and criminal lawyers who had been involved in proceedings where there may be attempts to regulate the media's access to, and reporting of, security-related information. The interviews were conducted in July and August 2007. It was around that time that Dr Mohamed Haneef was arrested in Queensland and charged with terrorism offences in circumstances where access to and the release of information was highly contentious.<sup>6</sup> As such, many of the interviewees had given a deal of thought to the issues that were discussed in the interviews, and the Haneef matter was referred to regularly.

These interviews canvassed the ways that the laws had restrictive effects, though neither the interviewer nor interviewees assumed that an unrestricted media was either desirable or practical. On the contrary, both journalists and lawyers accepted that secrecy is sometimes required and that means that information may need to be restricted. In addition, there was a clearly conveyed view that the media would not work against security authorities. As a lawyer put it, if a journalist thought a terrorist act was likely then "the first [priority] would be human safety" and they would go to the police "within two seconds"; "journalists aren't that intent on good stories that they would endanger [sic] an actual act of terrorism to get a good story".<sup>7</sup>

The research focused on major media outlets because these organisations have the resources and expertise needed to resist and challenge the

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<sup>5</sup> The most extensive report of this research can be found in Lawrence McNamara, 'Closure, Caution and the Question of Chilling: How Have Australian Counter-Terrorism Laws Affected the Media?', *Media & Arts Law Review*, vol. 14, no. 1 (2009), pp. 1-30.

<sup>6</sup> Dr Haneef, an Indian national, was arrested on suspicion that he was guilty of supporting terrorism through a connection to the attack at Glasgow International Airport on 1 July 2007. He was taken into custody for questioning on 2 July and held for twelve days before being charged. He was granted bail two days later but remained in detention following the Minister's immediate cancellation of his visa amid much talk of information that could not be released to the public but which implied that Haneef was meaningfully connected to terrorism. The criminal charges were withdrawn on 27 July 2007. The visa cancellation was overturned by the courts on 21 December 2007. On 13 March 2008 the Labor government elected in November 2007 established an inquiry into the Haneef case: <[www.haneefcaseinquiry.gov.au](http://www.haneefcaseinquiry.gov.au)>. On 29 August 2008 the Australian Federal Police (AFP) formally announced they were no longer investigating Haneef and the Australian Security Intelligence Organisation (ASIO) had earlier indicated they did not consider Haneef to have terrorism connections. The Clarke Inquiry reported to the government on 21 November 2008: 'Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef', <<http://www.haneefcaseinquiry.gov.au/www/inquiry/haneefcaseinquiry.nsf/Page/Report>> [Accessed 10 May 2009]. The government released the report to the public two days before Christmas on 23 December 2008.

<sup>7</sup> All comments are taken from the interviews unless otherwise stated.

limitations imposed by the law. If the effects are strong on major organisations then it might be that smaller bodies face even greater obstacles or greater difficulty overcoming the same obstacles.<sup>8</sup>

Commentators and columnists were not interviewed. The principal focus is on the media's ability to report on matters involving prosecutions for terrorism and investigative reporting on matters relating to terrorism. The media's ability to present opinion and comment on terrorism, terrorist groups or government policy are clearly very important aspects of the public discussion of national security. These matters have attracted significant concern and criticism, especially with regard to the extent to which sedition laws have been revived and revised in a way that prevents the expression of opinion.<sup>9</sup> However, this piece is principally concerned with the information-based aspects of reporting on national security matters.

## Open Justice and Closed Courts

The media do not have special access to courts. Their access and ability to report on matters are derived from the principles of open justice. 'Open justice' is a central—indeed, defining—feature of judicial proceedings in Australia and other common law countries. It means that hearings will ordinarily be accessible to members of the public and that information disclosed in them can be reported to the public at large. The rationales for open justice reside in the benefits of public scrutiny of the quality of justice being administered in the courts with exposure aiming to ensure that judicial power is exercised impartially.<sup>10</sup> However, open justice does not mean that all aspects of all proceedings can be reported at any time. A range of limits applies, essentially on the basis that there are other factors to be taken into account in the administration of justice and, on occasion, the administration of justice requires some limits on openness. These limits may restrict access to the court, or they may allow access but will restrict publication.

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<sup>8</sup> It would, however, be of great interest to explore the experience of smaller organisations because they may feel different effects, especially where there is a sense that their communities are being targeted by particular laws, by sections of the wider community, and perhaps by the major media.

<sup>9</sup> The sedition laws and associated restrictions on expression in the *Criminal Code* ss 80.2ff were enacted by the *Anti-Terrorism Act (No 2) 2005* (Cth), Schedule 7. The Australian Law Reform Commission reviewed these and made recommendations for change: *Fighting Words: A Review of Seditious Laws in Australia, Report 104* (Sydney: ALRC, 2006). The Howard government did not act on the recommendations. The Rudd government has recently indicated that it will implement almost all the recommendations: 'Australian Government Response to ALRC Review of Seditious Laws in Australia: December 2008', <[http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications\\_AustralianGovernmentresponseToALRCReviewofSeditiousLawsinAustralia-December2008](http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_AustralianGovernmentresponseToALRCReviewofSeditiousLawsinAustralia-December2008)> [Accessed 19 February 2009].

<sup>10</sup> For an excellent, brief outline of the history, rationales and significance of open justice, see Des Butler and Sharon Rodrick, *Australian Media Law*, 3rd edn. (Sydney: Thomson Lawbook Co., 2007), pp. 161-3.

In criminal cases, where access is generally allowed, the laws of *sub judice* contempt will play an important role in determining what can be published, both before and during a trial. When a person is charged with a criminal offence, the media will be able to report the basic facts associated with arrest and charge. However, under *sub judice* contempt laws, the media cannot publish material which may prejudice a trial. In particular, the publication of prior convictions and photographs of the accused are not generally permitted. There is a limited public interest defence under which some prejudice to the administration of justice may be permissible if there is a competing public interest that outweighs that prejudice.<sup>11</sup> This enables limited reporting of events and allegations at the time of arrest but is still approached cautiously. Once a matter reaches trial then criminal proceedings are ordinarily open to the public. The media may report cases, including reporting the evidence given in court. They may also be able to access a wide range of documents associated with the case, including indictments, briefs of evidence and witness statements. During a trial, material cannot be published if it was not heard by a jury or if it has been suppressed by order of the court.

In terrorism matters, there may be restrictions on access as well as publication. In these cases the ability to report turns heavily on the openness of court proceedings and media access to information and documents relied upon in those proceedings, especially because security-related information may not be easily discovered outside of proceedings. There are two ways access may be restricted in terrorism cases. The first is through the closure of courts using established powers and these have been relied upon in recent terrorism cases.<sup>12</sup> However, open justice must be considered and Justice Bongiorno in the Victorian Supreme Court recently stated that:

The Court will maintain its vigilance to ensure ['protective orders'] are never unreasonably or unnecessarily applied and of course the press interests can always seek to be heard on any occasion on which [such orders] are sought to be invoked.<sup>13</sup>

The second form of restriction is based on the management of evidence. It is well-established that there may be occasions where evidence will not be admissible if it would prejudice national security.<sup>14</sup> However, the *National Security Information (Civil and Criminal Proceedings) Act 2004* (Cth) (the

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<sup>11</sup> *Ex parte Bread Manufacturers Ltd; Re Truth and Sportsman Ltd* (1937) 37 SR (NSW) 242; *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15.

<sup>12</sup> *Crimes Act 1914* (Cth) s 85B; *Criminal Code Act 1995* (Cth) s 93.2; *R v Lohdi* [2006] NSWSC 596, affirmed in *R v Lohdi* (2006) 65 NSWLR 573, [2006] NSWCCA 101; *R v Benbrika, Abdul Nacer & Ors (Ruling no 1)* [2007] VSC 141.

<sup>13</sup> *R v Benbrika, Abdul Nacer & Ors (Ruling no 1)* [2007] VSC 141 at [18]; see also *John Fairfax Publications Pty Ltd v District Court of NSW* [2004] NSWCA 24; *R v Lohdi* (2006) 65 NSWLR 573, [2006] NSWCCA 101, esp. [10], [24], [27]-[28].

<sup>14</sup> *Evidence Act 1995* (Cth) s 130.

NSI Act) establishes a regime that goes much further and, as a consequence, has the potential to place quite comprehensive restrictions on media coverage of terrorism trials.

### **NATIONAL SECURITY INFORMATION LEGISLATION**

The NSI Act was prompted by the Commonwealth's concern that if it relied on established laws to argue that security-sensitive evidence was not admissible, then prosecutions would collapse due to a lack of evidence.<sup>15</sup> The new laws were enacted

to prevent the disclosure of information ... where the disclosure is likely to prejudice national security, except to the extent that preventing the disclosure would seriously interfere with the administration of justice.<sup>16</sup>

The principal effect is that a trial can proceed where some evidence may not be made available to the accused in its original or complete form.

The procedure requires that any party wishing to rely on evidence that may relate to national security must notify the Attorney-General if that evidence is to be disclosed in the proceedings.<sup>17</sup> If the Attorney-General thinks "there is a real, and not merely a remote, possibility that [a disclosure in evidence] will prejudice national security" then she or he may ask the court to rely on a summarised form of the evidence, or a document with information deleted from it, or evidence of a witness who cannot be called.<sup>18</sup> The court will then hear argument about the extent to which the Attorney-General's view should prevail. Under section 31, the court can decide to prohibit disclosure, permit some disclosure, or permit full disclosure. In making its determination the court must consider (a) the risk of prejudice to national security; (b) whether there would be a "substantial adverse effect on the defendant's right to receive a fair hearing"; and (c) any other matter the court considers relevant. The first of these factors must be given the greatest weight.<sup>19</sup>

There is little room for consideration of open justice. Only under the third factor could any such the public interest be taken into account. Moreover, it is difficult for media organisations to make persuasive arguments for openness because, although a judge may allow media submissions on the way evidence should be handled, the media lawyers are not permitted to be in the court while prosecution, defence and government argument is heard.<sup>20</sup> As such, it will be almost impossible for the media to address—or even to know—the specific issues in contention.

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<sup>15</sup> *R v Lappas & Dowling* [2001] ACTSC 115.

<sup>16</sup> *NSI Act*, s 3.

<sup>17</sup> *NSI Act*, ss 24-25.

<sup>18</sup> *NSI Act* ss 26-27.

<sup>19</sup> *NSI Act* ss 31(8).

<sup>20</sup> *NSI Act* s 29(2); *R v Lodhi* [2006] NSWSC 571; *Lohdi v R* [2007] NSWCCA 360.

The NSI Act provides a second way of managing evidence but it is even less satisfactory. Under section 22 the prosecutor and defendant

may agree to an arrangement about any disclosure, in the proceeding, of information that relates to national security or any disclosure, of information in the proceeding, that may affect national security.

An agreement may be far more restrictive than the court would order were disclosure issues contested. The agreement must be approved by the court but even a restrictive agreement could be appealing to a judge because the trial can be managed more effectively if the parties are not resorting to the disruptive, time-consuming section 31 procedures.<sup>21</sup> It would appear that, where the effect of a section 22 agreement would be that security-related information would not be disclosed, then requirement to notify the Attorney-General (under ss 24-25) would not arise. This could mean that an agreement could also be more restrictive than any limitations which would be sought by the Attorney-General.

By June 2008, the NSI Act had been invoked in proceedings involving twenty-eight defendants, as well as in one application for a control order.<sup>22</sup>

### **THE EXPERIENCE IN TERRORISM TRIALS**

While the scope for restrictions is clearly wide, to what extent and in what ways do these restrictions play out in practice? Interviews with journalists and lawyers suggest that are two main ways that the media feels the effects of the laws. First, formal restrictions flow from the different laws, though not necessarily or solely from the NSI legislation. Secondly, informal relationships are increasingly characterised by a lack of openness and this affects the coverage of terrorism trials.

Just as the closure of courts under established powers has been a concern, the NSI laws have also attracted criticism. No interviewees argued that exclusion of the media was necessarily inappropriate or always unjustified. On the contrary, it was accepted that “there will be times when the media or a party even, shouldn’t be able to be involved—it sort of defeats the purpose if they are”. However, there was a clear feeling that applications for court closure were at times used strategically by police to ensure that no media were present at the hearing, thereby forcing the media to rely on police statements.

There was discontent with the NSI procedure which denies the media a place in the process and excludes them from hearings. This was seen as an unjustifiable and inappropriate impediment to the media’s ability to argue

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<sup>21</sup> *R v Khazaal* [2006] NSWSC 1353 at [83]-[95].

<sup>22</sup> Attorney-General’s Department, *National Security Information (Civil and Criminal Proceedings) Act 2004 Practitioners’ Guide* (Canberra: Attorney-General’s Department, 2008), p. 5.

effectively in the public interest. Media lawyers argued that while the exclusion of journalists was one thing, there was no good reason to exclude the legal representatives:

We are officers of the court, we understand our obligations to the court, we are bound by them. The chances of us saying, "We understand what the judge has said, we understand what the Act says, but we're just going to do the opposite"—that's just not likely.

The section 22 provision enabling the prosecution and defence to agree on the way evidence will be managed was also criticised. Although there has been some defence support for the media's criticisms of the legislation,<sup>23</sup> media lawyers saw the parties as being "completely preoccupied with the form in which evidence is to be presented to the other side and to the court". For the parties there is good reason to reach an agreement: it helps the prosecution keep information secret and defence lawyers—while they "don't like using it [and] don't want to have to sign up to it"—have

clients who have been in custody for a year or two. [A refusal] to sign up or [a] challenge [to] the legislation means their trial is delayed and they're in custody for even longer.

In the interviews it was usually the legislation—rather than the lawyers—which was the subject of criticism. There was an acceptance that the parties' lawyers had obligations to act in their clients' interests but, still, "trying to put a blanket order over the whole proceedings" was not seen as being in the public interest.

It is difficult to predict how any particular evidence will be dealt with under the determination process or whether courts will approve proposed agreements:

It can be a bit of a lottery [as to how the judge decides]. It can depend on all manner of [their] prior experience and prior relationships with barristers, or with the media.

Experience so far has varied but most interviewees thought judges have not closed courts without seeking good justification, though none were sanguine:

[The judge] I thought was very, very robust in making the government explain why, if they wanted the court shut. [But] what if it was someone who hated the media and didn't give a toss about openness or accountability? ... Personality becomes a very big factor.

The media experience in terrorism trials is affected not only by the formal operation of the laws but also by journalists' informal relationships with lawyers and court staff, as well as relationships between lawyers. Access to information depends on good relationships, even where there are no

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<sup>23</sup> *R v Lodhi* [2006] NSWSC 571 at [62].

technical restrictions on obtaining or publishing the information. Court staff and lawyers are busy, and lawyers will almost always exercise an innate caution that ensures as little information about their client as possible is made public, especially if they are uncertain how information will be used. Even journalists with good contacts found terrorism cases “tougher than routine”.

A tension between lawyers has become apparent, observed even by the courts:

Something of a hostile attitude has emerged between the Commonwealth and the respondents. The respondents consider that the Commonwealth overstates its position on national security matters. The Commonwealth suspects that the respondents do not have a sufficient regard for matters of national security.<sup>24</sup>

The relationships between lawyers have become very important as each side wants to ensure the other is aware of and comfortable with any media contact:

there’s a lot of sensitivity about making sure everyone’s informed. ... Normally [you] don’t have to have a lot of argument about it when you are asking basic questions. But [in terrorism cases] everyone’s gone very sensitive about it and making sure that they are seen to be doing the right thing. ... There’s a heightened awareness of making sure it’s all done the right and proper and official way.

The problem is accentuated when prosecuting lawyers are from the Commonwealth Department of Public Prosecutions and (unlike their state counterparts) rarely have established relationships with regular reporters in the criminal courts. It is perhaps unsurprising then that lawyers are reluctant to speak. One journalist gave the example of a prosecution lawyer who:

wouldn’t even give me the first name of [the] barrister, saying that [s/he’s] not allowed to talk to the media, and when I explained that “I’m not looking for comment—I’m just trying to get the spelling right”, [s/he] said, “You’re lucky I’m even talking to you.”

Is open justice in terrorism trials in danger of disappearing? The overwhelming impression from the interviews is that this is indeed a genuine concern. One lawyer said that, “The routine order being sought is ... that all security sensitive information be heard in closed court. That is now the default set of orders.” The substance and operation of the laws gave rise to the perception that whereas suppression is “not meant to be the norm” and a case must be made for matters to be suppressed, “the terror rules almost make a different assumption—you’ve almost got to say why it is we *should* be allowed to publish. It almost reverses the onus.”

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<sup>24</sup> *R v Khazaal* [2006] NSWSC 1353 at [121].

## Restrictions, Uncertainty and the Question of Self-Censorship

The effects on reporting criminal proceedings are relatively straightforward because the operation of the laws can be seen with some clarity. In the realm of investigative reporting, the impact of the laws is less certain.

Investigative reporting on terrorism and national security is governed by a range of old and new laws. Defamation will be a concern just as it always has been; suggestions of involvement in terrorist activities or other abhorrent behaviour cannot be made unless they can be proved or are reported as part of covering court proceedings. However, there is much to suggest that new counter-terrorism laws are a significant component of a political and legal environment in which there is a danger of limited access to information and increased caution. This may further diminish the public's ability to know about and engage in informed debate about national security issues.

### COUNTER-TERRORISM LAWS AND INVESTIGATIVE REPORTING

The laws with most potential to affect the media are those governing the secrecy of some questioning and detention, and those under which journalists can be questioned and required to produce documents that will identify sources.

First, stringent secrecy provisions limit the media's ability to obtain and disseminate information about the investigation of terrorism. The Australian Security Intelligence Organisation (ASIO) has been granted the power to question and detain people for the purposes of investigation.<sup>25</sup> Through the Minister, a warrant may be sought on the basis that

there are reasonable grounds for believing that issuing [it] will substantially assist the collection of intelligence that is important in relation to a terrorism offence ... [and] that relying on other methods of collecting that intelligence would be ineffective.<sup>26</sup>

A warrant can be issued by a magistrate or judge and requires a person to "give information, or produce records or things, that is/are or may be relevant to intelligence that is important in relation to a terrorism offence".<sup>27</sup>

Any person who discloses the existence of a warrant while it is in force will be liable to two years imprisonment.<sup>28</sup> In the two years after the warrant expires, it will be an offence punishable by five years imprisonment to disclose any "operational information" that is known by virtue of the issue of

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<sup>25</sup> *Australian Security Intelligence Organisation Act 1979* (Cth) ('the ASIO Act'); *ASIO Legislation Amendment (Terrorism) Act 2003* (Cth); *ASIO Legislation Amendment (Terrorism) Act 2006* (Cth).

<sup>26</sup> *ASIO Act* ss 34D(4), 34F(4).

<sup>27</sup> *ASIO Act* s 34E(4), 34G(7).

<sup>28</sup> *ASIO Act* s 34ZS(1).

the warrant or questioning under it.<sup>29</sup> “Operational information” is defined as including an “operational capability, method or plan”.<sup>30</sup> This means that the two year post-expiry secrecy is quite comprehensive. Disclosing the existence of the warrant would appear to breach the law because using warrants to obtain intelligence seems to be an operational method. In addition, it would seem almost impossible to disclose any information acquired because, even though the prohibition applies only to operational information, the nature of intelligence work makes it impossible to know whether something is or is not “operational information”.

There are also preventative detention powers under the Commonwealth *Criminal Code*. These enable a person to “be taken into custody and detained for a short period of time in order to prevent an imminent terrorist act occurring” or to “preserve evidence of, or relating to, a recent terrorist act”.<sup>31</sup> Again, strict disclosure provisions will limit both access to information and publication. A detainee can only tell the Ombudsman or a lawyer that they have been detained.<sup>32</sup> Any person who discloses the existence of the order or reveals that someone is being detained will be liable to five years imprisonment.<sup>33</sup> However, unlike the ASIO provisions that continue for two years after the life of the order, the restrictions here finish when the order expires. As a result, it is almost impossible to obtain information about a preventative detention order while it is in force, even though the public interest in the existence of the order may be very strong. However, the public interest in preventing a terrorist attack is so strong that, at least in circumstances where the attack is imminent, there is good reason to see the *Criminal Code* restrictions as justifiable.

Secondly, new laws reduce the extent to which journalists can keep sources confidential. To obtain reliable information about matters of significant public interest—a task at the heart of the media’s fourth estate role—journalists may on occasion need to assure sources that their identities will be kept confidential. The obligation to maintain confidentiality is a core element of the Code of Ethics for Journalists.<sup>34</sup> Although it has only limited legal recognition, this obligation is strongly adhered to by journalists.<sup>35</sup> There are two ways that counter-terrorism laws affect the media in this regard.

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<sup>29</sup> *ASIO Act* s 34ZS(2).

<sup>30</sup> *ASIO Act* s 34ZS(5).

<sup>31</sup> *Criminal Code* s 105.1.

<sup>32</sup> *Criminal Code* s 105.36 – 105.37. A family member or employer can be contacted so they know the detainee is safe but “not able to be contacted for the time being”; they may not be told of the detention: s 105.35.

<sup>33</sup> *Criminal Code* s 105.41(2).

<sup>34</sup> *Evidence Amendment (Journalists’ Privilege) Act 2007* (Cth); *Evidence Act 1995* (Cth) ss 126A-126F; *Evidence Act 1995* (NSW) ss 126Aff.

<sup>35</sup> In the United Kingdom courts have observed that the protection of sources is important and, while noting that journalists’ rights are not absolute in this regard, they have limited the scope of

The first is that when the Australian Federal Police (AFP) has reasonable grounds to believe a person has documents that are relevant to and will assist the investigation of “a serious terrorism offence” then it may issue a “notice to produce” documents.<sup>36</sup> Documents must relate to finance, the disposal or acquisition of assets, travel, utilities, telephone calls and accounts, or residence.<sup>37</sup> If issued against a journalist, it is likely that documents would directly or indirectly identify sources. The second and more coercive possibility is that ASIO can seek a questioning warrant if it believes a journalist may have information that will be useful for the collection of intelligence relating to terrorism offences. The journalist may be unaware that they are in possession of such information and the information need not be admissible in evidence at a criminal trial.

Journalists are not presently able to keep sources confidential without fear of punishment. When there is a case before the courts then a journalist’s failure to identify a source could be contempt of court and could result in imprisonment. For example, where a person is being prosecuted for leaking information to the press, a journalist may be asked to reveal the source of information obtained for a story. Adhering to their Code of Ethics, the journalist will not do so. However, the *ASIO Act* does not require the state to have identified a person who is to be prosecuted and against whom they have compiled a case. These laws enable the security authorities to use a questioning warrant to ask the journalist, “Who is your source?” Remaining silent or refusing to reveal sources will be an offence punishable by five years jail.<sup>38</sup> Experience suggests that a contempt penalty would be far less.<sup>39</sup>

The secrecy provisions associated with the laws are again significant. Failure to comply with a notice to produce attracts a fine up to \$3300,<sup>40</sup> but where a notice includes terms that prevent the person disclosing the nature or existence of the notice then disclosing its existence a penalty of up to two years imprisonment.<sup>41</sup> The secrecy requirements would make it impossible to gather any support from other journalists, media organisations or anyone else such as a member of parliament in order to contest the demand to reveal a source.

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orders to produce documents under the *Terrorism Act 2000*: *Shiv Malik v Manchester Crown Court* [2008] EWHC 1362 [85]-[92], [109]-[111].

<sup>36</sup> *Anti-Terrorism Act 2005* (Cth), Schedule 6; *Crimes Act 1914* (Cth) s 3ZQN. The AFP can also request a Federal Magistrate to issue a notice where it concerns “a serious offence”: s 3ZQO.

<sup>37</sup> *Crimes Act* s 3ZQP.

<sup>38</sup> *ASIO Act* s 34L.

<sup>39</sup> See, for example, Senate Standing Committee on Legal and Constitutional Affairs, *Off the Record: Shield Laws for Journalists’ Confidential Sources* (Canberra: AGPS, 1994).

<sup>40</sup> *Crimes Act* s 3ZQS.

<sup>41</sup> *Crimes Act* ss 3ZQN(3)(g), 3ZQN(4)(g); 3ZQT.

A key issue explored in the interviews was whether journalists and lawyers were concerned that they could be subjected to the coercive powers of the state or prosecuted for a breach of the laws requiring secrecy, and whether any such concerns were affecting the practice of journalism or the editorial decisions to publish. In short, could it be said that the laws have given rise to a chilling effect?

### **A CHILLING EFFECT?**

It is not merely the existence of the laws which matters. Rather, it is a sense of whether and how the laws will be applied which will inform journalistic and editorial decision-making.

Interviewees did not see the main coercive powers as a direct concern. It was largely thought that it was unlikely that journalists would be held in preventative detention. Similarly, it was thought that ASIO questioning powers were unlikely to be used against journalists. However, it troubled several interviewees that journalists can now more easily be questioned without any need for the authorities to have commenced proceedings against a person thought to be a source: “they can haul us in, they can ask the questions and they can detain us until we [answer them]”. Nothing was said to suggest that this possibility affected journalists’ practices but it was argued that “it only has to come up once in a blue moon and for it to be hanging over people’s heads for it to affect the way they do their jobs”. The possibility that a notice to produce documents could be issued was seen as far more likely and was a cause for some concern and dismay, but few would be surprised if these powers were exercised.

The most contentious issues surrounded matters of great uncertainty: would the authorities commence a prosecution if the media breached a secrecy requirement or published restricted information, even where such a breach was clearly undertaken in the public interest? The interviews revealed a difference of opinion about the ways the law would be applied and showed up a distrust of police and security authorities.

At one end of the spectrum there was complete certainty that a breach would be prosecuted. As a senior journalist put it,

They wouldn’t hesitate ... [They have an attitude of] ‘we want to teach them a lesson, get them to pull their heads in, keep them in line, we want to punish them.’

Or, as another said, “They would take the gloves off.” The certainty of prosecution was seen as being motivated by different things:

[the police] would go gangbusters because they will have been telling the court that this information is secret, vital to national security, people’s lives are in danger, etc. It would almost be necessary for them to go hard.

A media lawyer argued that the use of media interviews as evidence in the Jack Thomas prosecution (for example)

indicates a philosophy on the part of the relevant authorities that they will use whatever tools are available to them to get whatever information they think may be relevant to them even if tangentially relevant.

The fact the counter-terrorism laws provide so many tools was thus seen as a major concern.

Conversely, other interviewees thought it highly unlikely a breach would be prosecuted, especially where there was a strong public interest in publication: “No. Definitely not. Absolutely not”, said one journalist. Others shared a lawyer’s view that “the AFP will be reluctant to take on the media—a particular journalist or newspaper or television station—unless it is absolutely necessary”. The media’s tendency and ability “to bite back really hard” would cause the authorities to balk at prosecuting.

Between these views lay a middle ground of doubt:

In certain circumstances I really think they would [prosecute], but not necessarily. If it was really embarrassing or devastating to electoral prospects. [There would be] political considerations ... and maybe genuine security considerations as well. ... I think they’d weigh all that up. I don’t think there’d be a natural reluctance [to prosecute].

There was uncertainty about just what the threshold would be before the authorities would take action but it was generally thought that “all the indications ... are that it won’t be set that high”.

Uncertainty about the consequences of a breach makes the pre-publication legal question very important: would publication in the particular circumstances actually constitute a breach? Some journalists and all media lawyers said that “one of the trickiest and most difficult areas” relates to reporting what could be considered “operational information”. A “complex” and “opaque” law, it is not easy to apply:

Even if you do have the information somehow then understanding what you might be able to report in a safe way, or what has to be kept secret because of the impact of the secrecy provisions is very delicate and difficult.

The behaviour of police and security authorities does not necessarily make the question easier to answer: “Where information that you think should be kept secret has been provided by ASIO itself or the AFP itself ... what do you do in that circumstance?”

While there is clearly great concern among lawyers and journalists, it cannot yet be said that the vulnerability and uncertainty has given rise to a chilling effect. There were repeated statements from interviewees to the effect that, while aware of and concerned about the laws, journalists are not

being put off by the potential reach of the laws in terms of their approach to investigative work or the cultivation of sources. The resistance to state incursion was seen as strong, at least in the major media outlets where the ethos of the fourth estate is genuinely embraced. In exceptional cases, defiance would be a possibility: “where the journalist is convinced they are in possession of a great story that the public should know about”, both lawyers and journalists generally thought that “an editorial decision could be taken to ignore the exposure under this legislation and in fact publish”. In the general run of stories, there was no indication from journalists that they feel they are being hampered by lawyers or editors. None of the media lawyers thought there had been a chilling effect at this point in time, but there was a clear sense of disquiet and caution amongst them—“a nervousness” about the reach of and potential exposure under counter-terrorism laws—and there was no certainty that the chill will remain in abeyance:

Primarily at the moment it's perception, it's worry, it's uncertainty. ... I wouldn't necessarily put it as high as a chilling effect. ... There's a degree of trepidation I suppose' [on the part of both lawyers and journalists because of the] uncertainty about the laws and how they'll be applied. And that can have a tendency to err on the side of caution, especially when there is stuff that's unclear ... new and untested.

There is not, said another lawyer, a chilling effect but there is “a sense [that when you're] dealing with counter-terrorism laws, of not crossing the line, of not fucking it up”.

## **Sources and Information: Control at the Periphery of the Legal Framework**

Even where experiences were not directly attributable to the existence or application of counter-terrorism legislation, the laws were still seen as an indicator of the state's willingness to restrict the flow of information. They were seen as constituting an important part of the context in which relationships are formed and decisions made. Although the laws were not necessarily being applied, the interviews suggested that counter-terrorism laws and the broader legal framework are nonetheless very much in the minds of sources in the community and the state. As such, the experiences at the periphery of the legal framework are at least as important as those which are affected directly by the laws.

### **INFORMATION FROM THE COMMUNITY**

Journalists reported that Muslim communities tended not to trust the media. The strongest comment was that “the media are seen as proxies for the authorities”. Others tended to think it was a broader sense of marginalisation and distrust of major media organisations which had treated Muslim communities badly. The perception, it was said, is that even if people accepted that the media were not working for the police then it was still thought that some journalists “may look at the police favourably, ... or

their work will be used by the authorities at the end of the day. And there has been a bit of truth in that". Community cautiousness seems justified because it appears the authorities monitor and exploit the way that a person deals with the media. While journalists generally thought their phone calls or emails were not directly monitored, most worked on the basis that their sources' calls would be monitored. There are already instances where journalists' work has been used by the authorities in the prosecution of terrorism offences.<sup>42</sup> Added to this, argued one journalist, the Australian media is, on the whole, "all a bit Anglo" and does not have the base of community contacts that provide a base for the trust in the media that is needed.

Journalists have found it difficult to get information from families or friends of people charged or under investigation. Families and friends of suspects "go to ground" once a person is arrested. Police, it was said, may warn families not to talk to the media in words "along the lines of, 'Well, you know, we've got a lot of power under the new laws.'" As a lawyer put it:

[The journalist] is right. They *do* have a lot of powers. [Families of suspects] are warned by their lawyers not to talk to the media because if they go and say to a television camera, "My brother is a good man and I stand by him", then they run the risk of being prosecuted for supporting terrorism.<sup>43</sup>

Specificity is not required to make a point: "You know we've got these new laws, and you know how strict [they] are. If you don't [do as we say then] we'll consider our options."

Silence has a significant affect on what the public gets to know. When someone will not speak to the media then a journalist's inquiries and analysis will take account of that. If it is not clear why a person refuses to speak then that may lead to adverse judgments:

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<sup>42</sup> The best known in Australia concerns the prosecution of Jack Thomas. After he was acquitted of some terrorism charges, the ABC broadcast interviews they had conducted with him before the trial took place. These interviews became the basis on which a re-trial was successfully sought: *R v Thomas (No 4)* [2008] VSCA 107; S. Neighbour, 'The Convert', *Four Corners*, ABC Television, 27 February 2006, <<http://www.abc.net.au/4corners/content/2006/s1580223.htm>> [Accessed 10 May 2009]; Mark Pearson and Naomi Busst, 'Anti-Terror Laws and the Media after 9/11: Three Models in Australia, New Zealand and the Pacific', *Pacific Journalism Review*, vol. 12, no. 2 (2006), pp. 9-27. In the United Kingdom, see *Shiv Malik v Manchester Crown Court* [2008] EWHC 1362.

<sup>43</sup> The possibility of prosecution may be somewhat alleviated following the Australian government's response to recommendations following reviews of terrorism legislation, though a warning given in unspecific terms may nonetheless make people reluctant to speak. See 'Australian Government responses to the Clarke Inquiry and other counter-terrorism reviews', 23 December 2008, <[http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications\\_AustralianGovernmentresponsestotheClarkeInquiryandothercounter-terrorismreviews-December2008](http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_AustralianGovernmentresponsestotheClarkeInquiryandothercounter-terrorismreviews-December2008)> [Accessed 19 February 2009].

if you ask a question and they don't answer, you might form a different judgment about why they aren't speaking, whether they've got something to hide. It has an impact on the story.

One journalist with significant contacts in Muslim and Arab communities argued that there was a more widespread silencing of opinion, stretching from individual interviews through to general discussion and talkback radio:

I think people were forthcoming before, they were much more vocal. ... I think that people have become much more paranoid now [and] they're not speaking. ... There's a self-censorship.

This, it was said is a cause for concern: "we don't know what their thoughts are because they're not talking any more".

### **INFORMATION FROM THE STATE**

The steadiest stream of information about terrorism comes from the government and its agencies, especially the police. Formal press statements, informal background briefing, and contacts within organisations are all important sources of information. Journalists and lawyers identified problems that affected their ability to get reliable information and, especially, information that can be tested across different sources.

Every journalist interviewed believed that access to information from sources in police and government has become more limited. This was partly, it was thought, because high levels of secrecy surrounding terrorism matters meant that fewer people in government have access to information. However, of much greater concern was that view that institutional sources are very vulnerable to prosecution:

I think [people are] very conscious [of what they are saying and leaking]. I get that broad picture stuff from contacts but people are pretty wary of giving you specific information. ... I think here there is a culture of fear—people see cases like Allan Kessing and that—fear for their own jobs.

Kessing was a public servant in the Customs department who in 2003 wrote an internal report on security problems at Sydney Airport. After being 'buried' for more than two years, the report was leaked to a national newspaper in 2005 with the result that the government spent over \$200 million improving airport security. Kessing has always denied he leaked the report but was charged with doing so. In 2007 he was found guilty and received a nine-month suspended prison sentence.<sup>44</sup> Described as an example of the "ruthless pursuit of whistleblowers and anyone else who contributes to the disclosure of government information", the Kessing matter was referred to often. Journalists and lawyers alike had little doubt that where information adverse to the government was leaked then the leaker

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<sup>44</sup> See generally, 'Strictly Confidential: Information, Secrecy and Government', *Insight*, SBS Television, 25 September 2007 (transcript available on request from <[www.sbs.com.au/insight/archive](http://www.sbs.com.au/insight/archive)>).

would be aggressively pursued. This was contrasted to occasions where it seemed that sensitive or secret information was strategically disclosed to the media; in almost every interview there was a mention of the presence of television cameras (from one organisation only) at a raid by the AFP.<sup>45</sup>

The second major observation concerned the ways that police managed information. As well as attempts to minimise media access to trials and court hearings, there was a perception amongst interviewees that the phrase “operational information” was deliberately employed to enable the government and the police to selectively disclose or withhold information. It was accepted that sometimes these are necessary steps for the authorities to take but there was much cynicism and a view that, too often, the intention was to restrict or manipulate media coverage rather than provide information which would enable a full and fair account in the press. The perceived strategic use of press conferences was heavily criticised. Lawyers were especially critical of police or ministerial statements made between the time a person was arrested and charged, and the time—which is often just hours—the person came before a court to apply for bail. Mohamed Haneef’s barrister, Stephen Keim, has argued that his client was:

subjected to an unrelenting campaign to damage his prospects before any future jury. From the moment of his arrest, law enforcement sources campaigned, albeit anonymously, to destroy his reputation in the community even though they must have been aware that their leaks were, variously, either misleading or simply untrue.<sup>46</sup>

Generally, the police and government approach to the media was seen as “calculated” and it was thought “there is a real, real concern” that there are “layers of spin doctors” involved in the provision of information. A journalist observed that in one matter, “the authorities knew what they had and didn’t have, but didn’t move to correct anything they saw was obviously wrong”. Accordingly, there is great caution about relying on information provided by the police.

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<sup>45</sup> This was the subject of complaint and an investigation which found that ASIO had not authorised any communication with the media by its own officers or those of police agencies, and that there had been no unauthorised disclosure from within ASIO: *Annual Report of the Inspector General of Intelligence and Security 2005-06* (Canberra: Commonwealth of Australia, 2006), pp. 23-4; cf. George Negus, ‘Rob Stary Interview’, *Dateline*, SBS Television, 29 June 2005, <[http://news.sbs.com.au/dateline/rob\\_stary\\_interview\\_130535](http://news.sbs.com.au/dateline/rob_stary_interview_130535)> [Accessed 10 September 2008]; T. Cookes, ‘ASIO Leaks’, *Dateline*, SBS Television, 3 August 2005, <[http://news.sbs.com.au/dateline/asio\\_leaks\\_130554](http://news.sbs.com.au/dateline/asio_leaks_130554)> [Accessed 10 September 2008].

<sup>46</sup> S. Keim, ‘Dr Haneef and Me’, *Alternative Law Journal*, vol. 33, no. 2 (2008), pp. 99-102 at 100 (references omitted). Similar criticisms have been made by criminal lawyer Rob Stary: Cookes, ‘ASIO Leaks’.

## **SCEPTICISM, DISTRUST AND SECURITY**

Police and security agencies face immense difficulties in assessing and addressing security threats and clearly do not want to be seen to fail in these tasks. Journalists and lawyers acknowledged this and saw a direct link between the difficulties and the tendency towards secrecy:

The authorities are very, very wary of being caught short. Not doing enough. ... Take Haneef, he's on his way to the airport, etc ... I think they take that very seriously and there are reasons for that. There is a whole err on the side of caution and [because of that] there is a tendency to keep information secret.

The media criticisms of the state did not, then, turn on the issue of secrecy of itself. Rather, the criticism centred around arguments that the government, police and security authorities have misjudged or responded poorly to security issues in circumstances that suggest secrecy has been either unnecessary or unjustified. The Haneef case was uppermost in the minds of all interviewees given the timing of the interviews, and comments suggest it has done inestimable damage to the trust the media have in the state. It was repeatedly cited as an example of the mismanagement of a prosecution and manipulation of information by government and police.<sup>47</sup> One of the more moderate comments was that it

increase[s] the realm of scepticism when you see that kind of crying wolf going on, so you don't tend to side ... with government claims about the need for all this stuff.

The Report of the Clarke Inquiry is unlikely to settle these doubts: the criticism that documents were "over-classified" in terms of secrecy, the criticism of the Immigration Minister and Department, and the AFP submission that there should be a formal restriction on the release of interview material will not put minds at ease.<sup>48</sup>

But the scepticism was not limited to Haneef. A media lawyer's experience was that there is "a real culture of secrecy" in the offices of the Commonwealth Attorney-General's and Director of Public Prosecutions that goes "way beyond" what is necessary. Journalists echoed this, reporting an "environment of secrecy" in which officials conveyed the sense that "secret information is held which indicates that there is something more than what you have been told". When information is released the view was that

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<sup>47</sup> For example, Chris Merritt states that the AFP handling of the matter makes the organisation look "sly": 'Cynical attempt to fool media', *The Australian*, 30 August 2008. It might be argued that the damage to trust is influenced by, and should be viewed in light of, broader events in the past decade; see generally Clive Hamilton and Sarah Maddison (eds.), *Silencing Dissent* (Sydney: Allen & Unwin, 2007); David Marr, *His Master's Voice: The Corruption of Public Debate under Howard (Quarterly Essay N.o 26)* (Melbourne: Black Inc, 2007).

<sup>48</sup> *Report of the Clarke Inquiry*, pp. 5, 160-161, 195-199, 285-286; see also Andrew Lynch, 'Learning from Haneef', *Inside Story*, 5 February 2009, <<http://inside.org.au/learning-from-haneef/>> [Accessed 19 February 2009].

they have an agenda for making it available. In most of this stuff I just tend to find every bit that comes out, they're dragged kicking and screaming to let it come out.

Another cautioned that the problem when information is released is that not only does it have an agenda, but “you don't know what you're getting—you don't know what agenda's being run”. The tendency to secrecy is damaging because “when things become so secretive and nebulous then reporters—not all, but some—conjure up fictions”. Journalists become vulnerable to off the record briefings, especially by police; if that is the only information that can be obtained and it is difficult to test then that is the information most likely to be published. But when the authorities are shown to have been secretive and to have been wrong then it will inevitably—and rightly—result in a resounding attack on the state.

## Conclusion

The enactment of counter-terrorism laws has been a response driven by security needs. The pursuit of security has seen a significant impact on the ability of the media to obtain information and convey it to the public. In large part, the potential effects of the laws remain far greater than the actual effects. However, although the resilience and robustness of the media persists for the time being, it does not mean that this situation will continue.

The relationship between security and media freedom in this context is not a straightforward one. While law can be vitally important—as the NSI legislation makes clear—the effects on media freedom do not directly correlate with restrictions (or freedoms) that are embodied in legislation. In particular, as the analysis above indicates, information is controlled in ways that are not dependent on the law being applied in a coercive or punitive way. The legislative framework can be seen as an indicator of priorities and approaches to information; it is a contextual beacon that signals and reflects the push for constant caution and secrecy. Indeed, at the periphery of the legal framework—where there are few provisions with direct effect—there appears to be a sweeping attempt to control of information. This sits in contrast with the ways that formal legal mechanisms have not yet had a chilling effect.

Information is controlled not merely by the authority of law, but by interwoven bonds of secrecy and trust. To the extent that control over information is necessary for national security, then these bonds are essential. However, there is much to suggest they are in danger of being loosened. It might be fairly said that the media will not be trusted by the state unless it can prove itself to have standards and practices that warrant that trust, but it is not a crisis of trust in the media that has given rise to concerns; it is a diminution of trust in the state that is troubling. The Haneef matter is emblematic of the dangers and problems but, as the interviews with media professionals indicate, closure and control and of information is pervasive. This is deeply

troubling; when events cast doubt upon the proposition that those who keep things secret can be trusted, then it is not merely the balance of security and media freedom which rests precariously, but security itself.

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**TRUTH, JUSTICE, AND THE MEDIA:  
AN ANALYSIS OF THE PUBLIC CRIMINAL TRIAL**

*Jonathan M. Remshak*

*The fact that media coverage has transformed events such as professional sports contests into a framework designed to accommodate that coverage does not mean that the First Amendment requires criminal trials to undergo the same transformation.<sup>1</sup>*

**I. INTRODUCTION**

In the wake of the information superhighway,<sup>2</sup> the First Amendment guarantee of freedom of the press<sup>3</sup> and the Sixth Amendment right to a fair trial<sup>4</sup> have increasingly come into conflict. This conflict has become most apparent in highly publicized trials where the media<sup>5</sup> has been drawn to the case either as a result of the prominence of the defendant or victim, or due to the unique or sensational nature of the alleged crime. The fundamental tension, therefore, between a free press and a fair trial is found in the right

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<sup>1</sup>KNPX Broadcasting Co. v. Arizona Superior Ct., 459 U.S. 1302, 1306-07 (1982).

<sup>2</sup>The term "information superhighway" was first used by then-Senator Al Gore in 1990 in reference to the emerging high-speed global communications network capable of carrying voice, data, video, and other services around the world. See Al Gore, *Networking the Future: We Need a National "Superhighway" for Computer Information*, WASH. POST, July 15, 1990, at B3. These services, when in full use, will utilize satellite, copper cable, fiber optics, and cellular telecommunications to integrate all communication into a single network. *Id.*

<sup>3</sup>The First Amendment, in pertinent part, provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press." U.S. CONST. amend. I.

<sup>4</sup>The Sixth Amendment, in pertinent part, provides: "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." U.S. CONST. amend. VI.

<sup>5</sup>The terms "press" and "media" will be used interchangeably throughout this Comment to refer to all enterprises involved in reporting, printing, publishing, or broadcasting news, unless the context otherwise suggests.

of the accused to a trial by an impartial jury and the right of the media, as "surrogate for the public,"<sup>6</sup> to gather information during criminal proceedings. This tension often erupts into conflict when the media, in its effort to diligently gather news, creates prejudicial publicity against the defendant. Widespread pretrial and trial publicity often results in the exposure of inadmissible, misleading, or inaccurate evidence to potential jurors; a diminished ability to select an impartial jury; the intimidation of witnesses; and the potential for biased verdicts due to jurors' fear of criticism or alienation from others who have watched the proceedings through the eye of the media.

The problems presented by the free press-fair trial conflict are not new and have continuously emerged throughout the course of American legal history. For example, the trial of Aaron Burr in 1807 presented Chief Justice Marshall with the acute problem of selecting an unbiased jury due to newspaper accounts and heightened discussion regarding the case in the area of Virginia from which the jurors were selected.<sup>7</sup> Similarly, in 1934, when Bruno Hauptmann went to trial for the kidnapping and murder of the Lindbergh baby, the press went with him and created what many described as a "carnival atmosphere" in the courtroom.<sup>8</sup> Most recently, the world was

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<sup>6</sup>*Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 572 (1980). The Court noted that prior to the press, cinema, and electronic media, attendance at court proceedings was a common pastime providing real life drama not otherwise available to the public. *Id.* (citing 6 JOHN HENRY WIGMORE, EVIDENCE § 1834, at 436 (J. Chadbourn rev. 1976)). As time passed, however, and the media replaced the courtroom as a forum of entertainment, information regarding trials has primarily been acquired by print and electronic media rather than by firsthand observation or word of mouth. *Id.*

<sup>7</sup>*United States v. Burr*, 25 F. Cas. 49 (C.C. Va. 1807) (No. 14,692g). Chief Justice Marshall conducted an extensive voir dire to find jurors who had not been biased by the deluge of pretrial publicity. *Id.* On this matter, the Court rendered a substantial opinion on the purposes of voir dire and the standards to be applied stating that "[t]he jury should enter upon the trial with minds open to those impressions which the testimony and the law of the case ought to make, not with those preconceived opinions which will resist those impressions." *Id.* at 50.

<sup>8</sup>*State v. Hauptmann*, 180 A. 809 (N.J.L. 1935), *cert. denied*, 296 U.S. 649 (1935). The members of the press in the courtroom included 141 newspaper reporters and photographers, 125 telegraph operators, and 40 messengers who ran about during the course of the proceedings. Albert H. Robbins, *The Hauptmann Trial in the Light of English Criminal Procedure*, 21 A.B.A. J. 301, 304 (1935) (citing an unnamed New York newspaper (Jan. 9, 1935)). In addition, newsreel footage of the proceedings, taken contrary to the judge's order which limited filming to trial recesses, appeared in newsreel theaters throughout the country. J. EDWARD GERALD, NEWS OF CRIME: COURTS AND PRESS IN CONFLICT 152 (1983). A special American Bar Association committee set up

captivated by the murder trial of Orenthal James ("O.J.") Simpson, as the speed of communication and the pervasiveness of the modern news media were able to inundate a worldwide audience with virtually instantaneous updates of the proceedings.<sup>9</sup>

This Comment will focus on the history and debate surrounding the conflict between the right to a free press and the right of the accused to a fair trial. Part II will trace the history and development of the public trial, with a particular focus on the influence of English common law heritage on the adoption of the Sixth Amendment.<sup>10</sup> Part III will discuss the constitutional analysis adopted by the Supreme Court of the United States as it has attempted to balance the tension between these two fundamentally important, but often conflicting rights.<sup>11</sup> Part IV will examine the Court's approaches to the free press-fair trial conflict in light of what has become the most publicized trial in history, the O.J. Simpson murder trial.<sup>12</sup> Finally, Part V will conclude that it is time once again to reevaluate the role of cameras in the courtroom based upon the analysis of this ongoing debate.<sup>13</sup>

## II. THE HISTORICAL DEVELOPMENT OF THE RIGHT OF THE ACCUSED TO A PUBLIC CRIMINAL TRIAL

The right of the accused to a public criminal trial has its roots in

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after the trial noted that it was "the most spectacular and depressing example of improper publicity and professional misconduct ever presented to the people of the United States in a criminal trial." *Report of the Special Committee on Cooperation Between Press, Radio and Bar, as to Publicity Interfering with Fair Trial of Judicial and Quasi-Judicial Proceedings*, 62 A.B.A. REP. 851, 861 (1937).

<sup>9</sup>People v. Simpson, No. BA097211 (Cal. Super. Ct. 1995); see also *infra* notes 120-27 and accompanying text (discussing the impact of media coverage on the worldwide audience and how it developed their perception of the double murder trial of American football great O.J. Simpson in what has been labeled the "trial of the century").

<sup>10</sup>See *infra* notes 14-29 and accompanying text.

<sup>11</sup>See *infra* notes 30-114 and accompanying text.

<sup>12</sup>See *infra* notes 115-30 and accompanying text.

<sup>13</sup>See *infra* notes 131-32 and accompanying text.

English common law.<sup>14</sup> Study of that heritage, however, reveals that the tradition of the public trial evolved not as right of the accused, but rather as an inescapable concomitant of trial by jury and the common law practice of conducting all criminal proceedings in public.<sup>15</sup> This common law tradition was perceived as a means of protecting the integrity of the trial and a guard against the partiality of the court.<sup>16</sup>

The origins of the proceedings that have become the modern criminal trial predate reliable historical records, but can be traced back to the early Anglo-Saxon criminal proceedings which were "open-air meetings of the freemen."<sup>17</sup> Conducted by compurgation and ordeal, these proceedings were attended by the freemen of the community who were called upon to render a judgment.<sup>18</sup> This Anglo-Saxon tradition of conducting judicial proceedings persisted after the Norman conquest when the Norman kings introduced the Frankish system of conducting inquest by means of a jury to the English.<sup>19</sup> Thereafter, wherever royal justice was introduced, the jury system accompanied it, and both spread rapidly throughout England after 1066.<sup>20</sup> The rapid spread of royal courts ultimately led to the replacement of older methods of trial, but the older courts' procedural devices, including public trial, were maintained.<sup>21</sup> Thus, the common law from its inception was wedded to the Anglo-Saxon tradition of publicity which was

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<sup>14</sup>In re Oliver, 333 U.S. 257, 266 (1948) ("This nation's accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage.").

<sup>15</sup>Gannett Co., Inc. v. DePasquale, 443 U.S. 368, 418-32 (1979) (Blackmun, J., concurring in part, dissenting in part).

<sup>16</sup>*Id.* at 428 (Blackmun, J., concurring in part, dissenting in part).

<sup>17</sup>FREDERICK POLLOCK, THE EXPANSION OF THE COMMON LAW 140 (1904).

<sup>18</sup>1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 7-24 (4th ed. 1927).

<sup>19</sup>1 *id.* at 316.

<sup>20</sup>1 *id.*

<sup>21</sup>1 *id.* at 317. "The jury trial was simply substituted for [older methods], and was adapted with as little change as possible to its new position." 1 *id.* This substitution served the Crown's interests by "enlarging the king's jurisdiction and bringing well-earned profit in fines and otherwise to the king's exchequer, and the best way of promoting those ends was to develop the institution, or let it develop itself, along the lines of least resistance." POLLACK, *supra* note 17, at 40.

strengthened by the hegemony of the royal courts in their administration of justice.<sup>22</sup>

By the seventeenth century, the concept of a public trial was firmly established under the common law.<sup>23</sup> Despite the public nature of criminal proceedings at that time, publicity was not associated with the rights of the accused, but rather with the effectiveness of the trial process.<sup>24</sup>

<sup>22</sup>POLLOCK, *supra* note 17, at 51.

<sup>23</sup>Criminal trials were conducted "openlie in the presence of the Judges, the Justices, the enquest, the prisoner, and so manie as will or can come so neare as to heare it, and all depositions and witnesses given aloude, that all men may heare from the mouth of the depositories and witnesses what is saide." THOMAS SMITH, *DE REPUBLICA ANGLORUM* 101 (L. Alston ed., 1972).

<sup>24</sup>The practice of conducting a public trial was an established feature of English justice long before the defendant was afforded even the most rudimentary rights. 1 JAMES F. STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 350 (1883). Prior to the eighteenth century, the accused was kept secretly in confinement until his trial and could not prepare for his defense. 1 *id.* Furthermore, the accused was provided with no notice beforehand of the evidence against him, no counsel was provided before or at the trial, he was not necessarily afforded the right to confront witnesses, nor did he have the right to call witnesses on his own behalf. 1 *id.*

Identifying the function of publicity at common law, Blackstone discussed the open-trial requirement, not in terms of individual liberties, but in terms of the effectiveness of the trial process. 3 WILLIAM BLACKSTONE, *COMMENTARIES* 373 (W. Jones ed., 1916). In particular, Blackstone recognized that publicity was an essential feature of common law trial practice in regard to ascertaining truth and preventing injustice. 3 *id.* Regarding the role of the public trial in ascertaining the truth, Blackstone noted that:

[O]pen examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth than private and secret examination taken down in writing . . . [because] a witness may frequently depose that in private which he will be ashamed to testify in a public and solemn tribunal.

3 *id.* Blackstone also recognized that publicity was an effective check on judicial abuse because:

[A]ll [the] evidence is to be given in open court, in the presence of the parties, their attorneys, the counsel and all bystanders, and before the judge and jury; each party having liberty to except to its competency, which exceptions are publicly stated, and by the judge are openly and publicly allowed or disallowed, in the face of the country: which must curb any secret bias or partiality that might arise in his own breast.

3 *id.* at 372.

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Similarly, Bentham noted that:

The advantages of publicity are neither inconsiderable nor unobvious. In the character of a security, it operates in the first place upon the deponent; and, in a way not less important, though less immediately relevant to the present purpose, upon the judge.

1 JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* 522 (1827). Bentham proffered that publicly held trials served as an essential check on the judicial process while maintaining the integrity of the system in the eyes of the citizens for whom it operates. 1 *id.* at 522-25. In regard to the examination of or deposition of witnesses, Bentham observed that the publicity operated as a check upon mendacity and incorrectness. 1 *id.* Elaborating on this, Bentham wrote:

Environed, as he sees himself, by a thousand eyes, contradiction, should he hazard a false tale, will seem ready to rise up in opposition to him from a thousand tongues; many a face, and every unknown one, presents to him a possible source of detection, from whence the truth he is struggling to suppress, may, through some unsuspected channel, burst forth to his confusion.

1 *id.* at 522-23. Bentham also noted that publicity serves as a security for the correctness of the registration and recordation of evidence in that those present during the proceedings may act as auditors capable of indicating the existence of error, whether it be by design or inadvertence, and a means by which it may be corrected. 1 *id.* at 523. Shifting to the role of publicity in maintaining judicial integrity, Bentham asserted that publicity served as a check against misdecision by restraining the judge from active partiality and impropriety. 1 *id.* Bentham contended that under the watchful eye of the public, judges would be more apt to avoid unrighteous conduct that would jeopardize their position within the community. 1 *id.* Similarly, Bentham explained that publicity served to protect the reputation of the judge by shielding him from false and malicious accusations regarding his conduct on the bench. 1 *id.* at 524-25. Finally, Bentham cited the educative impact of the public trial as a collateral, yet extensively important advantage. 1 *id.* at 525. Public trials, Bentham opined, served as a "school of the highest order, where the most important branches of morality are enforced," and where the citizens "are permitted to learn of the state of the laws on which their fate depends." 1 *id.*

Wigmore later wrote that:

[Publicity's] operation in tending to improve the quality of testimony is twofold. Subjectively, it produces in the witness's mind a disinclination to falsify . . . . Objectively, it secures the presence of those who by possibility may be able to furnish testimony in chief or to contradict falsifiers and yet may not have been known beforehand to the parties to possess any information.

6 JOHN HENRY WIGMORE, *EVIDENCE* § 1834, at 435-36 (J. Chadbourn rev., 1976). Furthermore, Wigmore noted that, independent of evidential service, publicity served three

Nevertheless, the trial, without exception, remained public.

The English common law practice of conducting public judicial proceedings was, thus, rooted in a long and unbroken tradition.<sup>25</sup> Reviewing this tradition, there is no evidence that criminal trials of any kind were ever conducted in private at common law, either at the request of the defendant or over his objection.<sup>26</sup> It was out of this tradition that the practice of conducting judicial criminal proceedings in public was firmly established throughout the American colonies.<sup>27</sup> Following the colonies

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other essential purposes. 6 *id.* at 438. First, publicity creates a "wholesome effect" upon all officers of the court in which each participant acting under the watchful eye of the public is "more strongly moved to a strict conscientiousness in the performance of duty." 6 *id.* Secondly, Wigmore opined, persons not called as parties to suits before the court, who may nevertheless be affected by pending litigation, have the opportunity to learn if they are in fact affected and protect themselves accordingly. 6 *id.* Finally, Wigmore asserted, public attendance provides a materially advantageous educative effect in which "[n]ot only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secret." 6 *id.*

<sup>25</sup>POLLACK, *supra* note 17, at 31-32. Writing in regard to the role of publicity in criminal procedure, Pollock noted, "Here we have one tradition, at any rate, which has persisted through all changes." *Id.*; see also E. JENKS, *THE BOOK OF ENGLISH LAW* 73-74 (6th ed. 1967) ("[O]ne of the most conspicuous features of English justice, that all judicial trials are held in open court, to which the public have free access, . . . appears to have been the rule in England from time immemorial.").

<sup>26</sup>1 HOLDSWORTH, *supra* note 18, at 156 nn.5 & 7. Holdsworth contended that not even the Court of the Star Chamber, which has traditionally been associated with secrecy, conducted hearings in private. 1 *id.*

<sup>27</sup>There is no evidence that any colonial court conducted criminal trials behind closed doors or recognized the right of the accused to compel a private trial. Several of the colonies explicitly recognized the openness of trials as part of the fundamental law of the colony. The 1677 Concessions and Agreements of West New Jersey provided:

That in all publick courts of justice for tryals of causes, civil or criminal, any person or persons, inhabitants of the said Province may freely come into, and attend the said courts, and hear and be present, at all or any such tryals as shall be there had or passed, that justice may not be done in a corner nor in any covert manner.

1 BERNARD SCHWARTZ, *THE BILL OF RIGHTS: A DOCUMENTARY HISTORY*, 129 (1971) (quoting *CONCESSIONS AND AGREEMENTS OF WEST NEW JERSEY (1677)*, ch. XXIII). Similarly, The Pennsylvania Frame of Government of 1682 provided "[t]hat all courts shall be open . . ." 1 *id.* at 140. This language was later reaffirmed in § 26 of the Pennsylvania Constitution of 1776. 2 BERNARD SCHWARTZ, *A DOCUMENTARY HISTORY*,

declaration of independence from England, the common law practice of conducting trials in public remained implicit<sup>28</sup> as the concept of the public trial evolved into a right of the accused through the adoption of the Sixth Amendment.<sup>29</sup>

### III. RECONCILING THE DEBATE: THE COURT'S ATTEMPT TO BALANCE THE RIGHT TO A FREE PRESS AND THE RIGHT TO A FAIR TRIAL

The Framers of the United States Constitution did not distinguish between the First Amendment and Sixth Amendment, so as to deem one superior to the other,<sup>30</sup> nor did they seek to address the inherent conflict that existed between the right to a free press and the right of the accused to a public trial by an impartial jury.<sup>31</sup> Instead, the courts have been forced to reconcile these competing interests and create a framework for balancing

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271 (1971).

<sup>28</sup>See *In re Oliver*, 333 U.S. 257, 266-67 (1948).

<sup>29</sup>The Pennsylvania Declaration of Rights of 1776 was the first provision to speak of the public trial as a right of the accused, providing that "in all prosecutions for criminal offences, a man hath a right to . . . a speedy public trial." 2 SCHWARTZ, *supra* note 27, at 265. The Pennsylvania provision was borrowed almost verbatim from the Virginia Declaration of Rights, adopted earlier that year, except for the addition of the word "public." 2 *id.* at 235. When read in conjunction with the Pennsylvania Constitution of 1776, it is apparent that Pennsylvania did not intend to depart from the implicit right to a public trial, but merely sought to establish this right as a right of the accused. See 2 *id.* at 271. Although the majority of the states followed the language of the Virginia Declaration of Rights, Vermont adopted the Pennsylvania language by adding the word "public" to the speedy trial provision. 2 *Id.* at 323.

At the time the Sixth Amendment was being debated, several states proposed amendments to Congress in accordance with the Virginia Declaration of Rights, with only New York mentioning a "public" trial. E. DUMBAULD, *THE BILL OF RIGHTS* 173-205 (1957). It has been suggested that Congress, modeling the proposed amendments on the provisions of the Virginia Declaration of Rights, merely did what Pennsylvania had done in 1776 by adding the word "public" with no intention of departing from the common law practice of open trials. *Id.* This is further supported by the lack of debate or comment on the issue at the time of its adoption. See *infra* note 92 and accompanying text (discussing the Sixth Amendment right to a public trial as a right of the accused).

<sup>30</sup>*Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976).

<sup>31</sup>*Id.* at 547.

the rights of the accused and the rights of the media.<sup>32</sup> The courts have performed this function throughout the course of our legal history, but have faced their most demanding challenges only within the last thirty years as they have had to contemplate them within the context of the communication explosion associated with the development of the electronic media.

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<sup>32</sup>See generally *Mu'Min v. Virginia*, 500 U.S. 415 (1991) (finding that trial judges need not conduct content questioning of jurors about the specific content of news reports to which they had been exposed); *Press-Enterprise Co. v. Superior Ct.*, 478 U.S. 1 (1986) (holding that the public and press have a First Amendment right of access to preliminary hearings); *Press-Enterprise Co. v. Superior Ct.*, 464 U.S. 501 (1984) (asserting that the First Amendment implicitly guarantees the press a right to attend voir dire); *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596 (1982) (ruling that statutes requiring unconditional closure of criminal trials are unconstitutional absent a "compelling government interest"); *Chandler v. Florida*, 449 U.S. 560 (1981) (concluding that a state could provide for radio, television and still photographic coverage of a criminal trial for public broadcast notwithstanding the objection of the defendant); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 (1980) ("Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public."); *Gannett v. DePasquale*, 433 U.S. 368 (1979) (stating that neither the public nor the press have a Sixth Amendment right to attend pretrial hearings); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (strictly limiting a trial judge's ability to issue prior restraints on trial publicity); *Murphy v. Florida*, 421 U.S. 794 (1975) (noting that juror exposure to information about a defendant does not presumptively deprive the defendant of due process); *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (outlining procedures trial courts can take to protect jurors from prejudicial publicity); *Estes v. Texas*, 381 U.S. 532 (1965) (declaring that in-court telecasts of criminal proceedings deny the defendant due process); *Rideau v. Louisiana*, 373 U.S. 723 (1963) (holding that the televising of a confession by the defendant constitutes a denial of due process by making it impossible to select an impartial jury in the area of viewers); *Irvin v. Dowd*, 366 U.S. 717 (1961) (suggesting that continued massive pretrial publicity may constitute evidence that the entire jury has been affected to the degree that the credibility of all jurors' honest assertions of impartiality are constitutionally undermined); *Stroud v. United States*, 251 U.S. 15 (1919) (upholding the exclusion of citizens from a certain county from serving as jurors as an alternative to a change of venue); *Holt v. United States*, 218 U.S. 245 (1910) (explaining that jurors are not necessarily unconstitutionally prejudiced after reading about a trial); *Simmons v. United States*, 142 U.S. 148 (1891) (determining that trial judges have the authority to discharge a jury that has been sufficiently exposed to evidence outside of a trial so that it cannot render an unprejudiced verdict); *Hopt v. Utah*, 120 U.S. 430 (1887) (stating trial judges are competent to determine the existence of unconstitutional prejudice by observing the demeanor of jurors who declare impartiality); *Reynolds v. United States*, 98 U.S. 145 (1878) (establishing guidelines governing the process for determining a juror's partiality); *United States v. Burr*, 25 Fed. Cas. 49 (C.C. Va. 1807) (No. 14,692g) (discussing the purpose of voir dire and the selection of impartial jurors).

A. CAMERAS IN THE COURTROOM: *ESTES V. TEXAS*

The Court's first attempt to reconcile the free press-fair trial debate within the context of the electronic age was in *Estes v. Texas*.<sup>33</sup> In *Estes*, the Court addressed the issue of in-court broadcast coverage of courtroom proceedings.<sup>34</sup> Although the conviction was reversed on due process grounds, the Court was widely split in its reasoning and failed to provide a conclusive standard to identify due process limitations on broadcast coverage in the courtroom.<sup>35</sup>

Writing for the Court, Justice Clark began with the proposition that the Sixth Amendment right to a public trial was designed to ensure that the accused be treated fairly and not be unjustly condemned.<sup>36</sup> While noting that

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<sup>33</sup>381 U.S. 532 (1965).

<sup>34</sup>*Id.* The petitioner, Billie Sol Estes, asserted that the televising and broadcasting of his trial deprived him of his right under the Fourteenth Amendment to the due process of law. *Id.* Estes, a much-publicized financier, was indicted in Reeves County, Texas for obtaining property through false pretenses. *Id.* at 552 (Warren, C.J., concurring). The case, however, was transferred to Smith County, Texas, 500 miles away due to the massive pretrial publicity. *Id.* Despite the change in venue, the courtroom was filled with newspaper reporters, cameramen, television cameras and spectators at the commencement of trial. *Id.* Taking issue with the presence and conduct of the media, Estes filed a motion with the court to exclude television, motion pictures, and still photography of the trial. *Id.* The Court denied the motion, but placed limitations on the extent of coverage that would be allowed at trial. *Id.* at 554 (Warren, C.J., concurring). The District Court for the Seventh Judicial District of Texas convicted Estes of swindling. *Id.* at 535 (Clark, J., plurality). The conviction was upheld by the Texas Court of Criminal Appeals. *Id.*

<sup>35</sup>In the five to four decision, the *Estes* Court produced six separate opinions. The majority opinion was split three ways: Justice Clark delivered the opinion of the Court; Chief Justice Warren, joined by Justices Douglas and Goldberg, delivered a concurring opinion; and Justice Harlan rendered a separate concurring opinion with reservation. The dissent was also split three ways, with opinions authored by Justices Stewart, White, and Brennan; Justice Stewart's dissent was joined by Justices Black, Brennan, and White; Justice White's dissent was joined by Justice Brennan; and Justice Brennan authored a separate dissent.

<sup>36</sup>*Id.* at 538-39 (Clark, J., plurality). Justice Clark noted:

The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the *lettre de cachet*. . . . [The Sixth Amendment] guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution.

the free press had been a powerful catalyst in awakening public interest in governmental affairs and that maximum freedom must be allowed to facilitate this function, Justice Clark concluded that the exercise of such must necessarily be subject to restrictions designed to preserve absolute fairness in the judicial process.<sup>37</sup> Justice Clark further explained that, while all members of the press are allowed access to courtroom proceedings and are plainly free to report whatever occurs in open court through their respective media, their presence should not unduly strain the judicial goal of fairness.<sup>38</sup> The Justice opined that television coverage of courtroom proceedings did not contribute to the ascertainment of truth, but rather presented numerous situations in which it might cause actual unfairness.<sup>39</sup> Finally, Justice Clark noted

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*Id.* at 539 (Clark, J., plurality) (quoting *In Re Oliver*, 333 U.S. 257, 268-70 (1948)).

<sup>37</sup>*Id.* The Justice adopted the position offered in the *amici curiae* brief of the National Association of Broadcasters and the Radio Television News Directors Association that the primary concern must be the proper administration of justice; that the life or liberty of an individual should not be jeopardized by the actions of the media; and that the due process requirements of the Fifth and Fourteenth Amendments and the provisions of the Sixth Amendment require procedures designed to assure a fair trial. *Id.* at 540 (Clark, J., plurality) (citation omitted).

<sup>38</sup>*Id.* at 540-44 (Clark, J., plurality). Justice Clark noted that although the press, as members of the public, are allowed access to the courtroom, they are not entitled to disrupt the atmosphere essential to the preservation of fairness. *Id.* at 540 (Clark, J., plurality). The newspaper reporter, therefore, is not allowed to bring his typewriter into the courtroom, just as the television reporter may not bring his camera into the courtroom until advances permit such reporting without their present hazards to a fair trial. *Id.*

<sup>39</sup>Justice Clark articulated several concerns about television coverage and its potential to cause unfairness during criminal proceedings. *Id.* at 545-50 (Clark, J., plurality). First, the televising of the proceedings could have a prejudicial impact upon the jurors. *Id.* at 545 (Clark, J., plurality). The very fact that a trial is to be televised creates a public interest in the details surrounding it, thus tainting prospective jurors with an increased chance of bias as to the accused's guilt or innocence prior to entering the jury box. *Id.* The resulting pretrial publicity and televising of jurors also subjects jurors to the fear of criticism and alienation from others who watched the proceedings through the eye of the media and reached opposite conclusions. *Id.* Finally, there is the potential for jurors to become transfixed on the camera rather than on the testimony presented before them. *Id.* at 546 (Clark, J., plurality).

Second, the quality of testimony could be impaired. *Id.* at 547 (Clark, J., plurality). In many cases, the witness's demeanor will be altered as the camera may cause some to become frightened, others to become embarrassed, and yet others to become cocky. *Id.* Testimony will also have a greater potential of becoming distorted as witnesses have the ability to watch each others testimony and shape their testimony to conform with that of prior witnesses. *Id.* Lastly, there is the problem of reluctant witnesses who refuse

that the ever-advancing techniques of electronic communication and the adjustment of the public to it may resolve the hazards of courtroom telecasts, but until that time the Court must consider the facts as they exist, and accordingly, concluded that the telecast of criminal proceedings violated the accused's right to due process.<sup>40</sup>

Concurring with Justice Clark's opinion, Chief Justice Warren, joined by Justices Douglas and Goldberg, agreed that the televising of criminal proceedings was inherently a denial of due process, but wrote separately to emphasize that the Court's condemnation of televised criminal trials was not based on generalities or abstract fears.<sup>41</sup> The Chief Justice based his conclusion on three grounds: the televising of trials diverts the trial from its proper purpose as a result of its inevitable impact on the participants; it gives the public the wrong impression regarding the purpose of trials, thereby detracting from the dignity and reliability of trials in general; and it singles out certain defendants and subjects them to prejudice not experienced by other defendants.<sup>42</sup> Moreover, the Chief Justice expressed a deep concern that the public, by watching the trial on television, would equate it with other forms of entertainment regularly seen on television, thus diminishing the integrity of the judicial process.<sup>43</sup> Concluding, Chief Justice Warren

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to subject themselves to the scrutiny of the media. *Id.* If such witnesses fail to appear the discovery of truth will be significantly frustrated. *Id.*

Third, the televising of proceedings would place additional responsibilities on the trial judge. *Id.* at 548 (Clark, J., plurality). The attention of the judge would necessarily be divided between making certain that the accused receives a fair trial and supervising the broadcast coverage. *Id.* There also would be the possibility that the judge could be adversely influenced through the presence of television, particularly where the judge is selected at the ballot box. *Id.*

Finally, cameras could have an adverse impact on the defendant. *Id.* at 549 (Clark, J., plurality). There is potential for the defendant, as with any other participant, to become distracted by the camera and lose his ability to concentrate on the proceedings which for some hold the balance between life and death. *Id.*

<sup>40</sup>*Id.* at 552 (Clark, J., plurality).

<sup>41</sup>*Id.* at 552 (Warren, C.J., concurring) The Chief Justice proffered that "this case presents a vivid illustration of the inherent prejudice of televised criminal trials and supports our conclusion that this is the appropriate time to make a definitive appraisal of television in the courtroom." *Id.*

<sup>42</sup>*Id.* at 565 (Warren, C.J., concurring).

<sup>43</sup>*Id.* at 571 (Warren, C.J., concurring). The Chief Justice expressed a fear that should the television industry become an integral part of the criminal justice system the public would attribute the shortcomings of the industry to the trial process itself, particularly those

reiterated that the trial is a public event, but noted that the guarantee of the public trial confers no special benefit on the press.<sup>44</sup>

Justice Harlan cast the necessary fifth vote to reverse Estes' conviction. While joining in the Court's opinion, Justice Harlan did so, subject to the reservations expressed in the concurrence.<sup>45</sup> The Justice stopped short of adopting Chief Justice Warren's position that the televising of trials was inherently unconstitutional, but did agree that the facts supported the Court's opinion that Estes' right to fair trial, as guaranteed by the Due Process Clause, was violated.<sup>46</sup> Justice Harlan continued by noting

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associated with commercialization. *Id.* at 574 (Warren, C.J., concurring). The television industry, Chief Justice Warren argued, might go so far as to provide expert commentary on the trial and anticipate potential legal strategies to compensate for what it may consider insufficiently dramatic segments of the trial. *Id.* at 572 (Warren, C.J., concurring). Furthermore, the Chief Justice reasoned that as television became more accepted in the courtroom more sacrifices would have to be made to accommodate the media, including alterations in the layout of the courtroom. *Id.* The resulting partnership created between the media and trial judges to stage criminal proceedings, Chief Justice Warren concluded, would pose a serious threat to the fairness, dignity and integrity of the legal system not only for those participating in the televised trials, but also those who observe and later become trial participants. *Id.* at 573-74 (Warren, C.J., concurring).

<sup>44</sup>*Id.* at 583-86 (Warren, C.J., concurring). In summary, Chief Justice Warren wrote, "On entering that hallowed sanctuary, where the lives, liberty, and property of people are in jeopardy, television representatives have only the rights of the general public, namely to be present, to observe the proceedings, and thereafter, if they choose, to report them." *Id.* at 586 (Warren, C.J., concurring).

<sup>45</sup>*Id.* at 587 (Harlan, J., concurring with reservation).

<sup>46</sup>*Id.* While concluding that there was no constitutional requirement that television be allowed in the courtroom, the Justice opined that considerations against allowing television in the courtroom during notorious criminal trials, such as this one, so far outweighed the countervailing factors advanced in its support that such a holding was required. *Id.* Recognizing that the right of "public trial" is not one belonging to the public, but rather one belonging to the accused, Justice Harlan explained:

A public trial implies only that the court must be open to those who wish to come, sit in the available seats, conduct themselves with decorum, and observe the trial process. It does not give anyone a concomitant right to photograph, record, broadcast, or otherwise transmit the trial proceedings to those members of the public not present, although to be sure, the guarantee of public trial does not of itself prohibit such activity.

...  
 ... The rights to print and speak, over television as elsewhere, do

that the impact of cameras in the courtroom would vary according to the particular case involved because the effect on the accused's constitutional rights would naturally vary from case to case.<sup>47</sup> The Justice, however, was unprepared to say that the constitutional issue should necessarily turn upon the nature of the particular case involved, but rather suggested that the issue undergo further examination and proceed on a case by case basis.<sup>48</sup> Nevertheless, Justice Harlan concluded that, because televised trials possess capabilities of interfering with the even course of the judicial process, they should be constitutionally banned.<sup>49</sup>

Writing in dissent, Justice Stewart, joined by Justices Black, Brennan, and White, began by flatly rejecting the majority's contention that the circumstances of the trial led to a denial of Estes' Fourteenth Amendment rights, but agreed that the use of cameras in the courtroom was an extremely

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not embody an independent right to bring the mechanical facilities of the broadcasting and printing industries into the courtroom. Once beyond the confines of the courthouse, a news-gathering agency may publicize, within wide limits, what its representatives have heard and seen in the courtroom. But the line is drawn at the courthouse door; and within, a reporter's constitutional rights are no greater than those of any other member of the public. Within the courthouse the only relevant constitutional consideration is that the accused be accorded a fair trial. If the presence of television substantially detracts from that goal, due process requires that its use be forbidden.

*Id.* at 588-89 (Harlan, J., concurring with reservation).

<sup>47</sup>*Id.* at 590 (Harlan, J., concurring with reservation).

<sup>48</sup>*Id.* at 590-91 (Harlan, J., concurring with reservation). Justice Harlan noted that the opinion of the Court could not necessarily go farther than the issues presented in this case, as only four members of the majority who unreservedly joined the Court's opinion would resolve the issue in the much broader sense of a *per se* constitutional rule at that time. *Id.* at 591 (Harlan, J., concurring with reservation).

<sup>49</sup>*Id.* at 596 (Harlan, J., concurring with reservation). Justice Harlan wrote:

We should not be deterred from making the constitutional judgment which this case demands by the prospect that the day may come when television will have become so commonplace an affair in the daily life of the average person as to dissipate all reasonable likelihood that its use in courtrooms may disparage the judicial process. If and when that day arrives the constitutional judgment called for now would of course be subject to re-examination in accordance with the traditional workings of the Due Process Clause.

*Id.* at 595-96 (Harlan, J., concurring with reservation).

extremely unwise policy.<sup>50</sup> The Justice, however, refused to escalate this personal view into a *per se* constitutional rule, citing the record and the absence of any circumstances attending the limited coverage of the trial which resulted in the denial of any right guaranteed by the Constitution.<sup>51</sup> Expressing concern over the majority's suggestion that there are limitations upon the public's right to know what goes on within the courtroom, Justice Stewart asserted that freedom of discussion should be given the widest range where there is no disruption of justice.<sup>52</sup> Accordingly, the dissent held that,

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<sup>50</sup>*Id.* at 601 (Stewart, J., dissenting). Justice Stewart noted that, in its present state, televised coverage of court proceedings was extremely unwise as it "invites many constitutional risks, and it detracts from the inherent dignity of a courtroom." *Id.*

<sup>51</sup>*Id.* at 601-02. (Stewart, J., dissenting). The Justice explained:

We deal here with matters subject to continuous and unforeseeable change - the techniques of public communication. In an area where all the variables may be modified tomorrow, I cannot at this time rest my determination on hypothetical possibilities not present in the record of this case. There is no claim here based upon any right guaranteed by the First Amendment. But it is important to remember that we move in an area touching the realm of free communication, and for that reason, if for no other, I would be wary of imposing any *per se* rule which, in the light of future technology, might serve to stifle or abridge true First Amendment rights.

*Id.* at 603-04 (Stewart, J., dissenting).

Citing the *amicus curiae* brief filed by the American Bar Association, Justice Stewart acknowledged that televised coverage of courtroom proceedings posed substantial risks, including: tainting the potential jury pool through the coverage of pre-trial hearings and motions from which the jury would normally be excluded; exposing jurors to inadmissible evidence; distorting the jurors' perspective of the proceedings as a result of rebroadcasts selected for their news value rather than evidentiary purposes; subjecting jurors to the pressure and opinions of television-watching family, friends, and strangers; and raising the jurors to celebrity status which in turn would inhibit their ability to render a fair, unbiased judgment. *Id.* at 612-13 (Stewart, J., dissenting). The Justice was quick to point out, however, that "none of these things happened or could have happened in this case" as the jurors were completely insulated from the press and members of the public who did see such telecasts. *Id.* at 613 (Stewart, J., dissenting). Based upon the record, Justice Stewart found that the presence of the camera in the courtroom in no way disturbed the judicial proceedings and went on to describe the trial as a mundane luridless affair that was "highly technical, if not downright dull." *Id.* at 614 (Stewart, J., dissenting).

<sup>52</sup>*Id.* at 615 (Stewart, J., dissenting) (citations omitted). The Justice opined that the idea of imposing upon any medium the burden of justifying its presence in the courtroom is contrary to the presumption underlying First Amendment freedoms and that the idea that nonparticipants may get the "wrong impression" from such coverage is an unacceptable invitation to censorship. *Id.* (citations omitted).

upon the record and the Court's present understanding of the impact of mass media on a criminal trial, there was an insufficient basis to ban cameras from every criminal courtroom.<sup>53</sup>

In a separate dissent, Justice White, joined by Justice Brennan, agreed with Justice Stewart that it was premature to promulgate a broad constitutional rule banning the use of cameras in the courtroom.<sup>54</sup> Addressing this single point, Justice White criticized the majority for hastily precluding the Court from engaging in further intelligent assessment of the probable hazards of allowing the presence of cameras in the courtroom and rendering a decision based upon too little experience.<sup>55</sup>

In a brief final dissent, Justice Brennan wrote to emphasize that only four of the five Justices voting for reversal rested on the proposition that televised coverage of criminal proceedings was constitutionally infirm regardless of the surrounding circumstances.<sup>56</sup> Citing Justice Harlan's concurrence as being a significantly less sweeping proposition than that of the other four Justices, Justice Brennan argued that the decision could not be construed as "a blanket constitutional prohibition against the televising of state criminal trials."<sup>57</sup>

The *Estes* decision left many questions unanswered regarding the use of television cameras in the courtroom. Following the decision there was much disagreement about whether the Court had issued an absolute ban against cameras in the courtroom. As a result, the use of cameras in the courtroom was virtually non-existent or limited to experimental programs

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<sup>53</sup>*Id.* Justice Stewart concluded, "I cannot say at this time that it is impossible to have a constitutional trial whenever any part of the proceedings is televised or recorded on television film. I cannot now hold that the [C]onstitution absolutely bars television cameras from every criminal courtroom." *Id.*

<sup>54</sup>*Id.* at 615 (White, J., dissenting).

<sup>55</sup>*Id.* at 616 (White, J., dissenting). Justice White noted that the materials currently available to assess the effect of cameras in the courtroom were "too sparse and fragmentary" to constitute the basis for a *per se* constitutional rule barring all forms of television coverage. *Id.* Acknowledging that certain serious threats to constitutional rights justify a prophylactic rule dispensing with the necessity of showing specific prejudice in particular cases, the Justice explained that, unlike in this instance, the Court has had ample experience in those matters to make informed judgments. *Id.* Thus, the Court's judgement, Justice White concluded, discouraged all further meaningful study of the use of television coverage in criminal proceedings. *Id.*

<sup>56</sup>*Id.* at 617 (Brennan, J., dissenting).

<sup>57</sup>*Id.*

until the Court reconsidered the effects of television sixteen years later in *Chandler v. Florida*.<sup>58</sup> During the interim, however, the Court addressed several other issues in its attempt to balance the First Amendment rights of the media with the Sixth Amendment rights of the accused.

#### B. HOW MUCH PUBLICITY IS TOO MUCH AND WHERE SHOULD IT STOP?

One year after the Court decided *Estes*, the Court seized the opportunity presented in *Sheppard v. Maxwell*<sup>59</sup> to outline steps that could be taken by a trial court to reduce the effect upon jurors of information disseminated by the press. Although it was clear that pretrial and extra-trial publicity could unconstitutionally prejudice a jury and deprive a defendant of a fair trial by an impartial jury, the Court never before prescribed more than a few isolated steps that could be taken to regulate the press. The excessive publicity surrounding *Sheppard*<sup>60</sup> and the trial judge's admission that he

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<sup>58</sup>449 U.S. 560 (1981); see also *infra* notes 105-18 and accompanying text.

<sup>59</sup>384 U.S. 333 (1966).

<sup>60</sup>*Id.* Dr. Samuel Sheppard was charged and ultimately convicted of second-degree murder of his wife, Marilyn Sheppard on July 4, 1954. *Id.* at 335. Asserting that the events leading to and following his arrest amounted to an "assault" by the press, Sheppard contended that the trial court's failure to protect him from the massive, pervasive, and prejudicial publicity deprived him of a fair trial consistent with the Due Process Clause of the Fourteenth Amendment. *Id.* From the outset, officials focused suspicion on Sheppard and, immediately thereafter, publicity in the media began. *Id.* at 335-49. Throughout the investigation leading to Sheppard's indictment, the newspapers emphasized evidence that tended to incriminate him, pointed out discrepancies in his statements to authorities, and ran a series of editorials demanding a swift investigation and arrest. *Id.* at 337-42. At the trial itself, members of the press were given seats at a temporary table set up inside the bar as well as all but one bench behind the bar that was set aside for the Sheppard family. *Id.* at 342-43. In addition, one television station was allowed to broadcast from a room next to the jury room while television and newsreel cameras were occasionally set up outside the steps in front of the courtroom to take motion pictures of the participants, including the jurors. *Id.* at 343. According to the Court, "The daily record of the proceedings was made available to the newspapers and the testimony of each witness was printed verbatim in the local editions, along with objections of counsel, and rulings by the judge." *Id.* at 344. Continuing, the Court cited nine examples of what it considered to be "flagrant episodes" of "intense publicity" during the course of the trial. *Id.* at 345-49. Emphasizing the intense publicity associated with this case, the Court noted that the record before it included five volumes of clippings from the three Cleveland newspapers covering the period from the murder until Sheppard's conviction in December 1954, and, although no such excerpts were included from newscasts on radio or television, it could be inferred that their coverage was equally as large. *Id.* at 342.

could not control the press,<sup>61</sup> however, prompted the Court to set forth detailed prescriptions for ameliorating the deleterious effects on the fairness of a trial as a result of such publicity.<sup>62</sup> Concluding that Sheppard did not receive a fair trial consistent with the Due Process Clause of the Fourteenth Amendment, the Court reversed and remanded the case to the district court with instructions to issue a writ of *habeas corpus*.<sup>63</sup>

Writing for the Court, Justice Clark began by affirming the importance of a free press to a fair trial.<sup>64</sup> The Court quickly noted, however, that the jury's verdict should be based on the evidence presented in open court, rather than outside sources, whether they be "private talk or public print."<sup>65</sup> Focusing then on the media attention surrounding the case, the Justice explained that the jurors were not shielded from outside sources and were thrust into the role of celebrities by the judge's failure to insulate them from reporters and photographers.<sup>66</sup> The Court concluded, however, that

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<sup>61</sup>*Id.* at 357-58.

<sup>62</sup>*Id.* at 357-63; *see also infra* note 70 and accompanying text.

<sup>63</sup>*Id.* at 363. The Court concluded:

Since the state trial judge did not fulfill his duty to protect Sheppard from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom, we must reverse the denial of the habeas petition.

*Id.*

<sup>64</sup>*Id.* at 350. Justice Clark wrote:

A responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. . . . The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.

*Id.*

<sup>65</sup>*Id.* at 350-52 (citations omitted).

<sup>66</sup>*Id.* at 353. Justice Clark noted that, aside from the trial judge's general admonitions at the beginning of the trial advising the jurors not to expose themselves to media coverage of the trial, the judge failed to take any other precautions to limit such exposure. *Id.* Throughout the trial, the Court observed, numerous pictures of the jurors along with their addresses appeared in the newspapers which, in turn, exposed them to expressions of opinion from friend and stranger alike and subjected them to a throng of anonymous letters

Sheppard was not denied due process by the judge's failure to take precautions against the influence of pretrial publicity alone, but instead ruled that the trial was unfair only when the massive pretrial publicity was added to the judge's failure to control the flow of information from the courtroom after the trial began.<sup>67</sup> Justice Clark asserted that the "carnival atmosphere" at the trial could have easily been avoided because the courtroom and the courthouse were subject to the control of the court which was empowered with the ability to control publicity surrounding criminal trials.<sup>68</sup> The presence of the press at judicial proceedings, the Court stated, must be limited when it is apparent that the accused might otherwise be prejudiced or disadvantaged.<sup>69</sup> Accordingly, the Justice proffered a list of suggestions outlining procedures that a trial judge could implement to ensure that the balance is never weighted against the accused.<sup>70</sup> Concluding, Justice Clark

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and telephone calls about the case. *Id.*

<sup>67</sup>*Id.* at 354-55. The Court described the scene during the trial as a state of "bedlam," finding that the arrangements made by the trial judge with the news media deprived Sheppard of that "judicial serenity and calm to which [he] was entitled." *Id.* at 355 (quoting *Estes v. Texas*, 381 U.S. 532, 536 (1965)). Further, the Justice pointed out that the judge lost his ability to supervise the courtroom by giving the "throng of newsmen gathered in the corridors of the courthouse absolute free reign." *Id.* This inability to control the publicity surrounding the trial, Justice Clark concluded, compounded the court's error. *Id.* at 357.

<sup>68</sup>*Id.* at 358.

<sup>69</sup>*Id.*

<sup>70</sup>*Id.* at 358-63. In summary, Justice Clark prescribed eleven steps a court could take to ameliorate the deleterious effects of excessive publicity and guarantee a fair trial by an impartial jury:

- (1) The number of journalists admitted to the court should be limited.
- (2) The behavior of journalists in court should be regulated.
- (3) Witnesses should be insulated from extrajudicial information.
- (4) The judge should control the release of information to the press by police officers, witnesses, and counsel for both sides.
- (5) The judge should warn reporters to check the accuracy of their news stories.
- (6) The court should point out the impropriety of publishing material not introduced in the proceedings.
- (7) The judge should request that appropriate city and county officials issue regulations governing the dissemination of information about the case by their employees.
- (8) When necessary, a case should be continued until the threat of

opined that courts must take such steps by rule and regulation to protect the judicial process from prejudicial outside influences and that the failure to do so deprives defendants of a fair trial consistent with due process.<sup>71</sup>

Despite its earlier decisions reversing convictions because of massive pretrial publicity,<sup>72</sup> the Court used its decision in *Murphy v. Florida*<sup>73</sup> to clarify how much pretrial publicity is unconstitutionally harmful to a defendant and how much is not.<sup>74</sup> In its decision, the Court refused to

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prejudicial pretrial publicity abates.

- (9) The trial should be moved to another county where the publicity level is acceptable.
- (10) The jury should be sequestered where the inflow of information is excessive and prejudicial.
- (11) If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered.

*Id.*

<sup>71</sup>*Id.* at 363.

<sup>72</sup>See *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (outlining procedures trial courts can take to protect jurors from prejudicial publicity); *Estes v. Texas*, 381 U.S. 532 (1965) (declaring that in-court telecasts of criminal proceedings deny the defendant due process); *Rideau v. Louisiana*, 373 U.S. 723 (1963) (holding that the televising of a confession by the defendant constitutes a denial of due process by making it impossible to select an impartial jury in the area of viewers); *Irvin v. Dowd*, 366 U.S. 717 (1961) (suggesting that continued massive pretrial publicity may constitute evidence that the entire jury has been affected to the degree that the credibility of all jurors' honest assertions of impartiality are constitutionally undermined).

<sup>73</sup>421 U.S. 794 (1975).

<sup>74</sup>*Id.* The petitioner, Jack Roland Murphy, who was convicted of robbery in a state court, asserted that he was denied a fair trial because jurors had learned from news accounts of prior felony convictions and other facts relating to the robbery charge. *Id.* at 795. The robbery received extensive press coverage, in large part, because Murphy had been in the news much before. *Id.* Murphy first became notorious as a result of his involvement in the 1964 theft of the Star of India sapphire from a museum in New York. *Id.* His flamboyant lifestyle thereafter made him a continuing subject of interest in the press where he came to be known as "Murph the Surf." *Id.* Attention was once again drawn to Murphy in 1968 and 1969 when, in addition to the robbery charges, he was convicted of one count of murder in Broward County, Florida and pleaded guilty to one count of a federal indictment involving stolen securities. *Id.* at 795-96. These events drew extensive press coverage beyond Florida and were evidenced in the record, as such, through the introduction of scores of articles highlighting Murphy's trials and tribulations. *Id.* at 796. Motions to dismiss the chosen jurors based on their knowledge of the past convictions were denied along with a motion for a change of venue. *Id.* In protest of the

establish a constitutional rule asserting that jurors with some extrajudicial knowledge of a defendant's prior criminal convictions are necessarily incapable of being impartial.<sup>75</sup> Rather, the Court held, in order for a defendant to show a level of unconstitutionality, he must either show that pretrial publicity unconstitutionally caused the prejudice of an individual juror, or that the attitude of the community-at-large was so hostile that it inherently prevented a fair trial by an impartial jury.<sup>76</sup>

Justice Marshall, writing for the Court, reiterated that a defendant is entitled to solemnity and sobriety in the criminal process and that such elements are essential attributes of a system that subscribes to any notion of fairness.<sup>77</sup> The Justice, however, explained that such elements cannot be made to stand for the proposition that juror exposure to information about a defendant's prior convictions or news accounts relating to the crime for which he is charged presumptively deprive the defendant of due process; but, rather, when making a determination of unfairness, the totality of the circumstances must be taken into consideration.<sup>78</sup> Accordingly, Justice Marshall concluded, it remains open to the defendant to demonstrate the actual existence of such an opinion in the mind of the juror as will raise a presumption of partiality.<sup>79</sup> Thus, the Court held, in determining whether a defendant has been accorded a fair and impartial jury, a distinction is to be made between mere familiarity with the defendant or his past and an actual predisposition against him, just as a distinction is made between largely

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selected jury, Murphy did not testify, enter evidence, or cross-examine any of the state's witnesses. *Id.* at 797. Subsequently, Murphy was convicted as charged. *Id.*

<sup>75</sup>*Id.* at 799-800.

<sup>76</sup>*Id.* at 799, 803.

<sup>77</sup>*Id.* at 799.

<sup>78</sup>*Id.* While acknowledging that the constitutional standard of fairness requires that a defendant have "a panel of impartial, indifferent jurors," the Justice asserted that qualified jurors need not be completely ignorant of the facts involved. *Id.* at 799-800 (quoting *Irvin v. Dowd*, 366 U.S. 717, 722 (1961)). Justice Marshall continued by rationalizing that to hold the mere existence of a preconceived notion as to guilt or innocence as being sufficient to rebut impartiality would establish an impossible standard for the prosecution to meet. *Id.* at 800 (quoting *Irvin*, 366 U.S. at 723). It has been found to be sufficient, therefore, the Justice explained, if a juror can lay aside any preconceived impressions or opinions and render a verdict based upon the evidence presented in court. *Id.* (quoting *Irvin*, 366 U.S. at 723).

<sup>79</sup>*Id.*

factual publicity from that which is invidious or inflammatory.<sup>80</sup> Justice Marshall opined that to ignore such differences and the potential for prejudice would not advance the cause of fundamental fairness, but only make impossible the timely prosecution of persons who are well known in the community, whether they be notorious or merely prominent.<sup>81</sup>

### C. ACCESS TO THE COURTROOM: WHERE CAN THE LINE BE DRAWN?

The Supreme Court's decisions relating to pretrial and extra-trial publicity shifted from a Sixth Amendment analysis to a First Amendment analysis with a line of cases beginning with *Nebraska Press Association v. Stuart*.<sup>82</sup> In *Nebraska Press*, the Court affirmed the media's right to publish information concerning judicial proceedings.<sup>83</sup> Despite recognizing that prior restraints on speech and publication are the most serious and intolerable infringements on First Amendment rights, the Court did not foreclose the possibility that a court could impose prior restraints in certain instances.<sup>84</sup> Instead, the Court developed a test that focused on the nature and extent of

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<sup>80</sup>*Id.* at 801-02 n.4.

<sup>81</sup>*Id.*

<sup>82</sup>427 U.S. 539 (1976).

<sup>83</sup>*Id.* The Nebraska Press Association filed a motion in opposition to an order entered by a Nebraska trial judge restraining the association's publication of information concerning the trial of Edwin Charles Simants who was charged with six counts of murder. *Id.* at 541. The judge's order was to be effective until a jury was impaneled and prohibited the press from reporting: the existence and contents of the defendant's confession; the nature of the defendant's statements to other persons; the contents of a note written on the night of the crime; certain medical testimony of the preliminary hearing; and the identity of the victims of the alleged sexual assault and nature of the assault. *Id.* at 543-44. Furthermore, the order prohibited the press from reporting on the exact nature of the restrictive order itself. *Id.* at 544. The Nebraska Supreme Court later modified and limited the trial judge's order. *Id.* at 545. The order as modified prohibited the press from reporting only three matters: any confessions or admissions made to police; any confessions or admissions made to third parties, except members of the press; and other facts "strongly implicative" of the accused. *Id.*

<sup>84</sup>*Id.* at 569. Although the Court did not hypothesize as to the type of circumstances in which prior restraints were permissible, it did not rule out the possibility that prior restraints could be used to protect against a threat to a defendant's right to a fair trial. *Id.* at 569-70. In so noting, the Court explained that it has frequently denied that First Amendments are absolute and that it has consistently rejected the proposition that prior restraint can never be employed. *Id.* at 570 (citations omitted).

the news coverage, the possible alternatives to restraining the press, and the effectiveness of the restraining order in protecting the defendant's right to a fair trial.<sup>85</sup>

In reaching this conclusion, Chief Justice Burger began by presenting a historical review of some of the conflicts between the First and Sixth Amendments, noting that only in rare cases are the conflicts serious.<sup>86</sup> The Chief Justice explained that juries are capable of putting pretrial publicity in proper perspective and that a trial judge can take measures "to mitigate the effects of pretrial publicity."<sup>87</sup> Shifting then to a First Amendment analysis, Chief Justice Burger noted that the First Amendment affords special protections against prior restraints.<sup>88</sup> Despite asserting that it was unnecessary to establish a priority between First and Sixth Amendment

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<sup>85</sup>*Id.* at 562. The Court stated that, when deciding whether to impose prior restraints on publication, a trial court must examine: "(a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger." *Id.*

<sup>86</sup>*Id.* at 551-55. Chief Justice Burger wrote:

In the overwhelming majority of criminal trials, pretrial publicity presents few unmanageable threats to [a defendant's Sixth Amendment rights]. But when the case is a "sensational" one tensions develop between the right of the accused to a trial by an impartial jury and the rights guaranteed others by the First Amendment. . . . [T]hese cases, [however, have] demonstrate[d] that pretrial publicity - even pervasive, adverse publicity - does not inevitably lead to an unfair trial.

*Id.* at 551, 554.

<sup>87</sup>*Id.* at 554-55. The Chief Justice asserted that the capacity of a jury to decide a case fairly is influenced by the tone and extent of the publicity, which most often is shaped by what attorneys, police, and other officials do to precipitate news coverage. *Id.* Moreover, Chief Justice Burger emphasized that the trial judge has a major responsibility to protect the defendant's right to a fair trial by mitigating the effects of pretrial publicity through the implementation of the measures described in *Sheppard*. *Id.* at 555; *see also supra* note 70 and accompanying text (discussing the procedures a trial judge may implement to ameliorate the deleterious effects of pretrial publicity).

<sup>88</sup>*Id.* at 559. Citing the Court's earlier decisions concerning prior restraints, Chief Justice Burger concluded that "prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights." *Id.* Further acknowledging that prior restraints are an immediate and irreversible sanction, the Chief Justice proffered that if a threat of criminal or civil sanctions after publication "chills" free speech, prior restraints must then necessarily "freeze" it. *Id.*

rights, the Chief Justice maintained that the protection against prior restraints should have particular force as applied to the reporting of criminal proceedings.<sup>89</sup> The Court enunciated, however, that these extraordinary measures afforded by the First Amendment carry with them an expectation tantamount to a fiduciary duty in which the press must exercise the protected rights of speech responsibly.<sup>90</sup> In conclusion, Chief Justice Burger held that the barriers against prior restraints remain high and the presumption against their use remained intact, but reiterated that the Court has frequently denied the principle that First Amendment rights are absolute and rejected the proposition that prior restraints could never be applied.<sup>91</sup>

Although the Court, in *Gannett Co. v. DePasquale*,<sup>92</sup> held that the public did not have an independent right of access to pretrial judicial proceedings under the Sixth or Fourteenth Amendments, it later held, in

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<sup>89</sup>*Id.* at 559-61. Chief Justice Burger explained that, up until then, the Court had consistently afforded truthful reports of judicial proceedings special protection against subsequent punishment. *Id.* at 559. Accordingly, the Chief Justice reasoned, protection against prior restraints should be given particular force in criminal proceedings where such restraints irreversibly impose a threat to communication of news and current events. *Id.* (citations omitted).

<sup>90</sup>*Id.* at 560. The Court opined that it would not be unreasonable or overburdensome to ask that those who exercise First Amendment rights in newspapers and broadcasting enterprises to direct their efforts to protect an accused's Sixth Amendment right to a fair trial by unbiased jurors. *Id.*

<sup>91</sup>*Id.* at 570. Chief Justice Burger wrote: "We reaffirm that the guarantees of freedom of expression are not an absolute prohibition [against prior restraint] under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact." *Id.*

<sup>92</sup>443 U.S. 368 (1979). The *Gannett* Court held that the Sixth Amendment right to a public trial is personal to the accused. *Id.* at 379-80. In so holding, the Court recognized that the public has an independent interest in the enforcement of Sixth Amendment guarantees, but concluded that the existence of such an interest does not create a constitutional right to the public. *Id.* at 383. The Court observed that openness in judicial proceedings arguably improves the quality of testimony, causes trial participants to perform their duties more conscientiously, and gives the public the opportunity to observe the legal system. *Id.* Nevertheless, the Court found that the public's interest in the administration of justice was "a far cry . . . from the creation of a constitutional right" and that it was adequately protected by the participants in the litigation. *Id.* at 383-84. The majority specifically noted that the Court need not address any First Amendment issues. *Id.* at 392. Thus, the Court did not decide whether the press and public had a First Amendment right of access. *Id.*

*Richmond Newspapers, Inc. v. Virginia*,<sup>93</sup> that the First Amendment implicitly conferred protection against the exclusion of the press from criminal proceedings.<sup>94</sup> Basing its decision on the common law presumption of open trials, the Court found an implied right of access to criminal trials through the First Amendment guarantees of free press, free speech, and the right of assembly.<sup>95</sup> Accordingly, the Court concluded that the right to publish what occurs during a trial would become all but meaningless if the press was denied access to a trial.<sup>96</sup> The Court, however, asserted that this right of access was not absolute and is subject to reasonable limitations.<sup>97</sup>

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<sup>93</sup>448 U.S. 555 (1980).

<sup>94</sup>*Id.* The petitioner, Richmond Newspapers, filed a motion in opposition to an order entered by a Virginia trial judge which closed the proceedings to the public. *Id.* at 560 (Burger, C.J., plurality). At the commencement of his third retrial, the defendant, John Paul Stevenson, who was charged with second degree murder, moved before the Virginia trial court to close the courtroom to the public. *Id.* at 559-60 (Burger, C.J., plurality). Neither the prosecutor nor two reporters for Richmond Newspapers present in the courtroom at the time the motion was presented to the court objected, and the judge subsequently granted the defendant's motion closing the trial. *Id.* at 560 (Burger, C.J., plurality). Later that afternoon, however, Richmond Newspapers asked for a hearing to vacate the order on the basis that the judge did not present any evidence supporting closure and that he did not consider other, less drastic, measures to protect the defendant's right to a fair trial. *Id.* The trial court denied the newspaper's motion to vacate its earlier order. *Id.* at 561 (Burger, C.J., plurality). The Virginia Supreme Court later denied Richmond Newspapers' petition for appeal. *Id.* at 562 (Burger, C.J., plurality).

<sup>95</sup>*Id.* at 577 (Burger, C.J., plurality). The Court proffered that the right of public access to criminal trials was guaranteed by an amalgam of First Amendment rights of speech and press. *Id.* Additionally, the Court found the right of assembly to be relevant on the basis that it was regarded not merely as an independent right, but also as a catalyst to other First Amendment rights. *Id.*

<sup>96</sup>*Id.* at 576-77 (Burger, C.J., plurality).

<sup>97</sup>*Id.* at 581 n.18 (Burger, C.J., plurality). Although the Court emphasized that its holding did not create an absolute First Amendment right of access, it did not define the circumstances in which a trial could be closed to the public. *Id.* The Court did, however, state that, while a judge may impose reasonable limitations on access, he may not exert control to deny or unwarrantedly abridge opportunities for the communication of thought. *Id.* (citing *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941)). Two years later, in *Globe Newspaper Co. v. Superior Court*, the Court provided some guidance as to when the right of access may be denied. 457 U.S. 596 (1982). In that holding, the Court opined that a statute requiring closure in a given situation must be justified by a "compelling governmental interest" and be "narrowly tailored" to support only that

Writing for the Court,<sup>98</sup> Chief Justice Burger first cited the historical support for open trials.<sup>99</sup> The Chief Justice noted that historically public trials served both a therapeutic<sup>100</sup> and prophylactic<sup>101</sup> purpose. The media, Chief Justice Burger continued, plays an important role in maintaining the public's confidence in the criminal justice system.<sup>102</sup> Based upon this analysis, the Chief Justice concluded that a presumption of openness is inherent in the very nature of the criminal trial and that the First Amendment can be read as protecting the right of everyone to attend such proceedings.<sup>103</sup> Thus, Chief Justice Burger concluded, criminal cases must

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particular interest. *Id.* at 606-07.

<sup>98</sup>Although the judgement was by a margin of eight to one, the largest number of Justices joining any one opinion was three. The plurality opinion, authored by Chief Justice Burger, was joined by Justices White and Stevens. Concurring opinions were authored by Justice White; Justice Stevens; Justice Brennan, who was joined by Justice Marshall; Justice Stewart; and Justice Blackmun. The lone dissent was delivered by then-Justice Rehnquist.

<sup>99</sup>*Richmond Newspapers*, 448 U.S. at 570-71 (Burger, C.J., plurality). Chief Justice Burger began with the observation that "at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open." *Id.* at 569 (Burger, C.J., plurality).

<sup>100</sup>*Id.* at 571 (Burger, C.J., plurality). The Chief Justice explained that "people sensed from experience and observation that . . . the means used to achieve justice must have the support derived from public acceptance of both the process and its results." *Id.* The open trial, the Chief Justice concluded, afforded such public support for the criminal justice system. *Id.*

<sup>101</sup>*Id.* Chief Justice Burger further explained that aside from the therapeutic purpose of the open trial, the open processes of justice provide an outlet for community concern, hostility, and emotion. *Id.* By satisfying the public's need to see that justice is done, Chief Justice Burger asserted, the open trial allows for the suppression of the natural human reactions of outrage and protest which ultimately manifest themselves in vengeful vigilante "self-help." *Id.*

<sup>102</sup>*Id.* at 572-73 (Burger, C.J., plurality). Validating the media's claim that it functions as a surrogate for the public, the Chief Justice wrote that "[i]nstead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media." *Id.* at 573 (Burger, C.J., plurality).

<sup>103</sup>*Id.* at 575 (Burger, C.J., plurality). The Chief Justice opined that the guaranteed freedoms of the First Amendment share a common core purpose of assuring free communication on matters relating to the functioning of government. *Id.* Continuing, Chief Justice Burger argued that, in the context of trials, the First Amendment alone

be open to the public.<sup>104</sup>

D. REEVALUATING THE ROLE OF CAMERAS IN THE COURTROOM:  
*CHANDLER V. FLORIDA*

Sixteen years after rendering its decision in *Estes*,<sup>105</sup> the Court once again had the opportunity to evaluate the role of cameras in the courtroom in *Chandler v. Florida*.<sup>106</sup> Reviewing its earlier decision in *Estes*, the Court concluded that it had not, and would not, promulgate a *per se* rule against the presence of television cameras in criminal proceedings.<sup>107</sup> The Court

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“prohibit[s] the government from summarily closing courtroom doors which had long been open to the public at the time the Amendment was adopted.” *Id.* at 576 (Burger, C.J., plurality). Accordingly, the Chief Justice reasoned that “a trial courtroom is a public place where people generally – and representatives of the media – have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place.” *Id.* at 578 (Burger, C.J., plurality).

<sup>104</sup>*Id.* at 581 (Burger, C.J., plurality). The Chief Justice wrote that “absent and overriding interest articulated in findings, the trial of a criminal case must be open to the public.” *Id.*

<sup>105</sup>See *supra* notes 33-57 and accompanying text.

<sup>106</sup>449 U.S. 560 (1981). The petitioners, Noel Chandler and Robert Granger, challenged the validity of Florida’s experimental program for allowing television coverage of courtroom proceedings asserting that such coverage violated their right to due process. *Id.* at 568. Under the experimental program implemented by the Florida Supreme Court in 1976, one civil and one criminal trial were to be televised upon the consent of all parties. *Id.* at 564. Recognizing that it was difficult to gain the consent of all involved parties, the Florida Supreme Court revised its order for a one-year test period to allow the televising of all judicial proceedings without the consent requirement and subject to guidelines governing the type of electronic equipment that was to be allowed. *Id.* at 564-65. Following the expiration of the one-year program, the court promulgated a revised judicial canon which permitted the use of cameras in Florida courtrooms. *Id.* at 566. The Florida Supreme Court, however, rejected any constitutional right of access for cameras through this promulgation. *Id.* at 569.

<sup>107</sup>*Id.* at 572-75. The Court concluded that:

*Estes* [was] not to be read as announcing a constitutional rule barring still photographic, radio, and television coverage in all cases and under all circumstances. It does not stand as an absolute ban on state experimentation with an evolving technology, which, in terms of modes of mass communication, was in its relative infancy in 1964, and is, even now, in a state of continuing change.

opined that an absolute constitutional ban on broadcast coverage could not be justified simply because there is a danger in some cases that prejudicial publicity may impair the ability of jurors to decide a case strictly upon the evidence produced at trial.<sup>108</sup> Rather, the Court argued, trial courts should afford defendants the opportunity to present showings that the presence of television cameras can indeed preclude fairness in their particular trials.<sup>109</sup> Concluding, the Court maintained that no one had been able to present empirical data sufficient to establish that the mere presence of broadcast media had an inherently adverse impact on criminal proceedings and that further evaluation must await the results of continuing experimentation.<sup>110</sup>

The Court, in an opinion written by Chief Justice Burger, began by announcing that *Estes* could not, and should not, be interpreted as holding that broadcast coverage of criminal trials inherently denied the accused due process.<sup>111</sup> Basing this conclusion upon the language of Justice Harlan's opinion, who joined the *Estes* plurality with reservation,<sup>112</sup> the Chief Justice explained that Justice Harlan appeared to have a much narrower view

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*Id.* at 573-74.

<sup>108</sup>*Id.* at 574-75. Noting that any criminal case that generates extensive pretrial publicity presents some risk that such publicity may compromise the defendant's right to a fair trial, the Court proffered that trial courts must be especially vigilant to guard against the impairment of a verdict based solely upon the evidence and relevant law. *Id.* at 574. The Court continued, however, by asserting that the mere risk of such publicity prejudicing jurors did not justify an absolute ban on news coverage of trials by the printed media and, accordingly, could not justify an absolute ban on all broadcast coverage. *Id.* at 575.

<sup>109</sup>*Id.* The Court wrote:

The risk of juror prejudice is present in any publication of a trial, but the appropriate safeguard against such prejudice is the defendant's right to demonstrate that the media's coverage of his case – be it printed or broadcast – compromised the ability of the particular jury that heard the case to adjudicate fairly.

*Id.*

<sup>110</sup>*Id.* at 579-81.

<sup>111</sup>*Id.* at 573-74.

<sup>112</sup>*Id.* at 570-74. The Chief Justice noted that the essential problem in asserting that *Estes* created a *per se* constitutional rule was that in "[p]arsing the six opinions of *Estes*, one is left with a sense of doubt as to precisely how much of Justice Clark's opinion was joined in, and supported by, Justice Harlan." *Id.* at 572.

than Justice Clark and that it should be construed as being limited to cases similar to *Estes*.<sup>113</sup> Accordingly, Chief Justice Burger announced that the Court need not “overrule” a holding never made by the Court.<sup>114</sup> Satisfied that *Estes* did not create a *per se* constitutional rule prohibiting the presence of television cameras in the courtroom, the Chief Justice announced that the issue must, therefore, be approached by the Court as a “matter of first impression.”<sup>115</sup> Chief Justice Burger began this analysis by reaffirming the dangers inherent in television trials, but purported that an absolute ban on broadcast coverage could not be justified simply because such a danger exists.<sup>116</sup> Alternatively, the Chief Justice proffered that in each case the defendant be afforded the right to demonstrate that the media’s coverage compromised his particular right to a fair trial.<sup>117</sup> Unable to conclude that broadcast coverage under all conditions was prohibited by the Constitution, Chief Justice Burger opined that the states must be free to experiment until

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<sup>113</sup>*Id.* at 571. Chief Justice Burger focused on Justice Harlan’s reasoning that even though the presence of the media had “mischievous potentialities for intruding upon the detached atmosphere which should always surround the judicial process,” its presence was not necessarily prejudicial. *Id.* (quoting *Estes v. Texas*, 381 U.S. 532, 587 (1965) (Harlan, J., concurring)). This, the Chief Justice concluded, clearly indicated that Justice Harlan intended to limit the Court’s holding to cases “utterly corrupted” by press coverage. *Id.* at 574 n.8.

<sup>114</sup>*Id.*

<sup>115</sup>*Id.* at 574.

<sup>116</sup>*Id.* at 574-75. Chief Justice Burger argued:

An absolute constitutional ban on broadcast coverage of trials cannot be justified simply because there is a danger that, in some cases, prejudicial broadcast accounts of pretrial and trial events may impair the ability of jurors to decide the issue of guilt or innocence uninfluenced by extraneous matter.

*Id.*

<sup>117</sup>*Id.* at 581. The Chief Justice explained, however, that “[t]o demonstrate prejudice in a specific case a defendant must show something more than juror awareness that the trial is such to attract the attention of broadcasters.” *Id.* According to Chief Justice Burger, a defendant could only demonstrate a violation of due process by showing that the media’s coverage compromised the jury’s ability to judge him fairly, or that the coverage had such an adverse impact on the trial participants that it amounted to a denial of due process. *Id.*

the matter was ripe for further evaluation.<sup>118</sup>

#### IV. THE DEBATE CONTINUES: IS IT TIME TO REEXAMINE *CHANDLER*?

With the *Chandler* decision, cameras reemerged in the courtroom in most state courts.<sup>119</sup> For the vast majority of cases, the presence of the camera had little or no significant impact and merely served as a replacement for the courtroom sketch artist. In a number of cases, however, the camera exacerbated pretrial publicity and has been criticized as preventing high profile defendants from receiving a fair trial.

The most recent and dramatic example of the potentially adverse impact of television coverage of courtroom proceedings has been the double-murder trial of O.J. Simpson. The media immediately picked up the story and created a deluge of pretrial publicity throughout the country. Following the arrest and arraignment of O.J. Simpson, media coverage intensified as the story of a fallen American hero began to unfold. Coverage of the judicial proceedings began with the preliminary hearing where much of the testimony was covered live by the major networks. Jury selection was later closed to televised coverage, but press representatives were allowed to observe the proceedings and reported every minute detail. Prior to the trial, much debate surrounded the use of television cameras during the proceedings.<sup>120</sup> Eventually, it was determined that a single camera placed

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<sup>118</sup>*Id.* at 582. Chief Justice Burger concluded that “[the Court is] not empowered by the Constitution to oversee or harness state procedural experimentation; only when the state action infringes fundamental guarantees [is it] authorized to intervene.” *Id.*

<sup>119</sup>To date, forty-seven states permit broadcast coverage of at least part of their court system. 1992 NATIONAL CENTER FOR STATE COURTS, SUMMARY OF TV IN STATE COURTS 2 (1992). Only Indiana, Mississippi, and South Dakota prohibit broadcast coverage altogether. *Id.* at 3.

<sup>120</sup>Proponents of providing broadcast coverage argued that cameras in the courtroom offered the best and most accurate record of judicial proceedings by serving as a check against misinformation. Furthermore, arguments in favor of allowing cameras in the courtroom maintained that televised proceedings provided the added incentive of informing and educating the public about the criminal justice system. Opponents of broadcast coverage, however, maintained that the presence of cameras in the courtroom would disrupt the proceedings and add to the flurry of misinformation as sound bites would be taken out of context and used for their newsworthiness rather than their evidentiary value. See, e.g., *Open Court (Media Circus Not a High Price to Pay for Unrestricted Coverage of O.J. Simpson Case)*, BROADCASTING & CABLE, Sept. 5, 1994, at 58; Susan Karlin, *The Simpson Trial TV Fights to Keep Its Courtroom Cameras*, ELECTRONIC MEDIA, Oct. 10,

above the jury box provided by CourtTV would be the source of televised coverage. Early coverage of the proceedings inundated the networks as gavel-to-gavel coverage preempted normal programming. As time passed, the major networks began to resume normal programming, but periodically provided special updates, live coverage of "key witnesses," and spent considerable amount of time covering the proceedings on the evening news broadcasts.<sup>121</sup> In addition to coverage on the major networks, several cable channels devoted significant portions of their air time to coverage, with some channels completely revamping existing programming in order to provide continuous daily coverage.<sup>122</sup> Each channel covering the trial scrambled to find leading legal commentators to provide insight and opinion as to how each side's case had been advanced on a day-to-day basis.<sup>123</sup> Outside the courthouse, the media assembled massive amounts of equipment and operated virtually around the clock, providing up to the minute reports originating from what came to be familiarly known as "Camp O.J."<sup>124</sup> When the case finally went to the jury and a verdict was rendered, coverage reached an all-time high as speculation mounted as to how the saga of O.J. would finally end. On October 4, 1995, the country came to a virtual standstill as the

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1994; Susan Karlin, *Media Gird to Fight for O.J. Pool Camera*, ELECTRONIC MEDIA, Oct. 31, 1994; Susan Karlin, *Media Covering O.J. Finally Get Day in Court*, ELECTRONIC MEDIA, Nov. 7, 1994; Susan Karlin, *Judge Ito Rules: The Camera Stays but Media Say Decision Won't Change Coverage*, ELECTRONIC MEDIA, Nov. 14, 1994; *TV Gets Its Day in Court*, ELECTRONIC MEDIA, Nov. 14, 1994.

<sup>121</sup>Jane Dalzell, *The Jury's Still Out News Media Plotting How to Cover Simpson Trial*, ELECTRONIC MEDIA, Aug. 15, 1994. From January to October 1995, the O.J. Simpson trial dominated news coverage taking up 26 hours 50 minutes of air time out of 197 hours of total available news time. Jennifer Seter, et al., *Simpson Trial & Trivia*, U.S. NEWS & WORLD REP., Oct. 16, 1995, at 42-43. In comparison, stories related to Bosnia only occupied 13 hours 1 minute of air time and the Oklahoma City bombing only 8 hours 53 minutes. *Id.*

<sup>122</sup>Dalzell, *supra* note 121. In total, CNN, which provided gavel-to-gavel coverage of the proceedings, aired 630 hours of the Simpson trial with an additional 300 hours devoted to the slow speed Bronco chase and pretrial hearings. Seter, *supra* note 121.

<sup>123</sup>CNN alone utilized 250 legal experts over the course of the trial to provide legal commentary and insight as to the day-to-day developments of the proceedings. Seter, *supra* note 121.

<sup>124</sup>*See, e.g., Media Mutiny*, MACLEANS, Oct. 31, 1994, at 9; Ann Hodges, *Media Hunkering Down at Camp O.J.*, HOUS. CHRON., Jan. 21, 1995, at 1; *From Near and Far, Hundreds of Reporters Cram Into 'Camp O.J.'*, CHI. TRIB., Jan. 23, 1995, at 2.

verdict was read.<sup>125</sup> Media coverage, however, did not end with the reading of the verdict as post-trial coverage began and the media began preparing for its coverage of an impending civil trial brought by the victims' families.

Prior to and during the O.J. trial, the court attempted to implement the safeguards prescribed in *Sheppard*, but the media attention surrounding the case often made such efforts futile.<sup>126</sup> Justice Clark's warnings of the impact of television coverage in *Estes* came to fruition as the trial was often disrupted by the extensive media coverage overwhelmingly lead by television.<sup>127</sup> Throughout and even after the trial, the media was not merely used as an instrument of informing the public, but was manipulated by the parties to try the case before the millions watching. Thus, even if the jury was completely insulated from the media coverage and a fair trial was in fact conducted in the courtroom, the public perception of what transpired has prevented O.J. Simpson from resuming a normal life.<sup>128</sup> Whereas a typical

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<sup>125</sup>The live telecast of the jury's verdict received a 42.9 rating based upon Nielsen Media Research figures, indicating that 42.9 percent of the nations TV homes were tuned into the television coverage. *Ratings Confirm Verdict Kept U.S. Glued to TV Sets*, CHI. TRIB., Oct. 5, 1995, at 27. The audience share during this half-hour period was 91 percent, meaning that 91 percent of televisions in use at the time were tuned to the proceedings. *Id.* In addition, it was estimated that there was a sixty percent drop in AT&T long-distance calls at the precise time of the verdict as compared with the same time the prior week. Jennifer Seter, et al., Seter, *supra* note 121, at 42-43.

<sup>126</sup>*See supra* note 70 and accompanying text (discussing the procedures a trial judge may implement to ameliorate the deleterious effects of pretrial and trial publicity).

<sup>127</sup>*See supra* note 39 and accompanying text (discussing the potential causes of unfairness during a criminal proceeding as a result of broadcast coverage).

<sup>128</sup>Although the jury rendered a verdict of "not guilty," much of the public that watched the trial through the eye of the media has since rendered a verdict of "guilty." As a result, O.J. Simpson has been unable to resume the lifestyle he enjoyed prior to the trial. Upon his return to his home in Brentwood, O.J. Simpson was greeted with signs reading "Welcome to the neighborhood, home of the Brentwood butcher." Additionally, since his acquittal, O.J. Simpson has been dropped by his talent agency and denied access to many of the exclusive clubs and restaurants where he was once welcome. *See, e.g.,* Pat Flynn, *As Party Flows, O.J.'s Neighbors Reflect*, SAN DIEGO UNION & TRIB., Oct. 4, 1995, at A1; John Horn, *O.J. May Find Former Lifestyle and Pals of Wealth, Power Suddenly Get Scarce 'He was Acquitted, Not Vindicated,' Actress Charlene Tilton Says*, ROCKY MTN. NEWS, Oct. 13, 1995, at 56A; Vincent J. Schodolski, *Simpson Tries to Rebuild Old Image Black Community Raises Questions; Neighbors Upset*, CHI. TRIB., Oct. 15, 1995, at 3; *see also* Nora Zamichow, *Americans Find it Hard to Forgive Fallen Heroes*, PORTLAND OREGONIAN, Nov. 5, 1995, at F6.

defendant in the same situation would have been released with little or no public outcry, millions have and still debate the outcome and have subjected the criminal justice system to meticulous scrutiny and criticism.

The backlash of the O.J. Simpson trial has reignited the debate concerning the use of television in the courtroom. The debate may linger for many years before a solution or compromise is reached, but already the impact of the "trial of the century" has been felt.<sup>129</sup> Several judges have closed the court to television trials in cases that, prior to the O.J. Simpson trial, would have likely been covered given the sensational nature of the crimes involved.<sup>130</sup> Specifically citing the Simpson trial, judges have noted that they have been reluctant to subject their courtroom to the potential media frenzy associated with televised coverage.

## V. CONCLUSION

The media explosion led by the emergence of the electronic age has subjected the criminal justice system to sharp criticism. As the goal of creating an information superhighway comes closer to becoming a reality, the threat to the judicial system becomes more imminent. Albeit that only a very small percentage of cases get any media attention, and, of those, an even smaller percentage get attention equivalent to that nearing the Simpson case, such coverage threatens not only the integrity of the system, but more importantly the defendant's right to a fair trial. If Fortescue was correct that it is better for twenty guilty men to escape than have one innocent man condemned unjustly,<sup>131</sup> then it is necessary to ensure that the media does not create a situation where even one defendant is denied a fair trial because of the prejudicial impact of extensive media coverage.

The Court needs to fashion a new standard regarding the use of cameras in the courtroom. In its analysis, it should consider the fact that

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<sup>129</sup>Betsy Streisand, *And Justice for All? The O.J. Simpson Trial: The Case Shakes Public Confidence in the Justice System and Will Resound Through the Culture for Many Years*, U.S. NEWS & WORLD REP., Oct. 9, 1995, at 46-47, 50-51.

<sup>130</sup>See, e.g., *Cameras, Electronic Media Banned at Susan Smith Trial*, L.A. TIMES, July 2, 1995, at A16.; Ann W. O'Neill & J. Michael Kennedy, *Judge Bars Television Cameras From Courtroom for Menendez Retrial; Ruling: Although Simpson Case is Not Mentioned, Decision is Seen as Backlash to Controversy Over Media Coverage it Received*, L.A. TIMES, Oct. 7, 1995, at B1.; Mark Hamblett & Nell Porter Brown, *Justice Upholds TV Ban at Salvi Trial: "Special Circumstances" Cited*, PATRIOT LEDGER, Feb. 2, 1996, at 5; Jamie Beckett, *Cameras Barred at Klass Trial/Proceedings Start in San Jose*, S.F. CHRON., Feb. 6, 1996, at A1.

<sup>131</sup>SIR JOHN FORTESCUE, *DE LAUDIBUS LEGUM ANGLIAE* 65 (Chrimes, S.B. ed., 1949).

cameras have never been allowed in federal courtrooms;<sup>132</sup> yet, the media has not been denied access, nor has the public been denied information concerning those proceedings. Significantly, federal proceedings, even in the most publicized cases, have not been subjected to nearly the same type of media frenzy that state court proceedings, which have been televised, have faced. Consequently, the public has been adequately informed and the defendant's right to a fair trial has been afforded greater protection. There is always the danger that pretrial and out-of-court publicity may threaten a fair trial, but, in such instances, it is up to the media to exercise responsibility and the Court to ensure that impartial juries are empaneled. There is, however, no need for such publicity to be exacerbated, as it has been, by the presence of cameras in the courtroom.

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<sup>132</sup>See FED. R. CRIM P. 53. Rule 53 provides that the "taking of photographs in the courtroom during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the courtroom shall not be permitted by the court." *Id.*

## NOTE

### INCITEMENT TO TERRORISM IN MEDIA COVERAGE: SOLUTIONS TO AL-JAZEERA AFTER THE RWANDAN MEDIA TRIAL

Spencer W. Davis\*

“The power of the media to create and destroy fundamental human values comes with great responsibility. Those who control such media are accountable for its consequences.”<sup>1</sup>

#### I. INTRODUCTION

The media plays an enormously important role in the activities of international terrorist organizations in the post-9/11 world. Through the media, terrorists broadcast their agenda to the general public and spread the atmosphere of fear that is essential to their goals.<sup>2</sup> Such would seem to be the motivation behind the stream of terrorist-produced video and audio tapes seen on media airwaves since the September 11, 2001 attacks in New York and Washington, DC.<sup>3</sup> The messages of terrorist leaders such as Osama Bin Laden<sup>4</sup> and Ayman Al-Zawahiri<sup>5</sup> have been routine fare on

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1. Prosecutor v. Nahimana, Case No. ICTR 99-52-T, Judgment, ¶ 945 (Dec. 3, 2003) [hereinafter Rwandan Media Trial], available at <http://www.ictor.org/ENGLISH/cases/Ngeze/judgement/mediatoc.pdf>.

2. See Emanuel Gross, *The Laws of War Waged Between Democratic States and Terrorist Organizations: Real or Illusive?*, 15 FLA. J. INT'L L. 389, 465 (2003).

3. See, e.g., *Analysts Dissect Bin Laden Tape For Clues*, MSNBC, Jan. 20, 2006, <http://www.msnbc.msn.com/id/10950397> (“The government sought Friday to pinpoint when Osama bin Laden recorded his most recent warning about planned attacks on the United States – a key fact that could help determine the risk that terrorists will carry out the threat.”).

4. See, e.g., *id.* (“The audio recording was the first public statement by bin Laden since December 2004.”); *Purported Bin Laden Tape Endorses Al-Zarqawi*, CNN, Dec. 27, 2004, <http://www.cnn.com/2004/WORLD/meast/12/27/binladen.tape/index.html> (“If the voice is bin Laden’s, the tape would mark the first time the al Qaeda leader has mentioned al-Zarqawi.”).

5. See, e.g., *Tape Purportedly Contains al-Zawahiri Diatribe*, MSNBC, Feb. 10, 2005, <http://www.msnbc.msn.com/id/6947571/> (“The purported Zawahiri comments were first issued Feb. 2 as a statement on the Internet, but were aired on tape by Al Jazeera on Thursday.”); *Al-Qaeda Threatens More UK, U.S. Attacks*, CNN, Aug. 4, 2005, <http://www.cnn.com/2005/WORLD/meast/08/04/zawahiri.london/index.html> (“In a video broadcast Thursday on

media newscasts. Media organizations confer upon terrorists a certain level of political legitimacy by the very fact that they deem these terrorist messages newsworthy.<sup>6</sup>

This dynamic gives rise to widespread concerns that unchecked media coverage actually facilitates the activities of terrorist organizations such as al-Qaeda.<sup>7</sup> The fear generated by the constant presence of terrorist threats on television and radio not only influences public opinion, as terrorists would like,<sup>8</sup> but may also contain hidden instructions to terrorist sleeper cells.<sup>9</sup> This makes the dangers of broadcasting terrorist messages in the media even greater. Television and radio give terrorists the power to speak directly to the public.<sup>10</sup> In the Middle East, where anti-U.S. sentiment already runs deep, such messages have the potential to reach millions,<sup>11</sup> potentially inciting acts of violence and terrorism. One need only look to the bloodshed caused by suicide bombers in Iraq to understand the profound consequences of inciting even one impressionable viewer to action.<sup>12</sup>

While Western media has generally taken a cautious approach to airing terrorist messages, Qatar-based news outlet Al-Jazeera is an open forum for such messages.<sup>13</sup> The editorial content of Al-Jazeera broadcasts is often criticized for its sympathetic tone

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Arabic-language TV station Al Jazeera Ayman al-Zawahiri also issued a warning for the United States.”).

6. See Gross, *supra* note 2, at 465; see also Dan Abrams, ‘Closing Argument’ on Al-Jazeera, MSNBC, Sept. 15, 2003, <http://www.msnbc.msn.com/id/3080770/> (“By refusing to treat [al Qaeda] as [criminals], by suggesting they’re just one side of an issue, Al-Jazeera is falsely portraying al Qaeda as some sort of legitimate organization.”).

7. See, e.g., Gross, *supra* note 2, at 465 (“[T]he outcome of terrorist incidents leads to the conclusion that the media provides an excellent channel for transmitting the fear which the terrorists wish to inspire in society as a whole.”); see also ABRAHAM H. MILLER, *TERRORISM, THE MEDIA, AND THE LAW I* (1982) (discussing the exploitation of the media by terrorists to further the terrorists’ cause).

8. See Gross, *supra* note 2, at 467 (“Moreover, [the media] provides the terrorists with an opportunity to broadcast their message to the general public, an opportunity which would not have been open to them had they operated within the accepted channels of a democratic society.”).

9. See Christopher Dickey, *The Only Show in Town*, NEWSWEEK, Oct. 13, 2001, available at <http://www.msnbc.msn.com/id/3067559/site/newsweek/>.

10. See *id.*

11. Al-Jazeera, for example, reaches thirty-five million viewers in the Arab world. See Frank Rich, Op-Ed., *No News is Good News*, N.Y. TIMES, Oct. 13, 2001, at A23.

12. See, e.g., *Double Bombing Rips Through Baghdad Shopping Area*, CNN, Jan. 19, 2006, <http://www.cnn.com/2006/WORLD/meast/01/19/iraq.main/index.html> (describing bombings in an Iraqi commercial district which killed fifteen and wounded forty-six).

13. See, e.g., Dickey, *supra* note 9 (“[W]hen bin Laden or his Al Qaeda spokesman wants to make a statement, they have a tape dropped off at the Al-Jazeera offices in Kabul.”).

towards terrorist organizations and hostile attitude toward the United States.<sup>14</sup> Though the U.S. government has pressured the government of Qatar to exercise some control over Al-Jazeera, there has been little change in its broadcast content.<sup>15</sup>

After a discussion of Al-Jazeera itself, this Note will examine media content that potentially acts as an incitement to terrorism and will discuss possible mechanisms to address this problem under international law. While the legal concept of incitement to terrorism is still in its infancy, international norms regarding incitement to violence and hate speech provide adaptable models. Relevant international conventions and current U.S. and European jurisprudence will be surveyed. The need to balance the legal concept of incitement in this context with the preservation of freedom and expression in an informed society will be addressed. Special emphasis will be placed on the recent decision of the International Criminal Tribunal for Rwanda in the so-called "*Rwandan Media Trial*," which sets the standard for holding media outlets accountable for the most serious of international crimes. This framework will then be analyzed for potential application to incitement to terrorism and, specifically, Al-Jazeera's actions.

This Note will focus on media outlets that air terrorist messages likely to incite violence—not on the terrorists themselves. This is based upon the supposition that state and international legal mechanisms are better equipped to deal with media outlets which, by virtue of their corporate nature, operate out in the open and within reach of legal enforcement. By focusing on the media outlets themselves, the underlying mechanisms of terrorism may be more effectively addressed and remedied.

## II. DISCUSSION

### A. *Factual Background of Al-Jazeera*

Al-Jazeera is a twenty-four hour satellite news channel based in the Middle Eastern nation of Qatar. It reaches 35 million viewers around the Arab world.<sup>16</sup> Whereas most state-controlled news media in the Middle East are tightly controlled, Al-Jazeera enjoys a

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14. See, e.g., Jonathan Alter, *The Other Air Battle*, NEWSWEEK, April 7, 2003, available at <http://www.msnbc.msn.com/id/3068651/site/newsweek/> ("Statements from Iraqi officials are covered on Al-Jazeera as facts; comments from American officials are portrayed as 'claims.'").

15. See *infra* notes 18, 39–42.

16. See Rich, *supra* note 11.

great degree of editorial freedom.<sup>17</sup> The network first became widely known to U.S. audiences in the aftermath of the September 11, 2001, attacks.<sup>18</sup> While Afghanistan remained under Taliban control in the weeks immediately following the terrorist attacks, Al-Jazeera was the only news station allowed to cover events in that country.<sup>19</sup>

Al-Jazeera's content was criticized for its anti-U.S. and anti-Israeli slant, and then-U.S. Secretary of State Colin Powell requested that the government of Qatar rein in the station.<sup>20</sup> U.S. Vice President Dick Cheney later met with the Emir of Qatar and echoed Powell's request.<sup>21</sup> Neither attempt led to a change in coverage satisfactory to U.S. critics. The Bush administration therefore shifted its strategy and took to the Al-Jazeera airwaves to tell its own side of the story directly to the Arab people.<sup>22</sup> Colin Powell, Secretary of Defense Donald Rumsfeld, and current Secretary of State Condoleezza Rice—as well as British Prime Minister Tony Blair—have all since appeared on the network.<sup>23</sup> Meanwhile, the Coalition Provisional Authority in Iraq set up a “war room” dedicated to identifying unverified or biased news reports so that they may be quickly refuted.<sup>24</sup>

The anti-U.S. bias of Al-Jazeera's coverage is far from subtle. A 2003 *Newsweek* report noted the following:

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17. See, e.g., *U.S. Urges Curb on Arab TV Channel*, BBC NEWS, Oct. 4, 2001, <http://news.bbc.co.uk/1/hi/world/americas/1578619.stm>. Though Qatar's rulers provide most of the funding for Al-Jazeera, Sheikh Hamad bin Jassim has stressed that the Qatari government is not responsible for the network, calling Al-Jazeera part of the “free press.” *Qatar Pledges Al-Jazeera 'Review'*, BBC NEWS, Apr. 30, 2004, [http://news.bbc.co.uk/1/hi/world/middle\\_east/3674287.stm](http://news.bbc.co.uk/1/hi/world/middle_east/3674287.stm).

18. See, e.g., *Censorship in Pashto and Arabic*, N.Y. TIMES, Oct. 10, 2001 at A18 (“It is surely Mr. bin Laden's favored news outlet, the one he chose to disseminate the video made after the Sept. 11 attacks.”).

19. See, e.g., *id.* (“Al Jazeera is also the only station permitted to have a reporter inside Taliban-controlled Afghanistan.”).

20. *Id.*

21. Jim Rutenberg, *In October Interview, Bin Laden Hinted at Role*, N.Y. TIMES, Feb. 1, 2002, at A10.

22. See, e.g., Rick Zednik, *Inside Al-Jazeera*, COLUM. JOURNALISM REV., Mar.–Apr. 2002, at 46 (“Indeed, as the State Department was pressuring Al Jazeera to limit anti-American content, it was offering the station its own officials for interviews. Colin Powell, Donald Rumsfeld, and Condoleezza Rice all appeared on Al Jazeera.”).

23. *Id.*; Alan Cowell, *Blair, Using Arabic TV, Says War is Not on Islam*, N.Y. TIMES, Oct. 9, 2001, at B6 (“Prime Minister Tony Blair made an unusual, electronic bid for a hearing in the Arab world today, using the same Arabic language satellite television station Osama bin Laden uses.”).

24. Melinda Liu, *War of Perceptions*, NEWSWEEK, Apr. 29, 2004, available at <http://www.msnbc.msn.com/id/4865405/site/newsweek/>.

Statements from Iraqi officials are covered on Al-Jazeera as facts; comments from American officials are portrayed as "claims." The phrase "so-called" always precedes "war on terror," and the crawl line under the screen keeps a running tally of civilian Iraqi casualties. Rumsfeld's news conference last week was split-screened by Al-Jazeera with a wounded girl in an Iraqi hospital bed.<sup>25</sup>

In addition to this perceived anti-U.S. bias, Al-Jazeera's willingness to broadcast the messages of terrorist leaders also earned the ire of U.S. officials.<sup>26</sup> Al-Jazeera routinely runs terrorist-produced audio and video recordings,<sup>27</sup> along with images of hostages,<sup>28</sup> dead or captured U.S. soldiers,<sup>29</sup> and, according to U.S. officials, falsified or unverified reports pertaining to attacks on civilians<sup>30</sup> and mosques<sup>31</sup> by U.S. forces. Because of Al-Jazeera's wide viewership, these messages and images are highly influential. The network has been described as "the most popular political party in the Arab world."<sup>32</sup>

Al-Jazeera's political influence, coupled with the arguably terrorist focus of its content, creates a strong danger of incitement.<sup>33</sup>

25. Alter, *supra* note 14.

26. See Bill Carter & Felicity Barringer, *Networks Agree to U.S. Request to Edit Future Bin Laden Tapes*, N.Y. TIMES, OCT. 11, 2001, at A1.

27. See, e.g., *Al-Jazeera Pledges Honesty, Fairness*, MSNBC, July 14, 2004, <http://www.msnbc.msn.com/id/5439207/> ("Al-Jazeera has also been accused of being an outlet for the al-Qaida terrorist network, broadcasting videotapes and audiotapes purportedly from Osama bin Laden or his aides.").

28. See, e.g., *Captors Threaten to Kill U.S. Journalist*, CNN, Jan. 17, 2006, <http://www.cnn.com/2006/WORLD/meast/01/17/iraqjournalist/index.html> ("Al Jazeera released no details on how it obtained the video [of kidnapped journalist Jill Carroll], which it said is from her kidnappers."); *Romanian Journalists in Iraq Video*, CNN, Apr. 22, 2005, <http://www.cnn.com/2005/WORLD/meast/04/22/iraq.romania/index.html> ("Al Jazeera has aired video of three Romanian journalists and a translator held hostage in Iraq."); *Report: Al-Zarqawi Group Takes More Hostages*, CNN, July 31, 2004, <http://www.cnn.com/2004/WORLD/meast/07/31/iraq.main/index.html> ("The video [broadcast on Al-Jazeera] showed three masked men and the two hostages, who are showing documents.").

29. See Martha Brant, *The Belly of the Beast*, NEWSWEEK, Mar. 29, 2003, available at <http://www.msnbc.msn.com/id/3068442/site/newsweek>; Bill Powell, *Shifting Power*, TIME, Apr. 26, 2004, at 34.

30. See Brant, *supra* note 29.

31. See Liu, *supra* note 24 ("The false reporting is reporting that we're using cluster bombs in places where we're not using cluster bombs, that we're attacking mosques in places where we're not attacking mosques, or that we're killing people in places where we didn't kill people," said State Department spokesman Richard Boucher, who called the coverage "inflammatory.").

32. Peter Feuilherade, *Al-Jazeera Debates Its Future*, BBC NEWS, July 13, 2005, [http://news.bbc.co.uk/1/hi/world/middle\\_east/3889551.stm](http://news.bbc.co.uk/1/hi/world/middle_east/3889551.stm).

33. See, e.g., *U.S. Attacks 'Biased' Arab News*, BBC NEWS, July 27, 2003, [http://news.bbc.co.uk/1/hi/world/middle\\_east/3101387.stm](http://news.bbc.co.uk/1/hi/world/middle_east/3101387.stm) (U.S. Deputy Secretary of Defense Paul Wolfowitz accuses Al-Jazeera of inciting violence against U.S. troops).

One prominent message aired by the network in 2003, recorded by ousted Iraqi dictator Saddam Hussein, encouraged new "resistance" against the U.S.-led occupation<sup>34</sup>—an explicit invitation for the violent insurgency that developed. An audiotape of Osama Bin Laden aired by the network in 2004, in which he called on Muslims to fight those who support a democratic government in Iraq,<sup>35</sup> further encouraged the insurgency. These are but two examples. Given the instability of the region, evidenced by the long and violent insurgency that has since plagued Iraq,<sup>36</sup> the potential influence of such messages is apparent. Some may infer that these broadcasts represent an endorsement of terrorist messages by Al-Jazeera. But at the very least, the knowledge that the network will continue to broadcast such material reassures terrorists their messages will reach the public and creates an incentive for further violence.<sup>37</sup> The fact that Al-Jazeera is the first recipient of the overwhelming majority of al-Qaeda tapes is perhaps the strongest evidence that terrorists are using the network as a mouthpiece.<sup>38</sup>

Donald Rumsfeld stated publicly:

We know that Al Jazeera has a pattern of playing propaganda over and over and over again . . . . What they do is, when there's a bomb that goes down, they grab some children and some women and pretend that the bomb hit the women and the children . . . . We are dealing with people that are perfectly willing to lie to the world to attempt to further their case—and to the extent people lie, ultimately they are caught lying and they lose their credibility.<sup>39</sup>

Rumsfeld asserts he has evidence that Al-Jazeera cooperates with insurgents,<sup>40</sup> though no such evidence has been publicly presented to date.

Other U.S. military officials have echoed Rumsfeld's assessments of Al-Jazeera's reporting. Then-U.S. Deputy Secretary of Defense

34. *Rumsfeld Blasts Arab TV Stations*, BBC NEWS, Nov. 26, 2003, [http://news.bbc.co.uk/1/hi/world/middle\\_east/3238680.stm](http://news.bbc.co.uk/1/hi/world/middle_east/3238680.stm).

35. See *Purported Bin-Laden Tape Endorses Al-Zarqawi*, *supra* note 4.

36. See, e.g., Edward Wong, *At Least 75 Iraqis Killed in Major Offensive by Insurgents*, N.Y. TIMES, Mar. 6, 2006, at 8.

37. See, e.g., Abrams, *supra* note 6 ("Any time [terrorists] want to put out propaganda, threats, video, they know they can safely turn to their boys at [Al-Jazeera]."); *Al-Qaida Tapes Often Come Through Al-Jazeera*, MSNBC, Jan. 20, 2006, <http://www.msnbc.msn.com/id/10948626> ("Analysts say Al-Jazeera . . . has carved out a niche for itself by channeling al-Qaida to the world.")

38. See *Al-Qaida Tapes Often Come Through Al-Jazeera*, *supra* note 37 (quoting media analyst Ben Venzke).

39. Nicholas D. Kristof, *Al-Jazeera: Out-Foxing Fox*, N.Y. TIMES, July 3, 2004, at A15 (quoting U.S. Secretary of Defense Donald Rumsfeld).

40. See *Rumsfeld Blasts Arab TV Stations*, *supra* note 34.

Paul Wolfowitz accused the network of inciting violence against U.S. troops through inaccurate reports of U.S. military action against Muslim clerics.<sup>41</sup> The U.S. Central Command commander, General John Abizaid, accused the station of not being truthful in its reporting, noting “[i]t is always interesting to me how Al-Jazeera manages to be at the scene of the crime whenever a hostage shows up or some other problem happens.”<sup>42</sup>

Whether Al-Jazeera intentionally misleads or whether the network suffers from a subconscious lack of objectivity is open to question. Some have pointed out that U.S. news channels may be just as guilty of presenting biased coverage.<sup>43</sup> In the documentary film, *Control Room*, U.S. Lieutenant John Rushing compares Al-Jazeera to the American Fox News Channel: “It benefits Al-Jazeera to play to Arab nationalism because that’s their audience, just like Fox plays to American patriotism, for the exact same reason—American nationalism—because that’s their demographic audience and that’s what they want to see.”<sup>44</sup> Moreover, once Al-Jazeera airs a terrorist message, U.S. networks are quick to pick up the story, expanding the coverage of these messages.<sup>45</sup> Nevertheless, U.S. networks are merely one of many sources of information available to the U.S. public. Al-Jazeera, in contrast, is often the *only* source of information for its viewers.<sup>46</sup> Among media outlets, therefore, Al-Jazeera creates a unique risk of incitement.

Criticism of Al-Jazeera does not come solely from the United States. Many Middle Eastern governments are critical of the network’s coverage as well. Saudi Arabia, Kuwait, and Egypt have each protested Al-Jazeera’s coverage of political dissidents.<sup>47</sup> In the aftermath of the most recent U.S.-Iraqi war, Baghdad’s interim national security advisory threatened to close Al-Jazeera’s Iraqi bureau if they “continue[d] to incite violence and sedition.”<sup>48</sup> Even al-Qaeda recently took to accusing the network of bias—this

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41. See *U.S. Attacks ‘Biased’ Arab News*, *supra* note 33.

42. Liu, *War of Perceptions*, *supra* note 24.

43. See, e.g., Alter, *supra* note 14 (comparing Al-Jazeera to American news outlet Fox News).

44. CONTROL ROOM (Magnolia Pictures 2004).

45. See Eric Schmit, *Bush Nominee for Pentagon is Under Attack*, N.Y. TIMES, OCT. 25, 2005, at A22 (quoting President Bush advisor J. Dorrance Smith).

46. See *Al-Qaida Tapes Often Come Through Al-Jazeera*, *supra* note 37 (referring to statements made by Kathleen Hall Jamieson of the University of Pennsylvania Annenberg Public Policy Center).

47. See, e.g., *U.S. Urges Curb on Arab TV Channel*, *supra* note 17.

48. Liu, *War of Perceptions*, *supra* note 24.

time, in *favor* of U.S. interests.<sup>49</sup> In response to their concerns, several Middle Eastern nations banned Al-Jazeera reporters from their borders.<sup>50</sup> Moreover, some advertisers have reportedly boycotted the station,<sup>51</sup> leading to financial difficulties that may force the network to privatize in the near future.<sup>52</sup>

Despite this criticism, Al-Jazeera continues to defend its editorial content, maintaining the right to broadcast differing viewpoints—the network's slogan is "The Opinion and the Other Opinion."<sup>53</sup> Al-Jazeera reporters tend to be unapologetic for the network's perceived bias, with one even asserting that "[w]e have to be biased towards the Arab nation, we are part of it."<sup>54</sup>

It is therefore debatable whether Al-Jazeera's news coverage is irresponsible, and defenders of the network would no doubt paint its Western critics as biased or misinformed. Nevertheless, it is apparent that the network continues to be an issue of concern, and the Bush administration has had little success in motivating Al-Jazeera to change its coverage through diplomatic overtures. Likewise, no legal remedy currently exists under international law if Al-Jazeera is in fact responsible in some way for inciting terrorism. However, given the key role media coverage plays in spreading fear and urging new acts of violence, international legal mechanisms must be devised that can adequately monitor the mass media for violence-inciting content and punish those who refuse to take responsibility for the material they disseminate.

### B. *The Evolution of Incitement in U.S. Jurisprudence*

A very brief examination of incitement as it developed under U.S. jurisprudence may be helpful to understanding the legal concepts discussed in this Note. The U.S. Supreme Court's decision in *Brandenburg v. Ohio* created the current incitement test.<sup>55</sup> The majority in *Brandenburg* drew a distinction between incitement and mere advocacy. The Court defined incitement as advocacy

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49. See Aamer Madhani, 'We're Paying Unbearable Price for Reporting Truth', CHICAGO TRIBUNE, June 26, 2005, at C6 (citing Al-Zarqawi's criticism of Al-Jazeera).

50. Brian Wheeler, *Al-Jazeera's Cash Crisis*, BBC NEWS, Apr. 7, 2003, <http://news.bbc.co.uk/1/hi/business/2908953.sum> (reporting that Jordan, Kuwait, Iran, and the Palestinians have all banned Al-Jazeera reporters).

51. See *id.*

52. See Steven R. Weisman, *Under Pressure, Qatar May Sell Jazeera Station*, N.Y. TIMES, Jan. 30, 2005, at A1.

53. Feuilherade, *Al-Jazeera Debates Its Future*, *supra* note 32.

54. *Id.*

55. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

“directed to inciting or producing *imminent* lawless action and . . . likely to incite or produce such action.”<sup>56</sup> While abstract advocacy remains within the scope of First Amendment protected speech,<sup>57</sup> incitement does not and may be prohibited by law.<sup>58</sup>

In the wake of *Brandenburg*, courts have developed a number of other doctrines that carve out additional categories of unprotected speech. Most notable for the purposes of this Note is the speech acts doctrine, which leaves as unprotected speech that is “so closely, immediately, and intentionally engaged with a particular unlawful act that the speech is itself part and parcel of that act.”<sup>59</sup> This approach effectively “criminalizes speech when it serves as the *actus reus* of an independent criminal offense.”<sup>60</sup> The speech is criminalized as action, not as expression; it is considered incidental that the action which is criminalized takes the form of speech.<sup>61</sup> As an action, therefore, it receives no First Amendment protection.<sup>62</sup>

While the speech acts doctrine might arguably apply to terrorist speech, it must be noted that this doctrine would typically apply only *against the terrorist*—the party actually speaking. Only in very limited circumstances, where the media outlets are themselves engaged in the illegal activities their disseminations incite—as was the case in the *Rwandan Media Trial*<sup>63</sup>—could the speech acts doctrine be applied to mass media. However, care must be taken in distinguishing between speech acts and incitement. The *actus reus* requirement of the speech acts doctrine means much would depend on the content of the material disseminated and the intent behind broadcasting or publishing it.

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56. *Id.* at 447 (emphasis added).

57. The First Amendment of the U.S. Constitution reads, “Congress shall make no law . . . abridging the freedom of speech.” U.S. CONST. amend. I.

58. See *Brandenburg*, 395 U.S. at 447.

59. Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 839 (2001).

60. Susan W. Brenner, *Complicit Publication: When Should the Dissemination of Ideas and Data be Criminalized?*, 13 ALB. L.J. SCI. & TECH. 273, 340 (2003).

61. See, e.g., *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233, 249 (4th Cir. 1997) (“[A] jury could reasonably find that [the defendant] aided and abetted the murders at issue through the quintessential speech act of providing step-by-step instructions for murder . . . so comprehensive and detailed that it is as if the instructor were literally present with the would-be murderer not only in the preparation and planning, but in the actual commission of, and follow-up to, the murder.”).

62. See Brenner, *supra* note 60, at n.126.

63. See *infra* Part II.E.

C. *Current International Agreements and Resolutions on the Media and Incitement*

Other international legal frameworks, beyond U.S. law, address incitement. Over the last half-century, a number of international organizations and agreements have recognized the obligation of states to prohibit the incitement of terrorism and violence within their borders. Attention has also been given to the importance of the media in countering violence through an informed public.

In accordance with these goals, the United Nations Educational, Scientific and Cultural Organization recognized the responsibility of nations to promote a free and balanced media in the Mass Media Declaration of 1978.<sup>64</sup> This declaration affirms the important role the mass media plays in "the strengthening of peace and international understanding [and in] promoting human rights and to countering racialism, apartheid and incitement to war."<sup>65</sup> It calls on states to "facilitate the procurement by the mass media in the developing countries of adequate conditions and resources enabling them to gain strength and expand," taking into account the constitutional provisions of member states that are designed to protect freedom of information.<sup>66</sup> Part of this obligation involves ensuring the "conditions for a free flow and wider and more balanced dissemination of information."<sup>67</sup>

The broad freedoms given to the media cannot go unfettered, however. As the United Nations (UN) recognized in a resolution passed during its first year in existence: "Freedom of information requires as an indispensable element the willingness and capacity to employ its privileges without abuse. It requires as a basic discipline the moral obligation to seek the facts without prejudice and to spread knowledge without malicious intent."<sup>68</sup>

Of course, the obligations of states to combat violence do not stop with the media. Article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination, for example, requires states to punish "all dissemination of ideas based

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64. See Declaration on Fundamental Principles concerning the Contribution of the Mass Media to Strengthening Peace and International Understanding, to the Promotion of Human Rights and to Countering Racialism, Apartheid and Incitement to War, UNESCO Doc. 20c/20 Rev. (Nov. 28, 1978) [hereinafter UNESCO Mass Media Declaration], available at [http://www.unhchr.ch/huml/menu3/b/d\\_media.htm](http://www.unhchr.ch/huml/menu3/b/d_media.htm).

65. *Id.* art. II.

66. *Id.* art. X.

67. *Id.* art. IX.

68. Calling of an International Conference on Freedom of Information, G.A. Res. 59 (I), ¶ 3 (Dec. 14, 1946).

on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin.”<sup>69</sup> The proscription of such disseminations naturally leads to freedom of expression concerns, and the United States has historically maintained an especially strong tradition of protecting such freedoms. The U.S. Senate, upon ratifying the Convention in 1994,<sup>70</sup> as well as in its 2000 report to the Convention Committee,<sup>71</sup> expressed reservations to Article 4(a) based upon the First Amendment and the *Brandenburg* standard.

The International Covenant on Civil and Political Rights echoes these incitement concerns, and in strong language states “[a]ny advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”<sup>72</sup> As with Article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination, the U.S. Senate expressed First Amendment reservations to this language upon ratification.<sup>73</sup>

In the 1990s, a flurry of new UN resolutions were passed with the aim of eliminating international terrorism. General Assembly Resolution 46/51 (1991), for example, “[c]alls upon all States to fulfill their obligations under international law to refrain from organizing, instigating, assisting or participating in terrorist acts in other States, or acquiescing in or encouraging activities within their territory directed towards the commission of such acts.”<sup>74</sup> General Assembly Resolution 51/201 (1996) specifically deals with the role of media and communications in combating terrorism, calling on nations to “note the risk of terrorists using electronic or wire communications systems and networks to carry out criminal acts and the need to find means, consistent with national law, to prevent

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69. International Convention on the Elimination of All Forms of Racial Discrimination art. 4(a), Mar. 7, 1966, 660 U.N.T.S. 195, available at [http://www.unhchr.ch/huml/menu3/b/d\\_icerd.htm](http://www.unhchr.ch/huml/menu3/b/d_icerd.htm).

70. S. EXEC. REP. NO. 103-29, at 33 (1994).

71. Committee on the Elimination of Racial Discrimination, *Report on the International Convention on the Elimination of all Forms of Racial Discrimination*, ¶¶ 154–55, U.N. Doc. CRED/C/351/Add.1 (Oct. 10, 2000).

72. International Covenant on Civil and Political Rights art. 20(2), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR], available at [http://www.unhchr.ch/html/menu3/b/a\\_ccpr.htm](http://www.unhchr.ch/html/menu3/b/a_ccpr.htm). The European Convention for the Protection of Human Rights and Fundamental Freedoms, discussed below, contains no analogous provision. See *Rwandan Media Trial*, *supra* note 1, ¶ 991.

73. See S. EXEC. REP. NO. 102-23, at 22 (1992).

74. Measures To Eliminate International Terrorism, G.A. Res. 46/51 (Dec. 9, 1991).

such criminality and to promote cooperation where appropriate.”<sup>75</sup> It also calls upon states “to intensify, as and where appropriate, the exchange of information on facts related to terrorism and, in so doing, to avoid the dissemination of inaccurate or unverified information.”<sup>76</sup> These measures are intended to ensure “effective cooperation between Member States so that those who participate in terrorist acts, including their financing, planning or incitement, are brought to justice.”<sup>77</sup>

The UN is not alone in addressing the role an unchecked media can play in facilitating terrorism. In Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Council of Europe guarantees the right to freedom of expression, but allows that right to be curtailed “in the interests of national security.”<sup>78</sup> Unlike the aforementioned UN resolutions, this Convention has been the subject of a substantial amount of litigation, principally before the European Court of Human Rights.<sup>79</sup>

#### D. *Incitement in International Jurisprudence*

While much of the treaty law regarding the media and incitement developed only in the last few decades, the case law of international tribunals goes back to World War II and more recently has been supplemented by the European Court of Human Rights. The International Military Tribunal at Nuremberg conducted the first international trials on media-related incitement, charging two defendants for their role in disseminating material that fueled the Holocaust.

##### 1. The Nuremberg Trials

Hans Fritzsche, editor-in-chief of the official Nazi-German news agency and head of the Wireless News Service, the Home Press Division of the Reich Ministry of Propaganda, and the Radio Division of the Nazi Party Propaganda Department, was charged with

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75. Measures To Eliminate International Terrorism, ¶ 1(3)(c), G.A. Res. 51/210 (Dec. 17, 1996).

76. *Id.* ¶ 1(4).

77. *Id.* ¶ 5, Annex.

78. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 10, Nov. 4, 1950, 213 U.N.T.S. 222, available at <http://www.echr.coe.int/Convention/webConvenENG.pdf>.

79. See *infra* Part II.D.2.

incitement to war crimes.<sup>80</sup> As part of his duties, Fritzsche allegedly falsified news reports “to arouse in the German People those passions which led them to the commission of atrocities.”<sup>81</sup> Specifically, his radio addresses maintained that the war was caused by the Jews, though his speeches stopped short of urging persecution or extermination of the Jews.<sup>82</sup> In its judgment, the Tribunal noted that Fritzsche lacked the position to take part in the formulation of such propaganda<sup>83</sup>—he was merely the “conduit to the press” for his superiors<sup>84</sup>—and that he had no reason to believe that the reports handed to him to disseminate were untrue.<sup>85</sup> For these reasons, Fritzsche was acquitted.<sup>86</sup>

The Soviet member of the Tribunal, however, wrote a dissent stressing the particular importance of propaganda to the Nazi regime and disputing the finding that Fritzsche was a secondary figure.<sup>87</sup> Because Fritzsche was the political director of German radio throughout the war, the Soviet member argued that he should bear responsibility for the provocative broadcasts he oversaw.<sup>88</sup>

The conflicting factual findings made by the majority and dissent in Fritzsche’s case may be due in part to some confusion over the complicated hierarchy of leadership employed by the Nazis. The Soviet magistrate placed emphasis on the defendant’s title of “Plenipotentiary of the Political Organization of Radio in Greater Germany”—a position the responsibilities of which remained unclear in the Tribunal’s factual findings—as evidence against the majority’s finding that Fritzsche was only a secondary figure.<sup>89</sup> Given the significance of Fritzsche’s rank to the majority’s findings, it is possible that a better understanding of this title may have led to a conviction.

Julius Streicher, in contrast, did not escape criminal liability for his publications. Streicher, editor-in-chief of the anti-Semitic newspaper *Der Sturmer*, was charged with incitement of the persecution

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80. 1 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL AT NUREMBERG 79 (1947) [hereinafter NUREMBERG TRIALS].

81. *Id.* at 337–38.

82. *Id.* at 338.

83. *Id.*

84. *Id.* at 337.

85. *Id.* at 338.

86. *Id.*

87. *Id.* at 350–51.

88. *Id.* at 352.

89. *Id.*

of the Jews.<sup>90</sup> *Der Sturmer*, which had a circulation in 1935 of 600,000, published numerous articles and letters calling for the extermination of the Jewish race.<sup>91</sup> Twelve articles written by Streicher himself were introduced into evidence.<sup>92</sup> The Tribunal also found evidence Streicher continued to publish such material even after he became aware of the Jewish exterminations in the occupied eastern territories, though Streicher repeatedly denied such knowledge.<sup>93</sup> Based upon this evidence, Streicher was convicted on the count of incitement.<sup>94</sup>

A number of factual distinctions may explain the different outcomes of the Fritzsche and Streicher trials. First and foremost, the influence of Streicher's position was more clearly demonstrated, and his responsibility for disseminating inciting content, and his ability to prevent such dissemination, were not in question. Furthermore, the majority in the Fritzsche trial may have been influenced by evidence that Fritzsche refused requests by Nazi propagandist Joseph Goebbels to publish inciting material, had prohibited the term "master race" from his airwaves, and, interestingly, had twice tried to ban Streicher's newspaper out of concern for its content.<sup>95</sup> Finally, the content of the materials disseminated by Fritzsche and Streicher, respectively, was markedly different. While Streicher specifically called for the extermination of the Jews,<sup>96</sup> the material broadcast by Fritzsche was less direct and more notional, focusing solely on principles of Jewish inferiority without calling for any specific action to be taken against them.<sup>97</sup>

If Streicher's publications constituted incitement, Fritzsche's broadcasts may be more properly analogized to abstract advocacy under U.S. First Amendment jurisprudence.<sup>98</sup> Alternatively, one could argue that Streicher's publications constituted speech acts, inextricably intertwined with the crimes of murder and genocide perpetrated against the Jews by Streicher's readers, though the

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90. *Id.* at 77.

91. *Id.* at 302-03.

92. *Id.* at 303.

93. *Id.*

94. *Id.* at 304.

95. Rwandan Media Trial, *supra* note 1, ¶ 982.

96. NUREMBERG TRIALS, *supra* note 80, at 302-03.

97. *Id.* at 338.

98. *See, e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (noting that free speech guarantees advocacy "of the use of force or of law violation [unless] . . . such advocacy is directed to inciting or producing imminent lawless action").

Nuremberg Tribunal “does not explicitly note a direct causal link between Streicher’s publication and any specific acts of murder.”<sup>99</sup>

## 2. Modern European Incitement Jurisprudence

Decades after Nuremberg, the European Court of Human Rights (ECHR) tried a number of media-related incitement cases. Litigated under Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>100</sup> a key issue in these cases was the proper balance of freedom of expression with national security interests.

In *Jersild v. Denmark*, a Danish Broadcasting Corporation journalist’s conviction for interviewing members of a racist youth group was overturned.<sup>101</sup> The journalist had been convicted under a Danish law prohibiting dissemination of ideas based on incitement to racial discrimination.<sup>102</sup> The interview in question contained a number of racially offensive comments from the interviewees, though these were balanced with questions which presented opposing views.<sup>103</sup> The ECHR indicated that an important factor in its decision was the issue of “whether the item in question, when considered as a whole, appeared from an objective point of view to have had as its purpose the propagation of racist views and ideas.”<sup>104</sup> Ultimately, the decisive issue was the distance the interviewer placed between himself and the views of the interviewees.<sup>105</sup>

In the case of *Incal v. Turkey*, the ECHR affirmed the legality of a leaflet criticizing, as racially biased against the Kurdish population, the local government’s efforts to maintain order.<sup>106</sup> The government argued that this material was likely to incite the Kurdish population to band together into neighborhood committees and resist authorities.<sup>107</sup> The ECHR, however, found the publication did not constitute incitement to violence, but noted that, in other circum-

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99. Rwandan Media Trial, *supra* note 1, ¶ 981.

100. European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 78, art. 10.

101. *Jersild v. Denmark*, 298 Eur. Ct. H.R. 27 (1994), available at <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database>.

102. *Id.* at 14.

103. The interviewees used the term “nigger,” asserted that blacks are not human beings and a drain on society’s resources, and further described various acts of criminal violence against blacks in a positive manner. *Id.* at 10–14.

104. *Id.* at 23–24.

105. *See id.* at 25.

106. *Incal v. Turkey*, 78 Eur. Ct. H.R. 1571–73 (1998), available at <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database>.

107. *Id.* at 1554–55.

stances, the possibility "such a text may conceal objectives and intentions different from the ones it proclaims" could not be ruled out.<sup>108</sup> The ECHR found no reason to doubt the sincerity of the leaflet's aims,<sup>109</sup> but clearly left the door open for governments to prohibit publications of materials that may covertly aim to incite violence.

In *Arslan v. Turkey*, the ECHR overturned the conviction of a book publisher,<sup>110</sup> noting that although some passages of the book were "particularly acerbic,"<sup>111</sup> were not a neutral depiction of historical fact,<sup>112</sup> and painted a generally negative picture of the Turkish population,<sup>113</sup> the passages did not raise to the level of incitement to violence.<sup>114</sup> The ECHR distinguished the book as a literary work rather than mass media, finding that the former has a lesser potential impact on security and order.<sup>115</sup>

In *Surek & Ozdemir v. Turkey*, the ECHR upheld the publication of an interview with the leader of a militant organization.<sup>116</sup> The publication's editor argued that the interview did not praise the organization or the views thereof, and that the piece was written objectively with the intent to inform the general public.<sup>117</sup> The ECHR found the piece newsworthy, noting:

Particular caution is called for when consideration is being given to the publication of the views of representatives of organisations which resort to violence against the State lest the media become a vehicle for the dissemination of hate speech and the promotion of violence. At the same time, where such views cannot be categorised as such, Contracting States cannot with reference to the protection of territorial integrity or national security or the prevention of crime or disorder restrict the right of the public to be informed of them by bringing the weight of the criminal law to bear on the media.<sup>118</sup>

A concurrence in the case maintained that the key questions at issue were, "Was the language intended to inflame or incite to vio-

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108. *Id.* at 1567.

109. *Id.*

110. *Arslan v. Turkey*, 13 Eur. Ct. H.R. 285-87 (1999), available at <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database>.

111. *Id.* at 287.

112. *Id.* at 286.

113. *Id.* at 287.

114. *Id.*

115. *Id.*

116. *Surek and Ozdemir v. Turkey*, Eur. Ct. H.R. (1999) (unreported), available at <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database>.

117. *Id.* ¶ 52.

118. *Id.* ¶ 63.

lence?" and "Was there a real and genuine risk that it might actually do so?"<sup>119</sup>—a standard remarkably similar to the *Brandenburg* test.

While the previous cases define the limits regulation of potentially-inciting material must respect, the case of *Surek v. Turkey (No. 1)*<sup>120</sup> demonstrates the conditions under which mass media may be lawfully convicted for incitement. In that case, the ECHR upheld the conviction of the owner of the same weekly review at issue in *Surek and Ozdemir*, this time for publishing two letters from readers condemning the military actions of Turkish authorities.<sup>121</sup> The ECHR found the strong language employed in the letters to have a clear intent to stigmatize the Turkish government and "appeal to bloody revenge by stirring up base emotions and hardening already embedded prejudices."<sup>122</sup> The ECHR also held that shareholders, despite lacking official editorial capacity, share responsibility for the content of their publications and have the power of commercial oversight to prevent the dissemination of inciting content.<sup>123</sup>

While the jurisprudence of the ECHR weighs many of the issues relevant to an incitement to terrorism standard, it is based upon European law and is therefore of a limited scope. However, in December 2003, the International Criminal Tribunal for Rwanda (ICTR) issued a groundbreaking decision expanding the scope of punishment for inciting speech under international law.

#### E. *The Rwandan Media Trial as a Standard for Incitement*

In *Prosecutor v. Nahimana (Rwandan Media Trial)*, the ICTR handed down the first convictions against mass media dissemination of inciting material under international criminal law since the Streicher trial at Nuremberg.<sup>124</sup> In the *Rwandan Media Trial* three media executives were indicted on various charges of crimes against humanity, genocide, conspiracy to commit genocide, and most notably "direct and public incitement to commit genocide" for their parts in the 1994 Rwandan genocides.<sup>125</sup> What is perhaps

119. *Id.* (concurring opinion of Judges Palm, Tulkens, Fischbach, Casadevall and Greve).

120. *Surek v. Turkey (No. 1)*, Eur. Ct. H.R. (1999), available at <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database>.

121. *Id.* at 362.

122. *Id.* at 383–84.

123. *Id.* at 384.

124. See Recent Cases, 117 HARV. L. REV. 2769, 2769 (2004).

125. *Rwandan Media Trial*, *supra* note 1, ¶¶ 8–10.

more remarkable than the conviction of all three defendants on incitement charges<sup>126</sup> is that all three were also found liable for the *crime of genocide*<sup>127</sup> for the speech they disseminated through their media outlets.<sup>128</sup>

### 1. Factual Findings in the *Rwandan Media Trial*

Two defendants—Ferdinand Nahimana and Jean-Bosco Barayagwiza—were charged for their roles in the management of an influential Rwandan radio station. Nahimana was a founding member and shareholder in the Rwandan radio station RTLM.<sup>129</sup> Barayagwiza was a founding member of the Coalition for the Defense of the Republic (CDR) political party, as well as a senior official at RTLM.<sup>130</sup> While Nahimana was the “number one” person in RTLM management, Barayagwiza occupied the “number two” role.<sup>131</sup>

Under the direction of Nahimana<sup>132</sup> and Barayagwiza,<sup>133</sup> RTLM played a key role in stirring up the ethnic hatred that fueled the Rwandan genocide.<sup>134</sup> From 1993 to 1994, RTLM broadcasts described ethnic Tutsis as enemies who should be identified by their physical characteristics and exterminated.<sup>135</sup> Other broadcasts linked the Tutsis with the civil war then raging throughout the country<sup>136</sup> and warned the Hutu population to fear and suspect them.<sup>137</sup> Some broadcasts listed the names of Tutsi individuals who were subsequently killed.<sup>138</sup>

On a more indirect level, RTLM also created a general atmosphere of ethnic hatred through the repeated broadcast of materi-

126. *Id.* ¶¶ 1092–94.

127. *Id.*

128. *See id.* ¶¶ 946–77A.

129. Prosecutor v. Ferdinand Nahimana, Case No. ICTR 99-52-T, Amended Indictment, 14 (Nov. 15, 1999) [hereinafter *Nahimana Indictment*], available at <http://www.ictr.org/ENGLISH/cases/Nahimana/indictment/index.pdf>.

130. Prosecutor v. Jean-Bosco Barayagwiza, Case No. ICTR 97-19-T, Amended Indictment, 13 (April 13, 2003) [hereinafter *Barayagwiza Indictment*], available at <http://www.ictr.org/ENGLISH/cases/Barayagwiza/indictment/index.pdf>.

131. *Rwandan Media Trial*, *supra* note 1, ¶ 970.

132. *Id.* ¶¶ 693–94, 966, 972–74.

133. *Id.* ¶¶ 970–73.

134. The impact of RTLM on the genocide was described by one witness as follows: “[W]hat RTLM did was to pour petrol—to spread petrol throughout the country little by little, so that one day it would be able to set fire to the whole country.” *Id.* ¶ 436.

135. *Id.* ¶¶ 392, 423, 425, 427 (“RTLM broadcasts continued after 6 April to define the enemy as the Tutsi, at times explicitly.”).

136. *Id.* ¶ 408.

137. *Id.* ¶ 410.

138. *Id.* ¶¶ 431, 442–48.

als designed to inflame the Hutu population. Various broadcasts referred to the Tutsis as *inyenzi* (cockroaches)<sup>139</sup> and *inkotanyi* (originally meaning “warrior,” though used as a negative epithet when referring to the Tutsi),<sup>140</sup> highlighted the physical differences of Tutsis from Hutus,<sup>141</sup> accused the Tutsis of having “all the money,”<sup>142</sup> and even played pop songs aimed at inflaming the Hutu population.<sup>143</sup> All of this led listeners to believe that RTLM hated that Tutsis, despite claims from Nahimana of network efforts to be even-handed.<sup>144</sup>

Where material was presented as fact in RTLM broadcasts—for example, when individuals were named as Tutsis or *inkotanyi* accomplices—no evidence was offered to prove that such on-air comments were anything more than mere speculation.<sup>145</sup> Broadcasts were not “couched in careful language” and negative inferences about Tutsis were “stated as definite conclusions.”<sup>146</sup> These journalistic standards “gave credibility to the ‘reign of rumour’”<sup>147</sup> which fueled the violent atmosphere in Rwanda.

The third defendant, Hassan Ngeze, was charged in connection with his role as editor-in-chief of the newspaper *Kangura*, a major Rwandan newspaper, as well as a founding member of the CDR.<sup>148</sup> Like RTLM—and in collaboration with them<sup>149</sup>—*Kangura* disseminated material referring to the Tutsis as the enemy,<sup>150</sup> portraying them as dishonest and evil,<sup>151</sup> and urging Hutus to take all necessary measures against them.<sup>152</sup> One prominent issue of the newspaper featured an image of a machete on the cover, conveying the

139. See, e.g., *id.* ¶¶ 398, 401, 406–07 (“In other broadcasts, the terms *Inkotanyi* and *Inyenzi* were used for the enemy.”).

140. See, e.g., *id.* ¶¶ 372, 375, 394, 400 (“[T]he broadcast in effect equated ‘an enemy, or an accomplice or an *Inkotanyi*’ with anyone who was not a Hutu.”).

141. *Id.* ¶ 368.

142. *Id.* ¶ 367.

143. *Id.* ¶ 440.

144. *Id.* ¶ 369.

145. See, e.g., *id.* ¶¶ 381–82, 386–87, 414 (“Hitimana provided no evidence in support of his contention that these people were *Inkotanyi* accomplices.”).

146. *Id.* ¶ 382.

147. *Id.* ¶ 389.

148. Prosecutor v. Hassan Ngeze, Case No. ICTR 97-27-T, Amended Indictment, 11 (Nov. 10, 1999) [hereinafter Ngeze Indictment], available at <http://www.ictor.org/ENGLISH/cases/Ngeze/indictment/ngezeamend.pdf>.

149. All three defendants were found guilty of conspiracy to commit genocide upon the finding that “*Kangura* interacted extensively with both RTLM and CDR.” Rwandan Media Trial, *supra* note 1, ¶ 1055.

150. *Id.* ¶ 138.

151. *Id.* ¶¶ 139, 152.

152. *Id.* ¶ 153.

message that the Tutsis should be eliminated through violence.<sup>153</sup> Through such words and imagery, *Kangura* fanned the "flames of ethnic hatred, resentment and fear against the Tutsi population."<sup>154</sup>

## 2. Legal Findings in the *Rwandan Media Trial*

### (i) Incitement Charges

In finding the defendants guilty of incitement to genocide, the ICTR relied upon much of the Nuremberg and ECHR precedent.<sup>155</sup> From the start, the ICTR made clear it considered not only the content of mass media, but also "the responsibilities inherent in ownership and institutional control over the media."<sup>156</sup>

The defendants were charged with the crime of "direct and public incitement to genocide,"<sup>157</sup> and the ICTR offered several definitions relating to this crime. *Incitement* was defined as "encouragement or provocation to commit an offense."<sup>158</sup> Such incitement is *direct* if it is "more than mere vague or indirect suggestion,"<sup>159</sup> and is *public* if it is "a call for criminal action . . . to members of the general public at large by such means as the mass media, for example, radio or television."<sup>160</sup> Though the decision is somewhat unclear on this point, past precedent from the ICTR reveals that incitement must be both direct and public to be punishable.<sup>161</sup>

In its legal findings, the ICTR weighed three major factors in adjudicating the incitement charges: intent, context, and causa-

153. *Id.* ¶ 950.

154. *Id.*

155. *See id.* ¶¶ 981–99.

156. *Id.* ¶ 979.

157. *Id.* ¶ 1016; *see also* Statute of the International Tribunal for Rwanda, S.C. Res. 955, art. 2(3)(c) (Nov. 8, 1994) [hereinafter ICTR Statute], available at <http://www.ictor.org/ENGLISH/basicdocs/statute/2004.pdf>.

158. *Rwandan Media Trial*, *supra* note 1, ¶ 1011.

159. *Id.*

160. *Id.*

161. *See* Prosecutor v. Jean-Paul Akayesu, Case No. ICTR 96-4-T, Judgment, (Sept. 2, 1998) [hereinafter Akayesu], available at [http://ictor.org/ENGLISH/cases/Akayesu/judgment/akay001.htm#6\\_3\\_3](http://ictor.org/ENGLISH/cases/Akayesu/judgment/akay001.htm#6_3_3). According to the ICTR:

[W]hatever the legal system, direct and public incitement must be defined for the purposes of interpreting Article 2(3)(c), as directly provoking the perpetrator(s) to commit genocide, whether through speeches, shouting or threats uttered in public places or at public gatherings, or through the sale or dissemination, offer for sale or display of written material or printed matter in public places or at public gatherings, or through the public display of placards or posters, or through any other means of audiovisual communication.

*Id.* ¶ 559.

tion.<sup>162</sup> With regard to intent, a crucial question is whether the purpose of publicly transmitting the material was of a bona fide nature—or, as the ECHR put it in *Surek & Ozdemir*, “Was the language intended to inflame or incite to violence?”<sup>163</sup> The actual language used in the media will be the indicator of intent,<sup>164</sup> with the factors of accuracy and tone being of particular relevance.<sup>165</sup> Furthermore, the specific intent to commit genocide is an indispensable element of the crime’s *mens rea*.<sup>166</sup>

In weighing the factor of context, the ICTR noted that an expression may be intended to incite covertly, even though it does not facially do so.<sup>167</sup> It is a question of assessing the sincerity of the author in light of the atmosphere.<sup>168</sup> A pervasive environment of violence may be an indicator of both context and intent, in that a statement provoking resentment of a particular group may be expected to lead to further violence.<sup>169</sup>

The final factor—causation—is somewhat more fluid. The ICTR, in line with international jurisprudence, noted that no specific causal link between the expression and violent acts is required for a finding of incitement.<sup>170</sup> Rather, the only question is “what the likely impact might be.”<sup>171</sup> In other words, “[i]t is the potential of the communication to cause genocide that makes it incitement.”<sup>172</sup> Under such a standard, causation might be relatively indirect<sup>173</sup> and conviction possible without any violent acts ever occurring.<sup>174</sup> This is crucial to the overall holding because, where genocide does in fact result from the incitement, the defendant may be charged with *both* genocide and incitement to genocide.<sup>175</sup>

Applying this standard to the disseminations of RTL and *Kangura* proved complicated as the materials in question ranged from direct calls for violent action to more abstract ideas of ethnic

162. See Rwandan Media Trial, *supra* note 1, ¶¶ 1001–10.

163. *Id.* ¶ 1002.

164. *Id.* ¶ 1001.

165. *Id.* ¶ 1021.

166. *Id.* ¶ 1012.

167. See *id.* ¶ 1005.

168. *Id.*

169. *Id.* ¶ 1022.

170. *Id.* ¶ 1007.

171. *Id.*

172. *Id.* ¶ 1015.

173. See *id.* ¶ 1007.

174. “Incitement to genocide” is characterized as an inchoate offense and, because genocide is such a serious crime, incitement may be punished even where it fails to produce the intended result. *Id.* ¶ 1013.

175. *Id.* ¶ 1015.

hatred.<sup>176</sup> Moreover, where media is concerned, a distinction must be made between promoting and merely discussing an inciting idea.<sup>177</sup> The former may be characterized by stereotyping and denigration<sup>178</sup> and may be punished, while the latter, if presented in the proper context and tone, is a crucial element of the freedom of expression protected by international law.<sup>179</sup> Of course, in a region where there is ongoing political strife, it may be difficult for media to convey hostile viewpoints in an informative manner without appearing to endorse them. To avoid liability in such a situation, the media must clearly distance itself from the violent message and convey a clear counter-message to ensure that no harm results from the broadcasts.<sup>180</sup>

Taking into account the foregoing considerations, the ICTR examined the content of RTLM broadcasts and *Kangura* publications. Though it found some communications fell short of incitement—those whose impact would result from “the reality conveyed by the words rather than the words themselves”<sup>181</sup>—the ICTR nevertheless found that much of the material disseminated through these media outlets had the intent and the effect of “heating up heads”<sup>182</sup> and systematically inciting listeners and readers to commit genocide.<sup>183</sup>

In particular, the ICTR discussed two patterns in these communications that crossed the line from acceptable discussion to incitement. First, the pervasive use of ethnic generalizations and stereotypes differed from verifiable factual statements about the realities of Rwandan life<sup>184</sup> and revealed an intent to promote resentment and inflame tensions rather than to inform.<sup>185</sup> The tone of the materials revealed the hostility of the journalists who presented them<sup>186</sup> and, in the genocidal environment of Rwanda,

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176. See *supra* Part II.E.1.

177. See *id.* ¶ 1020 (“The Chamber considers that it is critical to distinguish between the discussion of ethnic consciousness and the promotion of ethnic hatred.”).

178. *Id.* ¶ 1021.

179. *Id.* ¶ 1020.

180. *Id.* ¶ 1024.

181. *Id.* ¶ 1020.

182. *Id.* ¶ 1031.

183. *Id.* ¶¶ 1031–38.

184. *Id.* ¶ 1021 (explaining that an RTLM broadcast which stated that the Tutsis “have all the money” was a generalization and differed from a statement about the high percentage of taxes owned by Tutsis).

185. *Id.* (inferring that inaccurate statements are an indicator of an intent to promote hostility and resentment rather than to inform).

186. *Id.*

were more likely to lead to violence.<sup>187</sup> Moreover, though an RTLM journalist boasted that “even” the *inkotanyi* could speak on air, neither RTLM or *Kangura* were open and neutral fora.<sup>188</sup> Neither media outlet distanced themselves from the messages of ethnic hatred.<sup>189</sup> Therefore, the defendants could not convincingly argue that their disseminations were intended as even-handed or purely informative.<sup>190</sup>

Second, both RTLM and *Kangura* listed names of individuals suspected of Tutsi ties<sup>191</sup> and made direct calls for action against them.<sup>192</sup> These messages incited listeners and readers to action by “instilling fear in them, giving them names to associate with this fear, and mobilizing them to take independent, proactive measures in an effort to protect themselves.”<sup>193</sup>

This second pattern of incitement, standing on its own, would seem to constitute “direct and public incitement to genocide.”<sup>194</sup> The listing of specific individuals and the call to take action against them is certainly “more than mere vague or indirect suggestion,”<sup>195</sup> satisfying the directness requirement. The use of mass media to do so satisfies the public requirement. What is unclear is whether the first pattern of incitement—the use of ethnic stereotypes and denigrations to promote hostility and resentment against the Tutsis—is direct enough for a finding of liability. In other words, could the defendants have been convicted on incitement counts had there been no specific call for action?

## (ii) Genocide Charges

In addition to incitement, the defendants were convicted on separate genocide charges for the disseminations of RTLM and *Kangura*. The ICTR found a specific causal connection between RTLM broadcasts and the killing of individuals listed by name on the airwaves.<sup>196</sup> *Kangura*, meanwhile, paved the way for genocide

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187. *Id.* ¶ 1022.

188. *Id.* ¶ 1023. In fact, both “had a well-defined perspective for which they were known.” *Id.*

189. *Id.* ¶ 1024.

190. *See id.* ¶ 1023.

191. *Id.* ¶ 1026.

192. *Id.* ¶ 1028 (detailing lists of names disseminated in *Kangura* and RTLM broadcasts, calling for readers and listeners to organize in “self-defense” against the persons announced).

193. *Id.*

194. Ngeze Indictment, *supra* note 148, at 338.

195. *Id.* at 337.

196. Rwandan Media Trial, *supra* note 1, ¶ 949.

through “fear-mongering and hate propaganda,” generating a “killing frenzy” among the Hutu population.<sup>197</sup> The ICTR justified the genocide convictions by explaining:

The nature of media is such that causation of killing and other acts of genocide will necessarily be effected by an immediately proximate cause in addition to the communication itself. In the Chamber’s view, this does not diminish the causation to be attributed to the media, or the criminal accountability of those responsible for the communication.<sup>198</sup>

The ICTR made an analogy between the disseminations of RTLM and *Kangura* and the bullets in a gun, remarking that “[t]he trigger had such a deadly impact because the gun was loaded.”<sup>199</sup> This causal link, along with the requisite finding of genocidal intent,<sup>200</sup> was sufficient to convict the defendants for genocide. As with U.S. speech act jurisprudence,<sup>201</sup> the speech here was sufficiently intertwined with the illegal conduct to constitute the *actus reus* of the crime.

Though Nahimana and Barayagwiza argued that they had served in a managerial and not an editorial capacity, the ICTR found this legally irrelevant, extending liability to the highest levels of the chain of command for their failure to intervene into RTLM programming.<sup>202</sup> Similarly, Ngeze argued that publishing a news item in *Kangura* was not the same as authoring it.<sup>203</sup> However, as the ECHR in *Surek (No. 1)* found,<sup>204</sup> the ICTR held that even the publication of letters from readers must be subject to liability.<sup>205</sup> What matters is the content of the text, *not* who authored it.<sup>206</sup> Therefore, under ICTR precedent, liability for incitement—as well as genocide—attaches not just to the author or speaker, but also to the editorial staff and upper management of mass media outlets that disseminate inciting material.

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197. *Id.* ¶ 950.

198. *Id.* ¶ 952.

199. *Id.* ¶ 953.

200. *See id.* ¶¶ 957–69.

201. *See supra* Part II.B.

202. *Id.* ¶ 970.

203. *Id.* ¶ 148.

204. *See Surek v. Turkey (No. 1)*, Eur. Ct. H.R. (1999), available at <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database>.

205. Rwandan Media Trial, *supra* note 1, ¶ 1003.

206. *See id.*

### III. ANALYSIS

#### A. *Applying Rwandan Media Trial Precedent to Al-Jazeera*

While the *Rwandan Media Trial* is certainly groundbreaking precedent, could it be applied, even as persuasive authority, to Al-Jazeera? Unlike the genocide claims against RTLM and *Kangura*, there is currently no evidence that Al-Jazeera is directly involved with plotting or cooperating in terrorist activities.<sup>207</sup> Al-Jazeera only airs the messages of others. Therefore, if Al-Jazeera is liable for anything, it is only incitement to terrorism—not the crime of terrorism itself.

As discussed above, there were two prominent patterns of alleged incitement in the content of RTLM and *Kangura*: (1) the general promotion of hostility and resentment, and (2) the direct calls to action.<sup>208</sup> A comparison between the disseminations of RTLM, *Kangura*, and Al-Jazeera shows that both patterns are present in Al-Jazeera's broadcasts.

##### 1. Al-Jazeera and Direct Calls to Action

In the *Rwandan Media Trial*, it was found RTLM and *Kangura* each made direct calls to action—calling for the persecution of the Tutsis in the imperative voice.<sup>209</sup> In their defense, all three defendants argued that they did not author or state the inciting material themselves.<sup>210</sup> However, this distinction was irrelevant in the eyes of the ICTR.<sup>211</sup> Liability for incitement attaches not only to the author, but also to the editorial staff, management, and ownership of media outlets that disseminate inciting material.<sup>212</sup> Likewise, Al-Jazeera may claim that its reporters do not make direct calls for terrorist action. Nevertheless, the network has aired messages from Osama Bin Laden and Saddam Hussein, to cite but two examples,<sup>213</sup> calling for terrorist action against U.S. interests and the Iraqi interim government.<sup>214</sup> Under the precedent of the *Rwandan Media Trial*, Al-Jazeera's editors, managers, and financial contribu-

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207. Though former U.S. Secretary of Defense Donald Rumsfeld claims to have such evidence, he has yet to present it to the public. See *Rumsfeld blasts Arab TV stations*, *supra* note 34.

208. See *supra* Part II.E.2.

209. See *supra* notes 135, 152 and accompanying text.

210. See *supra* notes 202–206 and accompanying text.

211. See *id.*

212. See *supra* note 202.

213. See *supra* Part II.A.

214. See *supra* note 34 and accompanying text.

tors may all bear criminal responsibility for broadcasting these direct calls to action.

Such a finding would turn on whether the requisite intent, context, and causation are present.<sup>215</sup> The standard for causation is relatively indirect,<sup>216</sup> and where the "likely impact"<sup>217</sup> of broadcasting terrorist messages might be the commission of terrorist acts by Al-Jazeera viewers, the requisite causal link would probably be established. Note that no actual terrorist activity need occur for a finding of causality—the mere potential of terrorist activity suffices under the *Rwandan Media Trial* precedent.<sup>218</sup> Al-Jazeera televised messages from Saddam Hussein and Osama Bin Laden calling for violence against U.S. and Iraqi interests.<sup>219</sup> Such messages from two highly influential regional leaders would logically seem to result in some viewers actually carrying out those directions. Therefore, causation may not be difficult to establish.

The questions of intent and context are somewhat less certain. Even the network's most vocal critics would hesitate to say that Al-Jazeera has the specific intent of inciting terrorism. Rather, it is arguably more of a recklessness issue—Al-Jazeera is indifferent to the consequences its coverage may have. Al-Jazeera could certainly argue that, in broadcasting audio and video recordings of terrorist messages, it did not have the specific intent to incite violence, but rather aimed only to present all points of view to its viewers.<sup>220</sup> However, the accuracy and tone of these broadcasts must be taken into account<sup>221</sup>—factors that, according to the U.S. government, weigh against Al-Jazeera<sup>222</sup>—and in the context of the pervasive environment of violence in Iraq, the repeated broadcast of direct calls to violent action may certainly be expected to lead to further violence.

One could also argue that the network's refusal to cease the broadcast of terrorist messages, despite knowledge of the violent atmosphere in the region, creates the requisite intent. Nuremberg Principle VII, as cited by the ICTR in the *Akayesu* case, states that "complicity in the commission of a crime against peace, a war

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215. See *supra* Part II.E.2.

216. See *supra* notes 170–173 and accompanying text.

217. *Rwandan Media Trial*, *supra* note 1, ¶ 1007.

218. See *supra* note 174 and accompanying text.

219. See *supra* Part II.A.

220. See, e.g., Feuillerade, *supra* note 32 ("Al-Jazeera claims its slogan - The Opinion and the Other Opinion - reflects the right of differing voices to have their views heard.").

221. See *supra* note 165 and accompanying text.

222. See *supra* notes 39, 41–42 and accompanying text.

crime, or a crime against humanity . . . is a crime under international law.”<sup>223</sup> This suggests that if Al-Jazeera knows its broadcasts might incite terrorism, and fails to modify its content accordingly, it may constitute intent by way of complicity. Thus, a case may be made that the requisite causation, intent, and context are present with regard to Al-Jazeera’s broadcast of terrorist messages containing direct calls to violence, and the network may be liable for incitement to terrorism.

## 2. Al-Jazeera and the General Promotion of Hostility

With regard to the general promotion of hostility and resentment, the case against Al-Jazeera may be even stronger. The causation analysis in this instance would be identical to that discussed for direct calls to action. And there is considerably stronger evidence supporting findings of intent and context.

Like RTL and *Kangura*, Al-Jazeera has a “well-defined perspective” for which it is known.<sup>224</sup> The network seems consciously to cater to the biases of its viewers, as its reporters have admitted.<sup>225</sup> Many would further argue that Al-Jazeera broadcasts, like those of RTL, are not “couched in careful language,”<sup>226</sup> make negative inferences about the United States that are “stated as definite conclusions,”<sup>227</sup> and give “credibility to the ‘reign of rumour.’”<sup>228</sup> Statements of the U.S. government are portrayed as ‘claims’ while statements of those sympathetic to the causes of terrorist organizations and the deposed Baathist regime are portrayed as fact<sup>229</sup>—sometimes without verification.<sup>230</sup> When U.S. officials such as Donald Rumsfeld speak on the airwaves, they are shown alongside images of wounded Iraqis,<sup>231</sup> suggesting an attempt by the network to discredit those officials and implicitly link the violence to the U.S. government. The barrage of gruesome images of civilian casualties broadcast by Al-Jazeera,<sup>232</sup> along with corresponding reports

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223. Akayesu, *supra* note 161, ¶ 526.

224. Cf. Rwandan Media Trial, *supra* note 1, ¶ 1023 (noting that both RTL and *Kangura* had “a well-defined perspective for which they were known.”).

225. See *supra* note 54 and accompanying text.

226. Rwandan Media Trial, *supra* note 1, ¶ 382.

227. *Id.*

228. *Id.* ¶ 389.

229. See, e.g., Alter, *supra* note 14.

230. See, e.g., Brant, *supra* note 29 (describing Al-Jazeera’s unverified broadcast of pictures of Iraqi civilian casualties, which Al-Jazeera attributed to U.S. military action).

231. See, e.g., Alter, *supra* note 14.

232. See, e.g., Brant, *supra* note 29.

attributing these deaths to intentional or reckless U.S. targeting,<sup>233</sup> further support charges of bias that go to the requisite context and intent.

But where, if at all, does journalistic recklessness cross the line to incitement? Al-Jazeera argues that it does not promote terrorist viewpoints, but simply discusses them.<sup>234</sup> The determinative factor under ICTR and ECHR precedent may be whether Al-Jazeera sufficiently distances itself from the terrorist viewpoints it frequently reports.<sup>235</sup> To be sure, Al-Jazeera does present opposing views—Bush administration senior officials have even taken to the network's airwaves on numerous occasions<sup>236</sup>—but the overall tone nevertheless suggests a lack of even-handedness. Ultimately, it may be a question of how the common viewer judges the content. In the *Rwandan Media Trial*, the ICTR noted that listeners in fact believed that RTL M hated the Tutsis.<sup>237</sup> Therefore, we may ask, does the average Al-Jazeera viewer interpret the network's coverage as promoting terrorist viewpoints? Though this question is difficult to answer, it should be noted that Al-Jazeera, as a mass media outlet, would be subject to a more exacting standard than print media.<sup>238</sup>

It should also be noted that Western media is often accused of similar bias.<sup>239</sup> While this is not meant to suggest that the Western media should be the measuring stick by which journalistic bias is judged, it would certainly be difficult to find Al-Jazeera guilty of bias reaching the level of incitement if its coverage is typical of any other news network.

While the case against Al-Jazeera is by no means conclusive, the foregoing analysis at the very least demonstrates that a case can be

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233. See *id.*

234. See, e.g., *Iraq Extends Ban on Al-Jazeera TV*, BBC News, Sept. 4, 2004, [http://news.bbc.co.uk/2/hi/middle\\_east/3628398.stm](http://news.bbc.co.uk/2/hi/middle_east/3628398.stm) (Al-Jazeera reporters maintain they treat terrorist messages and hostage videotapes only as news stories.).

235. See *supra* notes 105, 180 and accompanying text.

236. See, e.g., *supra* note 23 and accompanying text.

237. *Rwandan Media Trial*, *supra* note 1, ¶ 369.

238. See *Arslan v. Turkey*, 13 Eur. Ct. H.R. 285 (1999), available at <http://www.echr.coe.int/ECHR/EN/Header/Case-Law/HUDOC/HUDOC+database>. The Court observed that:

[T]he applicant is a private individual and that he made his views public by means of a literary work rather than through the mass media, a fact which limited their potential impact on 'national security', public 'order' and 'territorial integrity' to a substantial degree . . . in the Court's view this is a factor which it is essential to take into consideration.

*Id.* at 287.

239. See, e.g., *supra* notes 43–44 and accompanying text.

made against the network under the *Rwandan Media Trial* precedent. Ultimately, a much more extensive set of factual findings with regard to Al-Jazeera's coverage would be necessary to determine whether either pattern of alleged incitement fulfills the standards set forth by international jurisprudence.

B. *Creating an International Framework for Mass Media Incitement to Terrorism*

While the *Rwandan Media Trial* offers a strong legal foundation for the liability of mass media outlets, it must be stressed that this case is aimed only at incitement to *genocide*. For the present purposes, it serves only as an analogy.

The international framework for prosecuting incitement to genocide is well-supported by international tribunals and treaties.<sup>240</sup> The case for a workable incitement to terrorism standard, on the other hand, is still in its infancy. UN General Assembly resolutions of the 1990s took the first steps, calling on states to promote the dissemination of accurate information in the context of the fight against terrorism and to take measures to bring those who incite terrorism to justice.<sup>241</sup> The European Convention for the Protection of Human Rights and Fundamental Freedoms goes further, allowing the prosecution of those who incite terrorism where the interests of national security are at stake.<sup>242</sup> Now the next step must be taken.

A broad international agreement must be adopted which, in terms similar to UN conventions condemning incitement to violence,<sup>243</sup> imposes a legal obligation upon member states to take measures to monitor and control media content that may incite terrorism. This may include the creation of a permanent tribunal appointed by the Security Council, designed specifically to adjudicate terrorist-related crimes, including incitement. Alternatively, the International Court of Justice or the International Criminal Court could be granted jurisdiction to hear such cases.

Though articulating a legal standard for incitement to terrorism will necessarily involve finding a delicate balance between security

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240. See generally *supra* Parts II.D.1. (International Military Tribunal at Nuremberg) and II.E.2. (International Criminal Tribunal for Rwanda).

241. See *supra* Part II.C.

242. See European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, available at <http://www.echr.coe.int/Convention/webConvenENG.pdf>.

243. See *id.*

concerns and the right to freedom of expression, the success of legal regimes governing incitement to genocide and hate speech demonstrates that the proper balance may be maintained. Fears of impeding expression need not stand in the way of the prevention of violence. As the Council of Europe published in a 2004 report on incitement to terrorism:

[N]ot everything can be justified in the name of freedom of expression, particularly where it is wrongly understood and tantamount to crime and suffering. Contrary to politically or ideologically motivated statements, the approval of and incitement to behaviour criminalised by law is not protected by such freedom and democracies must have the means to stop criminal abuses of this freedom and sanction them effectively.<sup>244</sup>

#### IV. CONCLUSION

The Al-Jazeera problem is unlikely to be solved by international law as it currently stands. Only when the international community takes serious steps toward adopting an incitement to terrorism standard will the nations of the world have an effective legal mechanism to control such broadcasts outside their borders.

In the meantime, capitalism may ultimately succeed where the law has failed. Faced with severe economic problems, Al-Jazeera is considering the prospect of privatization in the near future.<sup>245</sup> Initial reports suggest that shares would be traded on the Qatari stock market with only a minority stake available to foreign investors.<sup>246</sup> Whether this will have any effect on the network's editorial content remains to be seen.

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244. COUNCIL OF EUROPE, "Apologie du Terrorisme" and "Incitement to Terrorism" 7 (2004).

245. See Weisman, *supra* note 52, at 1; Roula Khalaf & William Wallis, *Qatar Shocked at Al-Jazeera Bombing Report*, FIN. TIMES, Nov. 24, 2005, at 12.

246. See Weisman, *supra* note 52, at 1.

6-2008

# The Terrorist Is A Star!: Regulating Media Coverage of Publicity-Seeking Crimes

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# The Terrorist Is A Star!: Regulating Media Coverage of Publicity-Seeking Crimes

Michelle Ward Ghetti\*

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"There is no need to cry in the wilderness when anyone so inclined can plead his case on national television."<sup>1</sup>

## I. PREFACE

The following piece, written twenty-five years ago,<sup>2</sup> is remarkable for four reasons: (1) it illustrates that terrorism and/or publicity-seeking crime and the media coverage of it were concerns being discussed twenty-five years ago;<sup>3</sup> (2) it is prophetic as to many issues;<sup>4</sup> (3) there has been little development in the law in this area,<sup>5</sup> despite an explosion of both broadcast technology/coverage<sup>6</sup> and publicity-seeking crime<sup>7</sup> since that time; and (4) there has been little to no coverage of it in legal journals.<sup>8</sup>

In the twenty-five years prior to the Article being written in 1982, approximately sixty incidents of non-state sponsored terrorism were documented within the United States or targeting United States citizens—more than there have been since 1982, although much of it was

1. Pohlmann & Foley, *Terrorism in the 70's: Media's Connection*, 61 NAT'L FORUM 33, 34 (1981).

2. The following piece was written for a First Amendment course at Southern Methodist University School of Law in the fall of 1982 where the author was finishing the final thirty hours of coursework toward graduation at Louisiana State University Law School. Although receiving an almost perfect score in the class, it was rejected for publication as a comment in the Louisiana Law Review because it was considered too controversial for a student piece.

3. See *Appendix A, infra*, for a listing of terrorist crimes committed in America or against Americans in the twenty-five years prior to 1982. See also the various books, magazine articles, and law journal articles cited throughout the piece describing the discourse on media coverage of terrorism at that time.

4. See, e.g., the discussion of the expected impact of television news in the future *infra* notes 71-75.

5. See discussion *infra* at notes 31-39.

6. See discussion *infra* at notes 14-24.

7. See *Appendix B* and note 26, *infra*, for a list of terrorist crimes committed in the United States or against Americans since that time. Actually, terrorist crime in the United States has decreased since 1982, although international terrorism has increased.

8. See discussion *infra* at notes 39-40.

due to the racial unrest and antiwar sentiment in the United States at that time.<sup>9</sup> By 1982, media coverage of such acts was being discussed within the media itself,<sup>10</sup> in general publications,<sup>11</sup> and in higher education journals, both in the schools of journalism<sup>12</sup> and law.<sup>13</sup>

In 1982, the ability to cover publicity-seeking crime and broadcast it quickly and to large numbers of people was only in its infancy. Electronic news gathering ("ENG")<sup>14</sup> had only just begun<sup>15</sup> Satellite broadcasting technology, enabling broadcasts from a distance, had only been developed in 1962,<sup>16</sup> the United States had only placed its first true geostationary satellite

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9. See Appendix A, *infra*.

10. The major forum for self-appraisal was a myriad of meetings of journalistic organizations and associations during 1977. For a discussion of these panels and meetings, see Herbert A. Terry, *Television and Terrorism: Professionalism Not Quite the Answer*, 53 IND. L.J. 745, 756-57 (1978). It is believed that the major impetus for the introspection was an incident in 1977 in Indianapolis, Indiana, wherein Tony Kiritis took a banker hostage for sixty-three hours, while making calls to a radio talk show host who broadcast everything he said on the air. He then stood outside with the hostage, a sawed-off shotgun wired to shoot him in the head, while making an emotional speech on live television.

11. See, e.g., *What's Right, Wrong with Television News*, U.S. NEWS & WORLD REPORT, Mar. 16, 1981 at 45 (Interview with Walter Cronkite) [hereinafter *Right, Wrong*].

12. See, e.g., Charles Fenyesi, *Looking Into the Muzzle of Terrorists*, QUILL, Jul.-Aug. 1977, at 16 (stating that competitiveness within the industry had placed the lives of hostages in undue danger); Mark Monday, *What's Wrong With Our Aim*, QUILL, Jul.-Aug. 1977, at 19 (explaining journalists should be better trained to understand and cover terrorists); Halina Czerniejewski, *Guidelines for the Coverage of Terrorism*, QUILL, Jul.-Aug. 1977, at 21 (noting that formal guidelines and a more thoughtful study of the problem are needed).

13. For example, in 1978, again in response to the Kiritis hostage-taking situation, the Indiana School of Law published a symposium issue dedicated to the issue of media coverage of publicity-seeking crimes. See, e.g., Terry, *supra* note 10, at 756-57; Walter B. Jaehrig, *Journalists and Terrorism: Captives of the Libertarian Tradition*, 53 IND. L.J. 717, 720 (1978); Jordan J. Paust, *International Law and Control of the Media: Terror, Repression and the Alternatives*, 53 IND. L.J. 621 (1978).

14. ENG is the use of electronic means for news coverage and transmission in place of using film as an intermediate step. Nielsen Media, Glossary of Media Terms—E Page, <http://www.nielsenmedia.com/glossary/terms/E/E.html> (last visited Apr. 16, 2008).

15. See Wysong Enterprises, Inc., Electronic News Gathering, [http://www.wysongusa.com/electronic\\_news\\_gathering.html](http://www.wysongusa.com/electronic_news_gathering.html) (last visited Apr. 16, 2008). ENG originally referred to the use of point-to-point terrestrial microwave signals to backhaul the remote signal to the studio. In modern news operations, however, it also includes satellite news gathering (SNG) and digital satellite news gathering (DSNG). ENG is almost always done using a specially modified truck or van. Terrestrial microwave vehicles can usually be identified by their masts which can be extended up to fifty feet (fifteen meters) in the air (to allow line-of-sight with the station's receiver antennas), while satellite trucks always use a larger dish that unfolds and points skywards toward one of the geostationary communications satellites.

16. Pacific Satellite, Satellite History, <http://www.pacificsatellite.com/project2.php> (last visited Apr. 16, 2008) (non-stationary satellite Telstar); Daniel L. Brenner et al., *History of Satellite Communications - The First Satellites*, 2 CABLE TV § 14:2 (2008).

in space in 1974<sup>17</sup> and by 1979, the United States had only three geostationary satellites in space.<sup>18</sup> Cable television was a recent invention with few people having access to it.<sup>19</sup> Mobile phones had only just been introduced to journalism in the 1980s,<sup>20</sup> and did not contain texting or imaging capabilities as they do today. Digital cameras were not created until the late 1990s.<sup>21</sup> The Internet was in its infancy,<sup>22</sup> the IBM personal computer having only been created in 1981.<sup>23</sup> The first twenty-four hour

17. EDinformatics, Communications Satellite, [http://www.edinformatics.com/inventionsinventors/communication\\_satellite.htm](http://www.edinformatics.com/inventionsinventors/communication_satellite.htm) (last visited Apr. 16, 2008); Satellite Industry Association, Satellites History, <http://www.sia.org/history.html> (last visited Apr. 16, 2008) (referring to Weststar).

18. See David J. Whalen, *Communications Satellites: Making the Global Village Possible*, NASA History Division, <http://www.hq.nasa.gov/office/pao/History/satcomhistory.html> (last visited Apr. 16, 2008) (Satcom I was launched in 1975). Television began using satellites on March 1, 1978 when the Public Broadcasting Service (PBS) introduced Public Television Satellite Service. Broadcast networks adopted satellite communication as a distribution method from 1978 through 1984. Federal Communications Commission, History of Satellite TV, [http://www.fcc.gov/cgb/kidszone/history\\_sat\\_tv.html](http://www.fcc.gov/cgb/kidszone/history_sat_tv.html) (last visited Apr. 16, 2008).

19. In 1980, only fifteen million people had access to cable, and they were typically in rural communities receiving local broadcasts. See Cable NJ, <http://www.cablenj.org/AboutUs/CableHistory.asp> (demonstrating advancements in cable) (last visited Mar. 23, 2008). By 1989, fifty-nine million people had access. By 1995, there were 139 different cable channels available. *Id.* By the late 1980s, ninety-eight percent of all homes in the U.S. had at least one television set. See EDinformatics, [http://edinformatics.com/inventions\\_inventors/television.htm](http://edinformatics.com/inventions_inventors/television.htm) (exploring the history of various media outlets) (last visited Mar. 23, 2008). Today, eighty-five percent of all U.S. households have cable, satellite or some other form of multi-channel reception. See Ted Hearn, *Analog Cutoff is Panned on Hill*, MULTICHANNEL NEWS, Sept. 30, 2002, <http://www.multichannel.com/article/CA246911.html>.

20. See Collette Snowden & Kerry Green, *Media Reporting, Mobility and Trauma*, 10 MEDIA/CULTURE 1, Mar. 2007, available at <http://journal.media-culture.org.au/0703/04-snowden-green.php>.

21. *Id.*

22. Internet Protocol ("IP") and Transmission Control Protocol ("TCP") were introduced in 1981 creating the TCP/IP protocol that much of the Internet uses today. Today, 1.173 billion people in the world use the Internet (approximately eighteen percent): approximately seventy percent of Americans, twelve percent of people in Asia, forty percent in Europe, and fifty-five percent in Australia. See Internet World Stats: World Internet Users, <http://www.internetworldstats.com/stats.htm> (last visited Mar. 23, 2008). Use of the Internet in the United States grew 225% between 2000 and 2007. More amazing is that use of the Internet increased 645% in Africa (3.6% use it), 495% in the Middle East (10.1% use it) and 509% in Latin America (19.8% use it). See Internet World Stats: Internet Usage Statistics for the Americas, <http://www.internetworldstats.com/stats2.htm> (last visited Mar. 23, 2008).

23. See IBM, IBM Personal Computer: Before the Beginning: Ancestors of the IBM Personal Computer, [http://www-03.ibm.com/ibm/history/exhibits/pc/pc\\_1.html](http://www-03.ibm.com/ibm/history/exhibits/pc/pc_1.html) (last visited Apr. 16, 2008).

news channel, Cable News Network ("CNN"), was only launched in 1980.<sup>24</sup> Of course, today, all major media outlets have websites.

Since 1982, there have been at least 522 documented incidents of non-state sponsored terrorism throughout the world,<sup>25</sup> thirty-seven on American soil or targeting American citizens or assets.<sup>26</sup> Today, publicity-seeking criminals—such as Osama Bin Laden,<sup>27</sup> the Virginia Tech shooter, Seung-Hui Cho,<sup>28</sup> and Jack McClellan<sup>29</sup>—unabashedly use the media to carry their message directly to the world.

Since 1982, the lower federal courts in the United States have dealt with the balance between media and the First Amendment in only limited ways. They have dealt with the reporter's privilege and found it insufficient to block the government's access to phone records relevant to funding of terrorism<sup>30</sup> or defendants' access to videotaped interviews of terrorists,<sup>31</sup> they have restricted media coverage of deportation proceedings where terrorism is involved,<sup>32</sup> and they have found no right of the media to imbed a

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24. See The History of Branding, History of CNN, <http://www.historyofbranding.com/cnn.html> (last visited Apr. 16, 2008). Today, there are five 24-hour news channels on cable in the United States: CNN, Headline News, Fox News Channel, MSNBC, and CNBC, as well as some regional channels. See Diane Ainsworth, *25 Hour News Through the Looking Glass*, BERKELEYAN, Jul. 12, 2000, <http://www.berkeley.edu/news/berkeleyan/2000/07/12/news.html>.

25. See Appendix B, *infra*.

26. Additionally, according to Mark Potok, Director of the Intelligence Project at the Southern Poverty Law Center, law enforcement officials have foiled sixty domestic terror plots since the Oklahoma City bombing and the number of hate groups has risen thirty-three percent since 2000 with 803 hate groups in existence in 2005. See Tim Talley, *Experts Fear Oklahoma City Bombing Lessons Forgotten*, SAN DIEGO UNION-TRIBUNE, Apr. 17, 2006.

27. See, e.g., *Bin Laden Video Finally Makes Militant Websites*, <http://www.usatoday.com/news/world/2007-09-08-bin-laden-videoN.htm?csp=34> (last visited Mar. 23, 2008) (regarding purposeful release of Bin Laden tape to news outlets before releasing it on the Internet).

28. See *What We Know*, <http://www.msnbc.msn.com/id/18185859/> (last visited Mar. 23, 2008) (detailing the package of correspondence express-mailed to NBC News during the two hours between the first and second shootings by Cho).

29. Jack McClellan is the self-admitted pedophile who ran a Web site with pictures of children and tips for other pedophiles. Fox News and others gave him an interview due to a Seattle newspaper report that Fox picked up on. See Katherine Noyes, *Judge Slaps Publicity-Seeking Pedophile With Restraining Order*, TECH NEWS WORLD, Aug. 6, 2007, <http://www.technewsworld.com/story/58695.html>.

30. See *N.Y. Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006).

31. See *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003).

32. See *N. Jersey Media Group v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002); *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 937 (E.D. Mich. 2002), *aff'd*, 303 F.3d 681 (6th Cir. 2002); *Ctr. for Nat'l Sec. Studies v. Dep't of Justice*, 331 F.3d 918 (D.C. Cir. 2003).

journalist with the troops.<sup>33</sup> They have also dealt with civil claims against media alleging that the media outlet aided and abetted crime<sup>34</sup> or negligently caused harm to another person.<sup>35</sup> The United States Supreme Court has remained silent. The more interesting legal developments have been in the international arena with the United Nations<sup>36</sup> and the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>37</sup> passing resolutions that affect media coverage of terrorism and with three cases in international courts that affected media coverage of terrorism.<sup>38</sup>

Very little has been published on media coverage of terrorism or publicity-seeking crime in the mainstream law journals or in books.<sup>39</sup> Most

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33. *Flynt v. Rumsfeld*, 355 F.3d 697, 703 (D.C. Cir. 2004).

34. See, e.g., *Rice v. Paladin Enter.*, 128 F.3d 233 (4th Cir. 1997) (murder victim's family sued publisher of "hit man instruction manual" for aiding and abetting murder and won); *Braun v. Soldier of Fortune Magazine, Inc.*, 968 F.2d 1110 (11th Cir. 1992) (\$4 million verdict to two brothers for murder of father).

35. See, e.g., *Clift v. Narragansett Television L.P.*, 688 A.2d 805 (R.I. 1996) (suicide victim's family sued television station for interview of family member during police standoff for allegedly negligently contributing to his suicide); *Risenhoover v. England*, 936 F. Supp. 392 (W.D. Tex. 1996) (families of ATF agents killed during the Branch Davidian/David Koresh search/arrest warrant execution allowed to sue newspaper and television stations which allegedly informed the Davidians pre-raid); *Hyde v. City of Columbia*, 637 S.W. 2d 251 (Mo. App. 1982); *Fla. Star v. B.J.F.*, 491 U.S. 524 (1989) (denying negligence cause of action against newspaper for releasing name of rape victim legally obtained as violative of First Amendment).

36. See G.A. Res. 51/210, paras. I(3)(c), I(4), U.N. Doc. A/RES/51/210 (Dec. 17, 1996).

37. See Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222, art. 10 on 7, available at <http://www.echr.coe.int/echr/> (click on 'Basic Texts,' then click on 'English') (last visited Apr. 16, 2008).

38. See *Jersild v. Denmark*, 298 Eur. Ct. H.R. 27, paras. 19-21, 25 (1994), available at <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=jersild%20v.%20denmark&sessionId=6392234&skin=hudoc-en> (interviews of racist people broadcasted on Danish radio; broadcaster found guilty of aiding and abetting a hate crime; European Court of Human Rights found conviction to be a violation of Art. 10); *Arslan v. Turkey*, 13 Eur. Ct. H.R. 285-87, ¶30 (1999), available at <http://cmiskp.echr.coe.int/tkp197/viewhbkm.asp?action=open&table=F69A27FD8FB86142BF01C1166DEA398649&key=852&sessionId=5836078&skin=hudoc-en&attachment=true> (author of book convicted of publishing separatist propaganda based on racial considerations; Court found punishment was disproportionate to aims pursued and not necessary in democratic society); *Prosecutor v. Nahimana*, Case No. ICTR 99-52-T, Judgment, paras. 8-10, 945 (Dec. 3, 2003) (radio station and newspaper owners convicted of intentionally aiding and abetting hate crimes through broadcasts/publications).

39. See, e.g., Daniel Joyce, *The Judith Miller Case and the Relationship Between Reporter and Source: Competing Visions of the Media's Role and Function*, 17 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 555 (2007); Jane E. Kirtley, *Transparency and Accountability In A Time of Terror: The Bush Administration's Assault on Freedom of Information*, 11 COMM. L. & POL'Y 479 (2006); Todd M. Gardella, *Beyond Terrorism: The Potential Chilling Effect on the Internet of Broad Law Enforcement Legislation*, 80 ST.

of what has been published has been on the Freedom of Information Act. Interestingly, like this initial piece, most of what has been published on the media's connection to terrorism is student-authored.<sup>40</sup>

In 1982, could we have imagined that a terrorist such as Osama Bin Laden would directly use the media to spread his message of terror around the world? In the balance of American constitutional rights and freedoms, is this the outcome desired? Why did the scholarly debate on this issue stop in the 1980s? Hopefully, this Article might serve as a catalyst to stimulate other scholars—in both the legal and journalistic fields—to reconsider this very serious issue.

## II. INTRODUCTION

“Terrorism” is a word which conjures up images of guerillas, foreign nationalists, and government overthrow. However, the term encompasses far more<sup>41</sup> and for the purposes of this discussion includes all violence aimed at

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JOHN'S L. REV. 655 (2006); *Recent Cases: International Law: Genocide: U.N. Tribunal Finds That Mass Media Hate Speech Constitutes Genocide, Incitement to Genocide, and Crimes Against Humanity – Prosecutor v. Nahimana, Barayagwiza and Ngeze*, 117 HARV. L. REV. 2769 (2004); Mary-Rose Papandrea, *Under Attack: The Public's Right to Know and the War On Terror*, 25 B.C. THIRD WORLD L.J. 35 (2005); Peter Margulies, *The Clear and Present Internet: Terrorism, Cyberspace, and the First Amendment*, 2004 UCLA J.L. & TECH 4 (2004); Carlos A. Kelly, *The Pen is Mightier Than the Sword or Why the Media Should Exercise Self-Restraint in Time of War*, 77 FLA. B.J. 22 (2003); Vivien Toomey Montz, *Recent Incitement Claims Against Publishers & Filmmakers: Restraints on First Amendment Rights or Proper Limits on Violent Speech?*, 1 VA. SPORTS & ENTER. L.J. 171 (2002); Sandra Davidson, *Blood Money: When Media Expose Others To Risk of Bodily Harm*, 19 HASTINGS COMM/ENT. L.J. 225 (1997). Examples of books would include: BRIGITTE L. NACOS, *MASS-MEDIATED TERRORISM: THE CENTRAL ROLE OF THE MEDIA IN TERRORISM & COUNTERTERRORISM* (2007); *TERRORISM, WAR, AND THE PRESS* (Nancy Palmer ed., 2003); BRIGITTE L. NACOS, *TERRORISM & THE MEDIA* (1994); Todd Fraley, *MEDIA TERRORISM & THEORY: A READER* (2006); WILLIAM A. HACHTEN & JAMES F. SCOTTON, *THE WORLD NEWS PRISM: GLOBAL MEDIA IN AN ERA OF TERRORISM* (2002); *FRAMING TERRORISM: THE NEWS MEDIA, THE GOVERNMENT, & THE PUBLIC* (Pippa Norris et al. eds., 2003).

40. See, e.g., Spencer W. Davis, Note, *Incitement to Terrorism in Media Coverage: Solutions to Al-Jazeera After the Rwandan Media Trial*, 38 GEO. WASH. INTL. L. REV. 749 (2006); Benjamin R. Davis, Comment, *Ending the Cyber Jihad: Combating Terrorist Exploitation of the Internet with the Rule of Law and Improved Tools for Cyber Governance*, 15 COMM/LAW CONSPICUOUS 119 (2006); David E. Pozen, Note, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 YALE L.J. 628 (2005); Elana J. Zeide, Note, *In Bed With the Military: First Amendment Implications of Embedded Journalism*, 80 N.Y.U. L. REV. 1309 (2005); Nick Suplina, Note, *Crowd Control: The Troubling Mix of First Amendment Law, Political Demonstrations, and Terrorism*, 73 GEO. WASH. L. REV. 395 (2005).

41. There is no generally accepted definition of terrorism. A common thread found in most definitions is the objective to receive the widest dissemination possible of the message, act, or identity of the perpetrators. See Research Study, *International and Transnational*

influencing the attitude and behavior of one or more target audiences, or, to coin a term, publicity-seeking crimes.<sup>42</sup> In the past decade, the number of publicity-seeking crimes has escalated to a point where thousands of lives,<sup>43</sup> forty-two per cent of them American,<sup>44</sup> are taken each year and whole societies are held captive by one or more misguided individuals.

One of the problems of combating incidences of publicity-seeking crime is media involvement. Violence or threats of violence have long been deemed "newsworthy"<sup>45</sup> items by the media. Publicity-seeking criminals have recognized this fact and put it to full use. By attacking highly visible targets in a dramatic manner, publicity-seeking criminals guarantee themselves saturated news coverage. They make a shocking appeal to traditional news values by making full use of the news industry's attraction to the dramatic, conflict-laden, and potentially tragic event. The media thus

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*Terrorism: Diagnosis and Prognosis*, 7-8 (CIA Apr. 1976) [hereinafter *Research Study*]; Dan van der Vat, *Terrorism and the Media*, INDEX ON CENSORSHIP, Apr. 1982, at 25; LEGAL & OTHER ASPECTS OF TERRORISM at 183 (E. Nobles Lowe et al. eds., 1979); M. CHERIF BASSIOUNI, INTERNATIONAL TERRORISM AND POLITICAL CRIMES at xi (1975). However, some criminal acts which would be labeled terrorism by many do not seek publicity. For example, state-sponsored terrorism, i.e. genocide, hopes to gain no publicity. See M. Cherif Bassiouni, *Terrorism, Law Enforcement, and the Mass Media: Perspectives, Problems, Proposals*, 72 J. CRIM. LAW & CRIMINOLOGY 1, 2, 7 (1981) [hereinafter Bassiouni, *Perspectives*]. See also, generally, Paust, *supra* note 13. Also, some criminal acts which seek publicity would not meet the criteria of some definitions of terrorism. Most definitions of terrorism require the objective of instilling fear in a targeted person or group of persons. Persons committing violent crimes just for self-glorification will not fit this element of many definitions.

42. A wide variety of crimes could be committed in seeking publicity but the most common are: kidnapping (with threat of bodily harm), barricading hostages, bombings (letter, incendiary, and explosive), hijacking, assassination and sniping. See NATIONAL FOREIGN ASSESSMENT CENTER, INTERNATIONAL TERRORISM IN 1978, at 4 (Fig. 5) (Mar. 1979) [hereinafter CIA REPORT].

43. In 1968-1971, deaths from terrorist activities averaged 60 per year and injuries averaged 200 per year. By 1978, death and injuries were up to 450 and 400 respectively. See *id.* at ii. By 1980, deaths were at 1,173. See *As Violence Spreads: Is U.S. Next?*, U.S. NEWS & WORLD REPORT at 32, 33 (Sept. 14, 1981) [hereinafter *Violence Spreads*].

44. The most active arenas for publicity-seeking crimes are North America, West Europe, Latin America, and the Middle East. Together they account for approximately 90% of all such activity. North America is the site of approximately 9.7% of the incidents while the U.S.S.R. and socialist Eastern Europe account for only 0.4% of terrorism. See CIA REPORT *supra* note 42, at 2, 7. Only 9.7% of the incidents take place in America—a fact which is explained by geographic inconvenience, bureaucratic obstacles, familiarity and attitude toward America. See *Violence Spreads*, *supra* note 43, at 33. Despite this statistic, Americans abroad are the most prominent targets of terrorism; 41.9% of the total casualties are American nationals. See CIA REPORT *supra* note 42, at 4 (Fig. 5).

45. Deciding just what "newsworthy material" is may be an unattainable goal. The line between news and entertainment is becoming thinner and thinner. See, e.g., discussion *infra* at notes 71-75.

further the criminals' objectives by publicizing an incident that was staged for the very purpose of obtaining media coverage. This has come to be called by many a "symbiotic relationship."<sup>46</sup>

Critics both within<sup>47</sup> and outside<sup>48</sup> the news industry have begun to voice an awareness, if not a concern, for the ease with which such criminals obtain publicity on both a national and international platform. And yet, since 1977, when most of the self-appraisal and outside criticism dramatically increased,<sup>49</sup> no real changes have been made. Although a number of self-regulating guidelines have been promulgated by various broadcasting organizations,<sup>50</sup> it has been the general consensus that the First Amendment

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46. See Bassiouni, *Perspectives*, *supra* note 42, at 14; Jaehnig, *supra* note 13, at 720.

47. See discussion *supra* at notes 10-12.

48. See, e.g., Fenyvesi, *supra* note 12, at 16 (explaining that competitiveness within the industry had placed the lives of hostages in undue danger); Monday, *supra* note 12, at 19 (journalists should be better trained to understand and cover terrorists); Czerniejewski, *supra* note 12, at 21 (arguing that formal guidelines and a more thoughtful study of the problem needed). The major forum for self appraisal, though, was the myriad of meetings of journalistic organizations and associations during 1977. For a discussion of these panels and meetings, see Terry, *supra* note 10, at 756-57.

49. 1977 saw a dramatic jump in the number of terrorist incidents, especially in America. However, the most likely cause for the critical attention given the problem that year was the manipulation of the media by theretofore unknown Anthony Kiritis to gain live news coverage to express his personal grievances while holding a gun to the head of his hostage. See Terry, *supra* note 10, at 750-52; Jaehnig, *supra* note 13, at 717-18 for details of the event. Coincidentally, by 1977, seventy-five percent of commercial television broadcast stations had three new pieces of equipment, just invented in 1973, referred to as ENG equipment. They include: small, light video cameras (minicams), light, battery-powered video recorders, and the real technological breakthrough, a device called the time-base connector which converts the output of the lightweight video tape recorders into a picture with sufficient stability to be broadcast. These three pieces of equipment for the first time allowed instantaneous on-the-spot coverage of the news. See Terry, *supra* note 10, at 749.

50. The following guidelines, included as a part of the CBS News Standards, became the model for most other guidelines that various news organizations adopted:

An essential component of the story is the demands of the terrorist/kidnapper and we must report those demands. But we should avoid providing an excessive platform for the terrorist/kidnapper. Thus, unless such demands are succinctly stated and free of rhetoric and propaganda, it may be better to paraphrase the demands instead of presenting them directly through the voice or picture of the terrorist/kidnapper.

Except in the most compelling circumstances, and then only with the approval of the President of CBS News or in his absence, the Senior Vice President of News, there should be no live coverage of the terrorist/kidnapper since we may fall into the trap of providing an unedited platform for him. (This does *not* limit live on-the-spot reporting by CBS News reporters, but care should be exercised to assure restraint and context.)

News personel [sic] should be mindful of the probable need by the authorities who are dealing with the terrorist for communication by telephone and hence should endeavor to ascertain, wherever feasible, whether our own use of such lines would

bars any government regulation in this area. It is the thesis of this Article that this may not be true in all cases. An analysis of the First Amendment as it applies to various forms of government regulation will follow the discussion of the problems created by publicity-seeking crimes and the media coverage thereof.

### III. THE PROBLEM OF MEDIA COVERAGE OF PUBLICITY-SEEKING CRIMES

The objectives of terrorists, other than seeking publicity, are often coercion, extortion, disorientation and despair, provocation of unpopular countermeasures, and (with regard to the terrorists themselves) morale-building.<sup>51</sup> M. Cherif Bassiouni, a leading scholar on international terrorism, has identified four types of publicity-seeking criminals based on their motivation: (1) the common criminal motivated by personal gain; (2) the person acting as a consequence of a psychopathic condition; (3) the person seeking to publicize a claim or redress an individual grievance; and (4) the ideologically motivated individual.<sup>52</sup> This last category of individual is the one most frequently associated with the term "terrorism." It has been noted, however, at least in the area of assassination,<sup>53</sup> that the emphasis may

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be likely to interfere with the authorities' communications.

Responsible CBS News representatives should endeavor to contact experts dealing with the hostage situation to determine whether they have any guidance on such questions as phraseology to be avoided, what kinds of questions or reports might tend exacerbate the situation, etc. Any recommendations by established authorities on the scene should be carefully considered as guidance (but not as instruction) by CBS News personnel.

Local authorities should also be given the name or names of CBS personnel whom they can contact should they have further guidance or wish to deal with such delicate questions as a newsman's call to the terrorists or other matters which might interfere with authorities dealing with the terrorist.

Guidelines affecting our coverage of civil disturbances are also applicable here, especially those which relate to avoiding the use of inflammatory catchwords or phrases, the reporting of rumors, etc. As in the case of policy dealing with civil disturbances, in dealing with a hostage story reporters should obey all police instructions but report immediately to their superiors any such instructions that seem to be intended to manage or suppress the news.

Coverage of this kind of story should be in such overall balance as to length that it does not unduly crowd out other important news of the hour/day.

Terry, *supra* note 10, at 776-77.

51. See *Research Study*, *supra* note 41, at 8. See also, Bassiouni, *Perspectives*, *supra* note 41, at 32, n.124 for a list of thirteen strategic objectives of terrorists that media coverage may help to fulfill.

52. See Bassiouni, *Perspectives*, *supra* 41, at 8.

53. See Richard Restak, *Assassin!*, 89 SCIENCE DIGEST 78, 82 (1981).

be shifting to individuals seeking self-definition<sup>54</sup> or self-assertion.<sup>55</sup> William R. Catton, professor of sociology at Washington University, observes that although

some of the groups so desperate for publicity want it as a presumed means of attaining political, economic, or nationalistic goals [(instrumentally - oriented terrorists)] ... [others] appear to crave publicity for its own sake [(expressly-oriented terrorists)] – i.e., as an antidote to the ignominy of seeming superfluous in a world too vast to have otherwise noticed their existence.<sup>56</sup>

If nothing else, commentators seem to agree on one thing: to these people, more conventional means of communication seem to be unavailable or ineffective.<sup>57</sup>

Scattered, isolated incidents of violence by themselves are of little use to publicity-seekers in producing their objectives of fear, coercion, and publication of a cause or self-identification. Terrorists rely on the psychological impact of acts rather than their immediate destructive consequences.<sup>58</sup> To achieve such impact, publicity-seeking criminals need to publicize their acts as widely as possible. Since the mass media have the ability to confer importance upon an individual or an event merely by presenting it,<sup>59</sup> they play a major role in the spreading and intensification of the desired psychological impact. With the advent of increasing numbers of technological communicative advances,<sup>60</sup> publicity-seeking criminals are able to command the immediate attention of millions, enabling these criminals to work their felonious will on whole nations rather than just the hostages in their presence.<sup>61</sup>

The media has been described as “a powerful force, sometimes more influential than government itself.”<sup>62</sup> In fact, Iranian Acting Foreign Minister Abol Hassan Banisadr, during the taking of American hostages from the U.S. Embassy in Iran, exemplified this attitude when he said,

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54. *Id.*

55. See William R. Catton, Jr., *Militants and the Media: Partners in Terrorism?*, 53 *IND. L.J.* 703, 707 (1978).

56. *Id.* at 710.

57. *Id.* at 705; Bassiouni, *Perspectives*, *supra* note 41, at 15; Restak, *supra* note 53, at 82-83.

58. See Bassiouni, *Perspectives*, *supra* note 41, at 8.

59. See Thomas G. Krattenmaker & L.A. Powe, Jr., *Televised Violence: First Amendment Principles and Social Science Theory*, 64 *VA. L. REV.* 1123, 1134 (1978).

60. See Terry, *supra* note 10, at 749; Bassiouni, *Perspectives*, *supra* note 41, at 14; *Research Study*, *supra* note 41, at 2, 19.

61. Catton, *supra* note 55, at 704.

62. See *Legal & Other Aspects of Terrorism*, *supra* note 41, at 183.

"Diplomats cannot solve this problem. We want to solve it through 'newspaper diplomacy.'"<sup>63</sup> This influence through the media could be a good thing if only the actions necessary to get this attention and consequential influence could fall short of violence.

Unfortunately, this has not been the case. William Raspberry, a columnist for the Washington Post, lamented on the use of violence as a means of gaining needed attention in the Watts Riots of 1965.<sup>64</sup> He pointed out that the attention received during the violent riots that summer brought home to the black people and other poor people that they could command the attention of the press. They realized that riots, threats of disorder, or demonstrations that had the prospect of getting out of hand always got the press out there. They found, for the first time, that this attention could lead to some positive gains for them and that was one of the reasons rioting flourished.<sup>65</sup>

Why, then, must violence be resorted to in order to gain the "needed attention"? Is it just an example of the age-old maxim, "The wheel that squeaks the loudest is the one that gets the grease?"<sup>66</sup> Or, is there more to it?

American mass media—electronic (television and radio) and print (newspaper and magazine)—are commercial enterprises just as any other business. They exist and thrive by making profits. Profits are obtained from selling time or space to advertisers at rates determined by circulation or audience size.<sup>67</sup> The larger the audience, the more each medium prospers. The availability of attention-getting content serves the audience-attracting needs of the industry.<sup>68</sup> The dramatic, often emotional events staged by publicity-seeking criminals make news, sell newspapers, and draw millions to the television set. This adds handsomely to the profits of media owners, advertisers, shareholders, and employees (and no doubt to the job security of the journalists covering the event)<sup>69</sup> and contributes to the overall "success" news reporting has seen in recent years.<sup>70</sup>

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63. *Tehran's Reluctant Diplomats*, TIME, Dec. 3, 1979 at 64.

64. Raspberry also points out that when the riots began, reporters for the *L.A. Times* could not find a single clip on Watts in their newspaper's morgue and that big city newspapers everywhere suddenly became painfully aware that they knew nothing about their own ghettos. See Pohlmann & Foley, *supra* note 1, at 34.

65. *Id.*

66. Attributed to Josh Billings, American humorist (1818-1885).

67. Bassiouni, *Perspectives*, *supra* note 41, at 25.

68. Catton, *supra* note 55, at 713.

69. See van der Vat, *supra* note 41, at 25.

70. Catton, *supra* note 55, at 713.

The supposition that "news" is becoming a more popular form of television "entertainment" is illustrated by such articles as *The Coming Explosion in TV News*.<sup>71</sup> Television tops all media in the number of people relying on it as their primary news source.<sup>72</sup> Urban stations are doubling and tripling the time they devote to news and nonfiction features.<sup>73</sup> Cable networks have already created one 24-hour news channel and are working on two more.<sup>74</sup> In fact, a former news chief at CBS predicts that news will soon become the prime staple of the American viewing public.<sup>75</sup> As the line between "news" and "entertainment" grows less and less visible, and as the commercial objectives of news carriers become more and more evident, publicity-seeking criminals can be expected to continue, if not escalate, their efforts to feed on this audience-attracting need.

In fact, according to a 1979 CIA report,<sup>76</sup> the nature and intensity of publicity-seeking crimes will fluctuate widely in the future.<sup>77</sup> The composition and character of such crimes will continue to change and increase in number although the regional patterns will stay the same.<sup>78</sup> According to the CIA, representatives of affluent countries, particularly government officials and business executives, will continue to be the primary targets for assassinations and kidnappings although the majority of incidents will continue to be bombings and incendiary attacks.<sup>79</sup> The CIA does voice a concern—as do others worried with nuclear development<sup>80</sup>—that overcoming present tactical and technological limitations may permit

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71. *The Coming Explosion in TV News*, U. S. NEWS & WORLD REPORT, Dec. 7, 1981 at 45.

72. *Id.*

73. *Id.*

74. *Id.* See also Right, Wrong, *supra* note 11, at 45.

75. See *The Coming Explosion in TV News*, *supra* note 71, at 45.

76. See CIA REPORT, *supra* note 42, at 1, 5.

77. *Id.*

78. *Id.*

79. *Id.*

80. See Catton, *supra* note 55, at 704. *But see, Violence Spreads*, *supra* note 43, at 34. Mr. Jenkins feels that because terrorists are not bent on killing large numbers of people, because they fear that resorting to nuclear terrorism might alienate constituents, because nuclear terrorism could provoke public revulsion and because terrorists fear an unprecedented governmental crackdown, any suggestion of mass killing would probably not succeed. *But see United States v. Progressive*, 467 F. Supp. 990 (E.D. Wis. 1979), where a lower federal court considered the potential for such nuclear destruction to outweigh any First Amendment rights. "A mistake in ruling against the United States could pave the way for thermonuclear annihilation for us all. In that event, our right to life is extinguished and the right to publish becomes moot." *Id.* at 996.

use of more sophisticated devices such as heat-seeking missiles and the like.<sup>81</sup>

The trend, as shown by the previous incident and death statistics,<sup>82</sup> is on a dramatic incline. Professor Catton believes that, in addition to feeling significance deprivation,<sup>83</sup> all people, especially Americans, are losing faith that any shortcomings of the present can be rectified in the future.<sup>84</sup> The combined effect of these feelings of insignificance, frustration with the system, and incompetence could lead to an increase in *American-based* expressly oriented acts. Brian Jenkins, director of the RAND Corporation program on political violence agrees.<sup>85</sup> He feels that although the American political system has an enormous co-optive capacity,<sup>86</sup> some "engines of terrorism"<sup>87</sup> that did not exist in America in the past could be emerging. He pointed to the peoples' perception of the economy and the development of single-issue politics as examples.<sup>88</sup> These changing societal factors combined with the high rate of relative success achieved<sup>89</sup> and the continued media saturation coverage<sup>90</sup> indicate little hope of de-escalation.

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81. See CIA REPORT, *supra* note 42, at 1, 5.

82. See Violence Spreads, *supra* note 43.

83. See *supra* note 54-59.

84. See Catton, *supra* note 52, at 708.

85. See Violence Spreads, *supra* note 43.

86. By "co-optive," Mr. Jenkins means that the American political system can "incorporate an enormous diversity within its political system." See *id.* at 33.

87. *Id.*

88. *Id.* Mr. Jenkins contrasts "single-issue politics" against an overall anti-capitalist or nihilistic philosophy. He observed that we have already seen some willingness among single-issue movements to break the law but noted that it was not to the extent of doing serious violence to people or property. However, in November 1982, this point may have been reached when an anti-nuclear power advocate held the Washington Monument and its occupants hostage.

89. Terrorists have met with a high degree of success in accomplishing their objectives. In a study of sixty-three major kidnapping and barricade operations executed between early 1968 and late 1974, the RAND Corporation concluded that such actions were subject to the following probabilities of risk and success:

87% probability of actually seizing hostages

79% chance that all members of the terrorist team will escape punishment or death, whether or not they successfully seized hostages

40% chance that all or some demands will be met in operations where something more than just safe passage or exit permission was demanded.

29% chance of complete compliance with such demands

83% chance of success where safe passage or exit, for the terrorist themselves or for others, was the sole demand

67% chance that, if concessions to the principal demands were rejected, all or virtually all members of the terrorist team could still escape alive by going underground, accepting safe passage in lieu of original demands, or surrendering to

What if this situation continues to exist? What are the consequences?

Professor Bassouini has determined four main effects of media coverage of publicity-seeking crimes: intimidation, imitation, immunization, and imperilization. Media coverage of publicity-seeking crimes often (1) enhances the environment of fear and coercion the terrorists seek to generate (intimidation factor); (2) encourages other individuals to engage in such conduct (imitation factor); (3) dulls the sense of outrage and contempt in the general public (immunization factor); and (4) endangers hostages' lives and interferes with effective law enforcement (imperilization factor).<sup>91</sup>

### A. Intimidation

Considered alone, each publicity-seeking act is not nearly as ominous as it appears to be. More than twice the number of people who have died in terrorist incidents between 1968 and 1975 have died from asthma in a single year in the U.S.; ten times as many have died from influenza.<sup>92</sup> By focusing on terrorist events and giving them a disproportionate amount of news coverage, the media engenders the feeling in the viewing public that such events are more common and, therefore, more dangerous than they really are.<sup>93</sup> Media, particularly television, gives the effect of authenticity *per se*.<sup>94</sup> It gives the criminal the auspices of power in a short time, with little effort, on a wide scale. In some respects, the modern "terrorist" is "created" by the media: they magnify and enlarge him and his powers far beyond its true magnitude.<sup>95</sup> In effect, television puts everyone at the scene of the crime, helpless to do anything, engendering feelings of anxiety and fear—the terrorist's instruments of coercion. This public anxiety enhances the perceived power of the terrorist in his own eyes as well as the eyes of his peer group and others.<sup>96</sup> This enhanced power often leads to imitation<sup>97</sup> and the cycle repeats itself.

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a sympathetic government, and  
100% probability of gaining major publicity whenever that was one of the  
terrorist's goals.

Research Study, *supra* note 39, at 22.

90. See *The Coming Explosion in TV News*, *supra* note 75, at 45.

91. See Bassiouni, *Perspectives*, *supra* note 41, at 18-19.

92. See Catton, *supra* note 55, at 712.

93. See Bassiouni, *Perspectives*, *supra* note 41, at 3.

94. *Id.* at 21.

95. See National Advisory Committee on Criminal Justice Standards & Goals, REPORT OF THE TASK FORCE ON DISORDERS & TERRORISM 366 (1976) [hereinafter TASK FORCE].

96. See Bassiouni, *Perspectives*, *supra* note 41, at 22.

97. See *id.* at 18-19.

### B. Imitation

According to leading sociologists, "among all the different ways one might behave in given circumstances, any particular way is more likely to be repeated when the circumstances recur if the previous time it was done it was followed by some gratifying experience."<sup>98</sup> This is referred to as the "operant conditioning model."<sup>99</sup> This can also occur as a result of vicarious reinforcement through observational learning.<sup>100</sup> In other words,

If a person observes another individual, with whom he more or less identifies, and sees that in certain circumstances a certain action by that other individual tends to be followed by an experience that is rewarding to that other person, the probability that the observer would behave in those circumstances in about the way the observed person did is enhanced.<sup>101</sup>

Therefore, if a would-be terrorist sees someone else's terror-inspiring act succeeding (i.e., resulting in a gratifying experience) then the probability that the would-be terrorist will engage in similar acts is increased. If publicity is what these individuals seek, then receiving such publicity is gratifying and rewarding. By providing such a "reward" to publicity-seeking criminals, media is reinforcing and encouraging present and future terrorists.<sup>102</sup> An excellent example of such a phenomenon took place during the Iran crisis.<sup>103</sup> Shortly after the incident began, United States' Embassies were attacked in Bangladesh, Libya, and Pakistan, basically following the steps of the successful Iranians.<sup>104</sup>

Of course, the information on operant conditioning and vicarious reinforcement is theoretical and data on such social phenomenon will never be clear enough to convince *all* social scientists and *all* legal scholars. But, to quote former Surgeon General Jesse Steinfeld, "There comes a time when

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98. See Catton, *supra* note 55, at 713.

99. See Gerwitz, *Mechanism of Social Learning: Some Roles of Stimulation and Behavior in Early Human Development*, in HANDBOOK OF SOCIALIZATION THEORY AND RESEARCH 57-212 (D. Goslin ed. 1969). See also Catton, *supra* note 55, at 713. Professor Bassiouni terms this phenomenon a "psychological projection prediction syndrome."

100. See Albert Bandura, *Social-Learning Theory of Identificatory Processes*, in HANDBOOK OF SOCIALIZATION THEORY AND RESEARCH 213-62 (D. Goslin, ed. 1969). See also Catton, *supra* note 55, at 714.

101. Catton, *supra* note 55, at 714.

102. *Id.*

103. See Tehran's Reluctant Diplomats, *supra* note 65.

104. See Bassiouni, *Perspectives*, *supra* note 41, at 26.

data are sufficient to justify action."<sup>105</sup> There is a strong argument that the time is now. Ninety-three per cent of police chiefs surveyed in a recent study felt like live television coverage of terrorist acts encouraged terrorism.<sup>106</sup> Sixty-four percent of the general public surveyed in a 1977 Gallup poll believed detailed news coverage of terrorism encourages others to commit similar crimes.<sup>107</sup> It is also suggested that terrorist groups conform to certain media stereotypes in their internal organizational structure, chain of command, choice of targets, time, place, and manner of action, and even in the attitudes of their members.<sup>108</sup>

Professor Catton warns, though, that the distinction must be made between "instrumentally-oriented terrorists" and "expressly-oriented terrorists."<sup>109</sup> For instrumentally-oriented terrorists, publicity about their goals would be reinforcing, but publicity about their actions and not their goals would not be reinforcing. For expressly-oriented terrorists, *any* publicity—even negative publicity—would be reinforcing. They seek publicity for its own sake, for self-identification. Any media attention provides relief from their "significance deprivation."<sup>110</sup>

### C. Immunization

Constant and detailed coverage of publicity-seeking crimes has three less immediate and perhaps more subtle effects on society. First, it increases the level of public tolerance of such crimes and lessens the feeling of righteous indignation.<sup>111</sup> This, one might argue, is good because it thwarts the terrorist's goal of intimidation by removing the shock factor.<sup>112</sup> On the

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105. Surgeon General's Report to the Scientific Advisory Committee on Television and Social Behavior: HEARINGS BEFORE THE SUBCOMMITTEE ON COMMUNICATIONS OF THE SENATE COMMITTEE ON COMMERCE, 92d Cong., 2d Sess., 25-26 (1972).

106. M. Sommer, *Project on Television Coverage of Terrorism*, reported in EDITOR & PUBLISHER, Aug. 27, 1977, at 12.

107. Jaehnig, *supra* note 13, at 721. See also, Hendrick, *When Television is a School for Criminals*, TV GUIDE, Jan. 29, 1977, at 4. After interviewing inmates at a Michigan prison, Hendrick reported that ninety percent of the inmates admitted that had "learned new tricks and improved their criminal expertise by watching crime programs." Forty percent said they had attempted crimes they had viewed on television. *Id.* at 5.

108. See Bassiouni, *Perspectives*, *supra* note 41, at 18.

109. *Id.*

110. *Id.* at 714.

111. See Bassiouni, *Perspectives*, *supra* note 41, at 22.

112. See Martha Crenshaw, *The Causes of Terrorism*, 13 COMPARATIVE POLITICS 379, 386 (July 1981); Bassiouni, *Perspectives*, *supra* note 41, at 22.

other hand, more persons will feel less constricted by conscience as a result of the lessening social opprobrium.<sup>113</sup>

Second, the portrayal of all terrorists as crazies or as individuals and/or organizations beyond society's means of control suggests to the public that there is nothing that can be done to solve the problem. The problem is explained away thus lessening the chance of actively seeking solutions and thereby increasing the probability that such acts will continue unhampered.

Third, repeated coverage of terrorist events tends to conceptualize the act.<sup>114</sup> Instead of seeing an individual criminal, an individual victim, or an individual policeman, the public perceives roles—i.e., terrorists, hostages, law enforcement agencies—being played in a huge chess game. The individual act becomes an event and the human dimensions become lost.

#### D. Imperilization

Ongoing coverage of hostage-taking incidents is the hotbed of the media coverage controversy, and yet the problems seen there are probably the most susceptible to legal solution.<sup>115</sup> There are two general areas of conflict: (1) media dissemination of information tactically useful to the publicity-seeking criminal and (2) media interference with an effective law enforcement response.<sup>116</sup>

##### 1. Media dissemination of information

Media can serve as the "intelligence arm"<sup>117</sup> of the criminal in many ways. Today, in most hostage situations, the criminal has a television or radio device within near proximity. By broadcasting police strategies,<sup>118</sup> activities, plans, or the presence of hidden persons<sup>119</sup> or escaping hostages, the media

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113. See Bassiouni, *Perspectives*, *supra* note 41, at 22.

114. *Id.*

115. See discussion *infra* at notes 313-331 and 349-351.

116. See Bassiouni, *Perspectives*, *supra* note 41, at 28-30.

117. *Id.* at 28.

118. For a discussion of the strategic, hollow immunity offer made to Anthony Kirtsis and the planned refutation almost broadcast along with the potential ramifications of such broadcast, see Jachnig, *supra* note 13, at 717, 719-20.

119. For example, in the 1977 Hanafi Muslim takeover of three buildings and 135 hostages in Washington, D.C., television cameras filmed a basket being lifted to the fifth floor where eleven people had evaded capture. Upon seeing this broadcast, the Hanafis tried to break the barricaded door to this room down. A tense nine-hour ordeal ensued but the police were finally able to free the people. See Bassiouni, *Perspectives*, *supra* note 41, at 29.

endangers the lives of the hostages,<sup>120</sup> law enforcement personnel, and innocent citizens.<sup>121</sup> They also assist the criminals in determining escape routes and repelling police assaults.<sup>122</sup>

## 2. Media interference with law enforcement

The physical presence of the media often interferes with the law enforcement agencies at the scene that are trained to effectively handle such situations. The somewhat obtrusive equipment interferes with their free movement and attracts crowds which compound the risk and increase the burden on the police. Questioning by a multitude of reporters can often distract key personnel at critical moments. Direct media contact with the criminal can tie up telephone access, incite the criminal by use of inflammatory questions or phrases,<sup>123</sup> goad the criminal into action to prove himself in the spotlight,<sup>124</sup> and can have the effect of isolating a trained professional negotiator from the mediating process by increasing the role of the untrained media person.<sup>125</sup> Police officials claim that the stampede of journalists to interview terrorists reinforces their sense of power and accomplishment.<sup>126</sup> Often, the mere presence of the media encourages terrorists to remain barricaded or to demand a press conference so as to increase coverage.<sup>127</sup>

Why then, with the multitude of bad consequences, do the media continue to grant such all-pervasive coverage to publicity-seeking criminals? The profit motive was considered earlier. The media, though, have what they consider more legitimate reasons for their continued coverage.

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120. For example, during the 1977 hijacking of a Lufthansa jet, the media broadcasted that the pilot was passing intelligence information to the police. Upon hearing this on their radio, the terrorists promptly executed the pilot. See Bassiouni, *Perspectives*, *supra* note 41, at 29.

121. The 1977 Sommer survey showed that seventy-nine per cent of the police chiefs surveyed felt that live television coverage was a threat to hostages. See M. Sommer, *supra* note 106, at 12.

122. See Bassiouni, *Perspectives*, *supra* note 41, at 29.

123. Those who have had experience with terrorists have discovered that one particular word—a trigger word—can turn a seemingly normal man into an irrational and abnormal one in an instant. See INSTITUTE FOR STUDY OF CONFLICT, *TELEVISION AND CONFLICT* (1978) at 19-20. For example, during the Hanafi incident, a media contact identified the Hanafi Muslims with the Black Muslims. Khaalis, the leader of the sect, became enraged and threatened to execute one hostage in retaliation until the reporter, following police advice, apologized. See Fenyvesi, *supra* note 12, at 17.

124. See Bassiouni, *Perspectives*, *supra* note 41, at 29.

125. *Id.* at 29-30.

126. Jaehnig, *supra* note 13, at 723.

127. See Bassiouni, *Perspectives*, *supra* note 41, at 30.

#### IV. THE MEDIA'S REASONING

The media defends its coverage of publicity-seeking crimes as being part of its historical role in the makeup of American society. The freedoms of expression and of the press are usually justified in one or more ways.<sup>128</sup> First, they are an essential process for advancing knowledge and discovering truth. Someone seeking knowledge and truth needs to hear all sides of a question and to consider all alternatives.<sup>129</sup> Second, they are an essential element of self-governance. The governed must, in order to exercise their right to vote, be fully informed.<sup>130</sup> These first two factors are commonly encompassed in the concept of the public's "right to know." Finally, they operate as democracy's safety valve by substituting reason for force and providing a framework within which the conflict necessary to the progress of society can take place without destroying society.<sup>131</sup>

The media feel that in fulfilling the above objectives, it is their duty to play the role of the uninvolved observer,<sup>132</sup> to merely report information. In fact, a widely-used reporting textbook advises the student of journalism that the *effect* of reporting the news is not the reporter's concern,<sup>133</sup> nor is preventing violence or determining the legitimacy of the grievance.<sup>134</sup> Walter Jaehnig, a professor of journalism himself, terms this role the "libertarian tradition."<sup>135</sup> Libertarianism lacks a moral code or philosophy and promotes moral neutrality.<sup>136</sup> When asked if a distinction shouldn't be made between terrorist acts and civil disobedience and the coverage keyed to such a distinction, an editor of a major metropolitan newspaper answered

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128. See Thomas I. Emerson, *THE SYSTEM OF FREEDOM OF EXPRESSION* 6-8 (1970). There has been great debate over the years as to whether the addition of "and of the press" to the First Amendment's guarantee of freedom of speech holds any special significance. It is the general feeling today that the press clause does not signify any "special" privileges except in very rare instances. For a discussion of the press clause, see generally, *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978) (Burger, J., concurring); Potter Stewart, *Or of the Press*, 26 HASTINGS L. J. 631 (1975); Melville B. Nimmer, *Introduction - Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 HASTINGS L. J. 639 (1975); David Lange, *The Speech and Press Clauses*, 23 UCLA L. REV. 77 (1975).

129. See Emerson, *supra* note 128, at 6.

130. *Id.*

131. *Id.*

132. See Jaehnig, *supra* note 13, at 735.

133. Curtis D. MacDougall, *Interpretive Reporting* 11 (1977).

134. See Jaehnig, *supra* note 13, at 732.

135. *Id.* at 739.

136. *Id.*

that "...once we start making judgments of this sort ... I think the media is ... doing something far different from its basic role of simply informing."<sup>137</sup>

This idea is simply not true. First, it assumes that such judgments are not already being made. Every day, editors and news producers decide what's "newsworthy" and what's not, how much coverage will be given, how it will be classified, how the headline will read, who will be interviewed, how many reporters and cameras should be sent, and so forth.<sup>138</sup> Second, with the instantaneous coverage permitted by the minicam, the individual decision of where one wants to go and what one wants to see has been taken away from the individual and put in the hands of the press. They have become the eyes and ears of the public—a conduit, a surrogate.<sup>139</sup> Like it or not, the media has the responsibility of deciding for the public what they want to experience in their lives.<sup>140</sup> The roles of the neutral, uninvolved observer and recorder of fact are antiquated ones if they even exist at all. Particularly in the area of coverage of publicity-seeking crimes, journalists today are often thrust into a life and death situation.<sup>141</sup> Every reporter covering such an event must decide whether his actions are going to be governed by the interests of the hostages/victims, public authorities and the community at large, or the newsgathering and financial interests of his station or newspaper.<sup>142</sup> Moral neutrality provides an insufficient basis for

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137. *Id.* at 741.

138. As Professor Catton put it, "Why have we less 'right to be alerted' by the media to each million tons of potentially climate changing CO<sub>2</sub> added to the atmosphere, or each ton of radioactive waste added by the electric power industry...? When did the authors of the Bill of Rights decide it was violence committed by militants that we most needed to be informed about?" Catton, *supra* note 55, at 715. See also Bassiouni, *Perspectives, supra* note 41, at 2 n.7 where Professor Bassiouni notes the lack of coverage of state-sponsored terrorism, i.e., genocide in Cambodia/Vietnam, etc.

139. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1979). Instantaneous broadcasting largely eliminates the journalistic editing function. As Robert Faw, a CBS news reporter, once said, "[T]here's absolutely no journalism that takes place in a situation like that. The reporter becomes a game show host." Jaehnig, *supra* note 13, at 719 n.4.

140. A distinction must be noted here. A frequent argument by television producers is that the viewer could choose not to watch a violent or obscene show. This theory has never been really tested in the television context in the courts but has not fared well in the radio context. See *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). It is even less viable as it applies to television news. If the public has a right to know the day's news, they have a right to not have to make a choice between viewing it with unnecessary violence, obscenity, etc. and not viewing it at all.

141. A distinction has been made, also, in the coverage of publicity-seeking crimes because the reporter, through his use by the criminal, becomes a newsmaker rather than just a reporter of facts. See *LEGAL AND OTHER ASPECTS OF TERRORISM, supra* note 41, at 183.

142. See Jaehnig, *supra* note 13, at 724.

such decisions.<sup>143</sup> Since the 1940's, it has been argued that the media's freedom to report must be accompanied by the duty to report responsibly.<sup>144</sup> Surely, responsible judgments must be made that distinguish between the war of ideas that is fought within the legitimate boundaries of freedom of speech and the conflicts that resort to violence and intimidation rather than verbal expression and intellect.

An additional purpose or role of the free press, as perceived by Justice Stewart and others,<sup>145</sup> is to act as an additional check on the three official branches of government.<sup>146</sup> In fact, the press has come to be termed the "Fourth Estate."<sup>147</sup> This, arguably, is an important role the media does play. But the coverage of publicity-seeking crimes is not related to the functioning of any one of our three branches of government. Even if the criminal's purpose is to draw attention to what he considers a defect in our governmental system, he must be made to understand that there are many nonviolent ways for his protest to be heard within the legitimate parameters of free speech. He has no constitutional right to express himself in violent ways at the expense of innocent people,<sup>148</sup> yet the media nearly guarantee him just such a right. In addition, there are other ways for the media to provide him a forum for expression<sup>149</sup> and to inform the public about an individual's grievances with our government in ways that do not publicize these violent acts.<sup>150</sup>

The media also express a concern over the possible loss of credibility in the eyes of the public if they withhold any information.<sup>151</sup> They fear the public will question what other types of information might be withheld,

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143. *Id.* at 739.

144. See COMMISSION ON FREEDOM OF THE PRESS, A FREE AND RESPONSIBLE PRESS (1947); FOUR THEORIES OF THE PRESS (Frederick Siebert, et al., eds. 1956); Clarence J. Mann, *Personnel and Property of Transnational Corporations*, LEGAL ASPECTS OF INT'L TERRORISM (ASIL 1978); Jaehnig, *supra* note 13, at 740, n.89.

145. Particularly the media themselves. See also, Floyd Abrams, *The Press Is Different: Reflections on Justice Stewart and the Autonomous Press*, 7 HOFSTRA L. REV. 563, 591-92 (1979).

146. Stewart, *supra* note 128, at 634.

147. *Id.* See also, LEGAL AND OTHER ASPECTS OF TERRORISM, *supra* note 41, at 183.

148. See Bassiouni, *Perspectives*, *supra* note 41, at 36. For a discussion of the speech/action dichotomy, see also Laurence H. Tribe, AMERICAN CONSTITUTIONAL LAW 601 (1978); *United States v. O'Brien*, 391 U.S. 367 (1968); *United States v. Miller*, 367 F.2d 72 (2d Cir. 1966).

149. See discussion *infra* at notes 341-346.

150. *Id.*

151. See 'Who's Who' Looks into the Ethical Questions of Covering Terrorist Acts, BROADCASTING, March 21, 1977 at 28 (statements of Walter Cronkite); Jaehnig, *supra* note 13, at 735.

suspect collusion with governmental agencies, and so forth. This again assumes that the public trusts that the media present all the facts in an unbiased way. In a recent national survey,<sup>152</sup> Barbara Walters, Dan Rather, and Roger Mudd—all leading journalists—were the top three *least* trusted news personalities of the year.<sup>153</sup> Evidently, the public does not “trust” all journalists now. Even so, the credibility problem can be overcome in three ways. First, if the public is told the reasons and purposes behind the limited coverage—and legitimate reasons they are—they will understand (and probably agree with) the suppression of some news. Second, if the media is only responding to our working within legitimate laws regulating coverage,<sup>154</sup> they can hardly be held responsible for limited coverage and accused of collusion. Finally, a total blackout is unnecessary (if not illegal).<sup>155</sup> As argued later in this Article,<sup>156</sup> limited access and perhaps restraints on publicizing life-endangering information prior to the culmination of the event would still allow the public to stay informed and yet alleviate some of the problems related to media coverage of such crimes.

The media also argue that they serve worthwhile and necessary functions while covering publicity-seeking crimes in that they squelch rumors,<sup>157</sup> they can be an effective bargaining tool for the negotiator to use to obtain release of hostages,<sup>158</sup> and they can provide law enforcement agencies with otherwise unavailable tactical and intelligence information.<sup>159</sup> They also argue that lack of coverage will provoke these criminals to even more visible forms of violence which can't be ignored,<sup>160</sup> instill in the public a false sense of security,<sup>161</sup> and fulfill the propaganda objective of terrorists by illustrating that democratic states are not really free.<sup>162</sup>

These are legitimate observations. It must be remembered, however, that were the media not there to begin with, in all likelihood neither would be the terrorists; the immediacy of rumors usually only affect the immediate

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152. Our Fifth Annual Poll: The Reader's Revenge, PEOPLE, Mar. 14, 1982, at 40.

153. *Id.* at 42.

154. See discussion *infra* at notes 249-253, 266-275, 281-287, 313-319.

155. See discussion *infra* at notes 240-280.

156. See discussion *infra* at notes 313-331.

157. See Jaehnig, *supra* note 13, at 735; LEGAL AND OTHER ASPECTS OF TERRORISM, *supra* note 41, at 187; van der Vat, *supra* note 41, at 26; Bassiouni, *Perspectives*, *supra* note 41, at 47.

158. See Bassiouni, *Perspectives*, *supra* note 41, at 31.

159. *Id.*

160. See van der Vat, *supra* note 41, at 26; Paust, *supra* note 13, at 671.

161. See van der Vat, *supra* note 41, at 26.

162. *Id.* See Jaehnig, *supra* note 13, at 24.

area and can be dissipated with minimal coverage. In a trade-off between giving tactical information to the terrorists which would endanger lives and getting tactical information from the terrorists, not many would choose the latter.<sup>163</sup> Also, as has been previously argued,<sup>164</sup> saturation coverage has the same effect on possible escalation in forms of violence as does lack of coverage and media-created anxiety is "functional rather than dysfunctional" only when it prepares individuals to confront danger realistically<sup>165</sup> which current coverage doesn't do. And, again, a no-win situation is created by the terrorist: choose your propaganda—my grievances or your purported lack of freedom. Again, this propaganda objective is truly only fulfilled by a total blackout which is not suggested here. Other restraints, given legitimate and compelling purposes behind them, are justifiable.

## V. SOLUTIONS

What, then, can be done? A number of suggestions have been made by both law enforcement officials, government<sup>166</sup> and the media.<sup>167</sup> However, very little else has been done. These suggestions can be divided into two basic groups: non-content-related and content-related.<sup>168</sup>

### A. *Non-content-related Suggestions*

The most often recommended and probably most feasible<sup>169</sup> suggestion is to limit the media's access to the crime scene.<sup>170</sup> Possibilities include setting up a "broadcast area" near police lines for bulletins and interviews,<sup>171</sup> setting up a "briefing area" for off-the-record information where no cameras or recording equipment would be allowed,<sup>172</sup> establishing a police hotline

163. See, e.g., *supra* text accompanying notes 106, 121 (police survey where 65% of the police chiefs felt live coverage endangered hostages and 100% felt live coverage should be discontinued).

164. See CIA REPORT, *supra* note 42, at 1, 5.

165. See Mendelsohn, *Socio-Psychological Perspectives on the Mass Media and Public Anxiety*, JOURNALISM Q. 514 (1963).

166. See generally TASK FORCE, *supra* note 95 (The task force was composed mainly of police and governmental officials); *Police, Media, And Terrorism*, CHRISTIAN SCIENCE MONITOR, Dec. 5, 1977, at 46 (package of suggestions prepared by Maurice J. Cullinane, former Washington, D.C. police chief) [hereinafter Cullinane].

167. See, e.g., Terry, *supra* note 10.

168. See Cullinane, *supra* note 166 (This is an important distinction because under constitutional analysis, much stricter scrutiny is given to any content-based regulation).

169. See discussion *infra* at notes 313-331.

170. Bassiouni, *Perspectives*, *supra* note 41, at 33, 43 & 44; TASK FORCE, *supra* note 95, at 9; Cullinane, *supra* note 166, at 46; Mann, *supra* note 144; Paust, *supra* note 13, at 672.

171. Cullinane, *supra* note 166, at 46.

172. *Id.*

that would be updated continuously,<sup>173</sup> appointing an official police spokesperson to give periodic briefings,<sup>174</sup> and restricting direct contact with the criminal during an ongoing crime.<sup>175</sup> Another non-content related suggestion is to restrict the use of cameras and lighting or allow only lone camera shots.<sup>176</sup> Finally, some suggest limiting the number of reporters allowed on the scene by using pool reporters to cover activities on behalf of all news organizations and agencies.<sup>177</sup> One journalist, himself having been held hostage, proposed that a committee of editors in the city experiencing the incident be empowered to declare and enforce a "news emergency" under which certain rules of the profession be suspended and where protecting or, at least, not endangering the lives of hostages would be top priority. Anyone violating this rule would be subject to disciplinary action by his employer.<sup>178</sup> It has been suggested that instead of regulating the actual on-the-scene press activities, the law enforcement agencies could offer training to media representatives in handling hostage situations. It is felt that through this educational process the media would become more aware of the problems and be better able to understand the police requests made and consequently be more apt to follow them.<sup>179</sup>

### B. Content-related Suggestions

The content-related suggestions can be further divided into two more groups: limitations on what information is to be released and requirements of specific information to be released.

*Limiting information:* Suggestions to limit information include: Police tactical information which could prejudice the lives of hostages or potential victims<sup>180</sup> should not be released;<sup>181</sup> any inflammatory or aggravating

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173. *Id.*

174. *Id.* See also TASK FORCE, *supra* note 95, at 729.

175. Cullinane, *supra* note 166, at 46.

176. *Id.*

177. *Id.* See also *Saxbe v. Washington Post*, 417 U.S. 843, 874 at n.17 (1974) (Powell, J., dissenting) (the media argue that pools are time-consuming to establish, raise questions about which news organization should be permitted in the pool, and imply that news editors will be inclined to delegate responsibility for sensitive coverage to reporters whom they do not know); Jaehnig, *supra* note 13, at 733. However, as Justice Powell noted in *Saxbe*, pools are effectively used in other situations (trials, White House press coverage, etc.).

178. See CHARLES FENYVESI, *THE MEDIA & TERRORISM* 28, 30 (1977).

179. See Terry, *supra* note 10, at 775.

180. See Chris Elkins, *Caging the Beasts, Political Violence and the Role of the Media: Some Perspectives*, 1 POL. COMM. & PERSUASION 79, 98 (1980) (an example of endangering the life of a potential victim rather than a hostage is the news media broadcast that the armed vest worn by President Ford could only be pierced by a Springfield 303 rifle bullet).

information should be delayed until the incident is over;<sup>182</sup> sensationalism should be avoided;<sup>183</sup> reports should be confined to police disseminated information only, at least until the incident is over;<sup>184</sup> "how to" information relating to terrorist tactics should be avoided;<sup>185</sup> and the name of any individual or group claiming responsibility for a bombing should be withheld.<sup>186</sup>

Some suggest that because one of the underlying causes of publicity-seeking crimes is that more conventional means of communication seem unavailable,<sup>187</sup> the media should provide increased access to the conventional media to representatives of minority and non-establishment points of view.<sup>188</sup> One suggestion is to set aside one hour per week for presentation of messages by the public to be apportioned on a first-come-first-served basis and/or a representative spokesperson system.<sup>189</sup>

### C. *Providing Information*

Most authorities agree that at least the media should strive to give a balanced treatment of the phenomenon.<sup>190</sup> They should provide information from official sources in answer to the criminal's self-serving statements.<sup>191</sup> They should give follow-up coverage of the incident; for example, they should cover the law enforcement and judicial responses to the criminal and his actions.<sup>192</sup> Some feel that media has the responsibility to educate the public concerning the impropriety of taking innocent lives in order to publicize demands and grievances, the relative infrequency of such acts, the legitimate needs of law enforcement in a democratic society, and the

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181. See TASK FORCE, *supra* note 95, at 729.

182. *Id.* See also Mann, *supra* note 144, at 672.

183. See TASK FORCE, *supra* note 95, at 729.

184. See Cullinane, *supra* note 166, at 46.

185. *Id.*

186. *Id.*

187. See van der Vat, *supra* note 41, at 27; Catton, *supra* note 55, at 705.

188. See Bassiouni, *Perspectives*, *supra* note 41, at 50; Pohlmann & Foley, *supra* note 1, at 35]; Terry, *supra* note 10, at 773-74.

189. Terry, *supra* note 10, at 773-74.

190. See TASK FORCE, *supra* note 95, at 367-68; Bassiouni, *Perspectives*, *supra* note 41, at 27; Jaehnig, *supra* note 13, at 740; Paust, *supra* note 13, at 672. Note that however balanced the coverage is, the pervasive influence remains. Any publicity—whether it put them in a good light or not—is gratifying to an expressly-oriented terrorist. See Catton, *supra* note 55, at 729.

191. See TASK FORCE, *supra* note 95, at 729.

192. Note, however, that the current statistics of success and failure would be a deterrent to future criminals. See note 86, *supra*.

non-romantic aspects of terrorism.<sup>193</sup> The media do indeed contribute to the problem of publicity-seeking crime. Is it not too much to hope that they would also contribute to its solution?

Perhaps it is too much to expect of the media. Since 1941, the media have been urged to police themselves.<sup>194</sup> And yet, it took a flurry of incidents in 1977<sup>195</sup> to even get some "guidelines" proposed and randomly adopted.<sup>196</sup> Western media officials are now aware of the dangers inherent in the coverage of publicity-seeking crimes but the competitive pressures are strong,<sup>197</sup> "professional judgment" may be unattainable,<sup>198</sup> and the industry is fragmented in nature and therefore hard to control from within.<sup>199</sup>

The competitiveness of news organizations,<sup>200</sup> their fear of being "scooped" by the opposition,<sup>201</sup> and their aforementioned quest for larger audiences and prestige<sup>202</sup> combine to encourage rather than discourage escalated reporting techniques and sensationalistic coverage. Many police officials, in fact, believe that it is the competition between newsmen, inspired by their respective news organizations, that lies at the root of the problem.<sup>203</sup> An individual reporter who might refrain from covering a particular event for personal ethical reasons will more often succumb to the

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193. See Mann, *supra* note 144, at 740.

194. See Terry, *supra* note 10, at 747; H.A.A. Cooper, *Terrorism and the Media*, 24 CHITTY'S LAW J. 226, 230 (Sept. 1976); Bassiouni, *Perspectives*, *supra* note 41, at 46; Pohlmann & Foley, *supra* note 1 at 35.

195. The first quarter of 1977 saw more than the usual number of publicity-seeking crimes: February 8 through February 10, Anthony Kiristsis held a mortgage company president hostage for sixty-three hours gaining a live news conference to state his views; February 14, Frederick Cowan held two captives in a New York factory then committed suicide; March 7 through March 9, Cory Moore took two captives and later received a telephone call from President Carter; March 9 through March 11, Hanafi Muslims took three Washington, D.C. buildings and 134 hostages. Terry, *supra* note 10, at 745.

196. *Id.* at 776.

197. See *Research Study*, *supra* 41, at 30. See also, text at notes 67-70, *supra*, and 200-206, *infra*.

198. See Terry, *supra* note 10, at 760. See also, text, *supra* at notes 207-214.

199. See, *Nebraska Press Ass'n v. Stewart*, 427 U.S. 539, 550 (1976). See also, Jaehnig, *supra* note 13, at 727.

200. See *Research Study*, *supra* note 41, at 30; *Right, Wrong*, *supra* note 11, at 45; Jaehnig, *supra* note 13 at 726, 736; Bassiouni, *Perspectives*, *supra* note 41, at 25.

201. See Pohlmann & Foley, *supra* note 1, at 35; Terry, *supra* note 10, at 768; *Crisis Cop Raps Media: Hostage Squad's Frank Bolz Asks Press to Police Itself*, MORE, June 1977 at 19 [hereinafter *Crisis Cop*]; Bassiouni, *Perspectives*, *supra* note 41, at 25.

202. See Bassiouni, *Perspectives*, *supra* note 41, at 25.

203. See *Crisis Cop*, *supra* note 201, at 19; Jaehnig, *supra* note 13, at 726.

subtle persuasion of potential career enhancement.<sup>204</sup> Network policies of recruitment and advancement assure that newsroom policies rather than philosophical principles succeed in network news.<sup>205</sup> Newspaper staffers also conform to newsroom policies due to the somewhat more subtle factors of socialization within the job environment and esteem for superiors.<sup>206</sup> Reporters are seeking to establish the reputation of being first with the news and first with the viewers. Neither factor is conducive to operating a self-regulated industry. Neither is either factor conducive to responsible reporting.

The media industry argues that they are a profession and that like any other recognized profession—e.g. doctors or lawyers—should be allowed to regulate themselves. However, journalists are not now and have never been truly considered “professionals.”<sup>207</sup> They have no intense period of specialization; they, in fact, abhor responsibility for their judgments and actions;<sup>208</sup> they tend to place greater emphasis on economic gain rather than personal service; they have no comprehensive self-governing organization; and they have no true Code of Ethics subject to clarification and interpretation by the courts.<sup>209</sup> In truth, there is no reason to expect the industry to be “professional” enough to regulate itself.

Finally, self-regulation itself is an almost impossible task given the vast number of organizations nationwide with no central authority.<sup>210</sup> The National Association of Broadcasters (“NAB”), which most television stations belong to and which has been instrumental in regulating such areas as the family viewing hour,<sup>211</sup> is the nearest thing in the industry to a central authority; however, membership is not mandatory.<sup>212</sup> Even the United States Supreme Court has openly recognized the problems inherent in fragmented self-imposed restraints:<sup>213</sup> reporters from distant places are unlikely to be guided by their own standards and state courts have real

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204. See Warren Breed, *Social Control in the News Room: A Functional Analysis*, 33 SOC. FORCES 326, 329-30 (1955); Jaehnig, *supra* note 13, at 742.

205. Jaehnig, *supra* note 13, at 742.

206. Breed, *supra* note 204, at 329-30.

207. See Terry, *supra* note 10, at 760-61.

208. See Jaehnig, *supra* note 13, at 732-39.

209. See Jack M. McLeod & Searle E. Hawley, Jr., *Professionalism Among Newsmen*, 41 JOUR. Q. 529, 530 (1964). Factors from a list of eight criteria relevant to deciding if an occupation is a profession are found in this publication.

210. See Jaehnig, *supra* note 13, at 727, 736; *Nebraska Press Ass'n v. Stewart*, 427 U.S. 539, 550 (1976).

211. See Marc A. Franklin, *CASES AND MATERIALS ON MASS MEDIA LAW* (2d ed. 1982).

212. *Id.*

213. See *Nebraska Press Assn. v. Stuart*, 427 U.S. 539, 550 (1976).

practical difficulties in controlling newspapers or broadcasters outside of their jurisdiction.<sup>214</sup>

All of this being true, still no one outside of government has seriously considered anything more than self-regulation. Why?

## VI. THE FIRST AMENDMENT

"Congress shall make no law . . . abridging freedom of speech or of the press . . . ."<sup>215</sup>

The First Amendment has stood as a bar to government regulation of the media for 200 years. And yet, as Thomas Emerson has observed, "[t]he outstanding fact about the First Amendment today is that the Supreme Court has never developed any comprehensive theory of what that constitutional guarantee means and how it should be applied in concrete cases."<sup>216</sup> Despite the apparent unequivocal command of the First Amendment, a majority of the Court has never supported the absolutist approach of interpretation.<sup>217</sup> Whole areas or forms of expression have been held outside the scope of constitutional protection.<sup>218</sup> Even with regard to protected speech, the Court frequently uses a balancing approach weighing the government concern involved in the regulatory scheme against the speaker's, writer's and/or society's interest in the expression.<sup>219</sup> Within this balancing approach, the Court has on occasion found that certain categories of speech required a lower level of protection.<sup>220</sup> Nonetheless, the First Amendment continues to

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214. *Id.*

215. U.S. CONST. Amend. I.

216. See Emerson, *supra* note 128.

217. Only Justices Black and Douglas have subscribed to a literal interpretation of the First Amendment. See generally Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865 (1960); Countryman, *Justice Douglas and Freedom of Expression*, 1978 U. ILL. L.F. 301. See also *Time, Inc. v. Hill*, 385 U.S. 374, 398 (1967) (Black concurring); 385 U.S. at 401 (Douglas concurring); *Rosenblatt v. Baer*, 383 U.S. 75, 90 (1966) (Douglas dissenting), 383 U.S. at 95 (Black dissenting).

218. "There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words - those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

219. Franklin, *supra* note 211, at 34.

220. Obscenity is one example. See *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). See generally Daniel A. Farber, *Content Regulation and the First Amendment: A Revisionist*

maintain a somewhat preferred position in constitutional analysis,<sup>221</sup> and when the press uses it as their shield or sword it could be a potent and valuable weapon.

There are two basic types of government interference with First Amendment freedoms: content-related and content-neutral.<sup>222</sup> Content-related regulation pertains to controlling *what* is said while content-neutral regulation applies to the *manner* in which it is said or, as applied to the press, the manner in which the information is received. The importance of the distinction is that normally the government bears a heavy burden in overcoming the presumption that content-based regulation is unconstitutional while the interests are more evenly balanced if a content-neutral regulation is at issue.<sup>223</sup>

A few words should be said at this point concerning the unique status of the electronic media (television and radio). The Supreme Court has been willing to recognize a limited distinction between printed and electronic media.<sup>224</sup> Rationales for the different treatment of the broadcasting industry include: (1) airwaves are in the public domain and, as such, the grant of a license is a privilege, not a right;<sup>225</sup> (2) due to a scarcity of airways, some regulation must occur so as to guarantee the public an uncluttered, comprehensible broadcast;<sup>226</sup> (3) the unique power of the medium,<sup>227</sup> and (4) the pervasive and intrusive nature of the medium.<sup>228</sup> The Court has

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*View*, 68 GEO. L. J. 727 (1980); Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113 (1981).

221. See *United States v. Carolene Products Co.*, 304 U.S. 144 (1938); *Thomas v. Collins*, 323 U.S. 516, 530 (1945). *But see Kovacs v. Cooper*, 336 U.S. 77, 89 (1949) (Frankfurter, J., concurring).

222. See Tribe, *supra* note 148, at 580-81; Bassiouni, *Perspectives, supra* note 41, at 36.

223. See Bassiouni, *Perspectives, supra* note 41, at 36.

224. See, e.g., *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 386, 388 (1969).

225. See Comment, *The First Amendment and Regulation of TV News*, 72 COLUMBIA L. REV. 746 (1972) [hereinafter *Regulation of TV News*]; Bassiouni, *Perspectives, supra* note 41, at 45. "A licensed broadcaster is 'granted the free and exclusive use of a limited and valuable part of the public domain; when he accepts that franchise it is burdened by enforceable public obligations.'" *Columbia Broadcast Service v. FCC*, 453 U.S. 367, 395 (1981) (quoting *Office of Comm'n of the United Church of Christ v. FCC*, 359 F. 2d 994, 1003 (1966)).

226. See *Regulation of TV News, supra* note 225 at 766; Bassiouni, *Perspectives, supra* note 41, at 45.

227. See *Regulation of TV News, supra* note 225 at 765-66; H.R. REP. NO. 349, 92nd Cong., 1st Sess. 61-63 (1971); Bassiouni, *Perspectives, supra* note 41, at 45.

228. H.R. REP. NO. 349, 92nd Cong., 1st Sess., 61-63 (1971); Bassiouni, *Perspectives, supra* note 41, at 45; *Red Lion, supra* note 224, 395 U.S. at 387; *Pacifica, supra* note 224, 438 U.S. at 748. Other distinctions can be drawn between broadcasting, particularly television, and the print media: (1) the reader of a newspaper can at any time go directly to what interests

upheld regulation of the broadcasting medium by the FCC<sup>229</sup> who has been empowered by the Communications Act of 1934 to grant renewable licenses on the basis of a "public interest, convenience, or necessity" standard.<sup>230</sup> Although the FCC has no power of censorship nor power to interfere with the right of free speech,<sup>231</sup> the Commission is specifically directed to consider the demands of the public when promulgating rules and regulations<sup>232</sup> and prescribing restrictions and conditions<sup>233</sup> upon obtaining a grant,<sup>234</sup> renewal,<sup>235</sup> or modification<sup>236</sup> of a license. However, although there are numerous legal areas of content-regulation by the FCC and Congress,<sup>237</sup> the Commission has never taken action against a license based

him and skim or ignore the rest; in broadcasting, the choice is made for the listener by the broadcaster: the speed, content and sequence are fixed; (2) the role of sound: written messages are not communicated unless they are read, and reading requires an affirmative act; an ordinary habitual television watcher could avoid messages only by the affirmative act of frequently leaving the room, changing the channel, or doing some other such affirmative act; (3) a person who knows he is appearing on television may alter his behavior because of it; and (4) television is not neutral; it represents a coherent world of images and messages serving its own institutional interest. See Franklin, *supra* note 211, at 716-17.

229. See, e.g., *Red Lion*, *supra* note 224, 395 U.S. at 387; *Pacifica*, *supra* note 224, 438 U.S. at 748; *FCC v. RCA Comm'n., Inc.*, 346 U.S. 86 (1953).

230. 47 U.S.C. §§ 303, 307, 309 (1970).

231. See *id.* at § 326.

232. See *id.* at § 303.

233. See *id.* at § 326.

234. See *id.* at §§ 307(a), 309(a).

235. See *id.* at § 307.

236. *Id.*

237. For example,

- 1) covert sponsorship of broadcast activities forbidden - 47 U.S.C. § 317(a)(1) (1970);
- 2) airing of rigged quiz shows forbidden - § 509(a);
- 3) obscenity - In re Application of WDKD for Renewal of License, 33 F.C.C. 250 (1962);
- 4) broadcasting obscene language - 18 U.S.C. §1464 (1970) (making obscenity, indecency or profane language a criminal act);
- 5) defamation - *Trinity Methodist Church, S. v. FRC*, 62 F.2d 850 (D.C. Cir. 1932) *cert. denied*, 288 U.S. 599 (1933) (denial of license renewal);
- 6) Fraud contests - In the Matter of KWK Radio, Inc., 34 FCC 1039 (1963) (license revocation);
- 7) Illegal lotteries - *WRBL Radio Station, Inc.*, 2 FCC 687 (1936); 18 U.S.C. § 1302 (1970);
- 8) Harmful medical advice - *KFKB Broadcasting Assn. v. FRC*, 47 F.2d 670 (D.C. Cir. 1931) (denial of license renewal).
- 9) Gambling information - *Community Broadcasting Service, Inc.*, 20 FCC 168 (1955) (denial of license renewal).
- 10) No mechanically reproduced production of news or other material "in which element of time is of special significance" made without announcement of such.

on improper news reporting,<sup>238</sup> and the Supreme Court, when confronted with news-related issues, has failed to distinguish between the two mediums.<sup>239</sup> It is only within the last ten to fifteen years that the broadcasting industry, particularly news reporting, has grown to have such a pervasive influence on our society. Our government, including the Supreme Court, has not assimilated this change into its constitutional analysis quite so quickly. However, the basis for a valid distinction regarding news reporting is there and should never be forgotten.

There are actually four forms of control over the media the government has used: prior restraints, subsequent punishments, access restrictions, and FCC regulations. With each type of restraint, the analysis differs.

### A. *Prior Restraint*

Considered the most pernicious form of regulation, prior restraints are extremely hard, if not impossible, for the government to justify. A prior restraint is considered, in many ways, to be more inhibiting than a subsequent punishment or an access restriction. As the United States Supreme Court has said,

It is likely to bring under government scrutiny a far wider range of expression; it shuts off communication before it takes place; suppression by a stroke of the pen is more likely to be applied than suppression through a criminal process; the procedures do not require attention to the safeguards of the criminal process; the system allows less opportunity for public appraisal and criticism; and the dynamics of the system drive toward excesses, as the history of all censorship shows.<sup>240</sup>

The true "muscle" in a system of prior restraints is the fact that once an injunction is issued, the party against whom it is issued must obey the injunction until it is stayed,<sup>241</sup> vacated, or reversed on appeal and should he be held in contempt, he is usually not permitted to assert the invalidity of the underlying order.<sup>242</sup> The Fifth Circuit has noted, however, that the media present special problems in contempt proceedings.<sup>243</sup> It has recognized that

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47 CFR 73.118, 73.288, 73.653 (1971).

238. See Regulation of TV News, *supra* note 225, at 748.

239. See, e.g., *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980); *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978).

240. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 589-90 (1976) (Brennan, J., concurring) (quoting Emerson, *supra* note 128 at 5-6).

241. State and federal courts commonly provide that a single appellate judge may stay the order of a lower court. See Franklin, *supra* note 211 at 62.

242. See *id.* at 60.

243. See *United States v. Dickinson*, 465 F.2d 496 (5th Cir. 1972).

timeliness of the publication of news is sometimes all-important.<sup>244</sup> Thus, "where the publication of news is sought to be restrained, the incontestable inviolability of the order may depend on the immediate accessibility of orderly review."<sup>245</sup> "[N]ewsmen are citizens, too. They too may sometimes have to wait. They are not yet wrapped in any immunity or given the absolute right to decide with impunity whether a judge's order is to be obeyed or whether an appellate court is acting promptly enough."<sup>246</sup>

*Near v. Minnesota*<sup>247</sup> was the first case involving press censorship and prior restraint to come before the Supreme Court. Chief Justice Hughes, writing for the majority, noted, "The main purpose of such constitutional provisions is to prevent all such previous restraints upon publications as had been practiced by other governments."<sup>248</sup> However, he also suggested that the prohibition against prior restraints is not absolute,<sup>249</sup> noting that limitations on First Amendment protection might be recognized in the following situations: (1) to "prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops" (troopship exception);<sup>250</sup> (2) to enforce the "primary requirements of decency" against obscene publications;<sup>251</sup> (3) to protect the community "against incitements to acts of violence and the overthrow by force of orderly government;"<sup>252</sup> and (4) to enjoin "against uttering words that may have all the effect of force."<sup>253</sup>

Forty years later, in the "Pentagon Papers" case,<sup>254</sup> the Supreme Court was still unwilling to declare an absolute ban against prior restraints.<sup>255</sup> Although rejecting by six to three the government's effort to restrain the publication of classified materials on the Vietnam War, the Justices, in their concurrences and dissents, discussed the times when prior restraint might be permitted. Justice Brennan would have upheld the troop/ship exception as the only exception.<sup>256</sup> Justices Stewart and White would have upheld a

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244. *Id.* at 512.

245. *Id.*

246. *Id.* (internal citation omitted).

247. *Near v. Minnesota*, 283 U.S. 697 (1931).

248. *Id.* at 714.

249. *Id.* at 716.

250. *Id.*

251. *Id.*

252. *Id.*

253. *Id.*

254. *N.Y. Times Co. v. U.S.*, 403 U.S. 713 (1971).

255. *See id.* at 714.

256. *See id.* at 726-27.

prior restraint where disclosure would "surely result in direct, immediate, and irreparable damage to our Nation or its people."<sup>257</sup> Justices Marshall, White, Stewart and Burger felt that a prior restraint might be okay had Congress legislated it but that it was "inconsistent with the concept of separation of powers for th[at] Court to use its power of contempt to prevent [certain] behavior."<sup>258</sup> Justice Blackmun subscribed to a system of balancing.<sup>259</sup>

*Near* concerned a *total* restraint on a future publication by a newspaper while the Pentagon Papers case involved publishing material about an event that was history. *Nebraska Press Association v. Stewart*<sup>260</sup> provides a case more directly analogous to a terrorist situation in that it involved only a temporary restraint on publication<sup>261</sup> and an urgent ongoing situation in the context of pretrial publicity.<sup>262</sup> Even so, the Court decided that other alternatives were available and therefore a resort to prior restraints was unconstitutional.<sup>263</sup> It should be noted, however, that the Court went through a detailed analysis of the record considering the nature and extent of the pretrial news coverage, alternative measures, how effective a restraining order would be, and the precise terms of such an order.<sup>264</sup> A four-prong-test can be deduced from the Court's analysis and was enunciated by Justice Powell in his concurrence.<sup>265</sup> A prior restraint may issue only when there is a showing that (1) there is a clear threat to the governmental interest, (2) "such a threat is posed by the actual publicity to be restrained," (3) "no less restrictive alternatives are available" and (4) "previous publicity or publicity from unrestrained sources will not render the restraint inefficacious."<sup>266</sup>

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257. *Id.* at 729.

258. *Id.* at 741.

259. *See id.* at 761.

260. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

261. The temporary nature of the order did not persuade the Court. In fact, it noted that in *New York Times Co.* the burden on the Government was not reduced by the temporary nature of a restraint. *Id.* at 559. The Court also discussed the nature of delay in the news industry concluding that the element of time is important if the press is to "fulfill its traditional function of bringing news to the public promptly." *Id.* at 560-561. The Court also expressed a skepticism about any measure which "would allow government to insinuate itself into the editorial rooms of this Nation's press." *Id.* (quoting *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 259 (1974) (White, J., concurring)).

262. *See id.* at 542.

263. *See id.* at 570.

264. *Id.* at 562-70.

265. *Id.* at 571 (Powell, J. concurring).

266. *Id.*

Closely related to prior restraints are the "clear and present danger"<sup>267</sup> and "national/state security"<sup>268</sup> cases. The "clear and present danger" doctrine originated during the World-War-I-era in *Schenk v. United States*<sup>269</sup> and concerned subversive advocacy. The original test was "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."<sup>270</sup> Subsequent cases have added a requirement of immediacy.<sup>271</sup> As stated in *Landmark Communications v. Virginia*,<sup>272</sup>

the [clear and present danger] test requires a court to make its own inquiry into the imminence and magnitude of danger said to flow from the particular utterance and then to balance the character of the evil, as well as its likelihood, against the need for free and unfettered expression. The possibility that other measures will serve the State's interests should also be weighed.<sup>273</sup>

As one can see it is hard to distinguish between the requirements necessary to overcome a prior restraint and the requirements of the clear and present danger test. Appropriately, it has been suggested that the clear and present danger test (i.e. suppression is all right if the harm sought to be avoided is specific, the suppression sought to be suppressed is likely to cause that harm, and the threatened harm is imminent)<sup>274</sup> is the framework for the Supreme Court's analysis of most content-related speech.<sup>275</sup>

Although the Supreme Court has long realized that the "State has [a] necessary interest in . . . preventing the community from being disrupted by violent disorders endangering both persons and property,"<sup>276</sup> it is unlikely that prior restraints or regulations relating to the intimidation,<sup>277</sup> imitation,<sup>278</sup> and immunization<sup>279</sup> factors will be allowed. They lack immediacy of

267. *Schenk v. U.S.*, 249 U.S. 47, 52 (1919); *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

268. *Franklin*, *supra* note 211, at 260; *U.S. v. Progressive, Inc.*, 467 F. Supp. 990 (E.D. Wis. 1979); *N.Y. Times v. U.S.*, 403 U.S. 713 (1971).

269. *Schenk v. U.S.*, 249 U.S. 47 (1919).

270. *Id.* at 52.

271. The publication must "surely result in direct, immediate, and irreparable damage to our Nation or its people." *N.Y. Times*, 403 U. S. at 730 (Stewart, J., concurring). *See also, Brandenburg*, *supra* note 267, 395 U.S. at 447-48.

272. *Landmark Comm'ns v. Virginia*, 435 U.S. 829 (1978).

273. *Id.* at 843.

274. *See Bassiouni, Perspectives*, *supra* note 41, at 38.

275. *KRATTENMAKER & POWE*, *supra* note 61, at 1183-93.

276. *Brandenburg v. Hayes*, 408 U.S. 665, 701 (1972).

277. *See text at note 89-94, supra.*

278. *See text at note 95-107, supra.*

279. *See text at note 108-111, supra.*

danger and sufficient empirical data to link the broadcast to the harm.<sup>280</sup> However, dissemination of information highly likely to jeopardize the lives of hostages or victims is a specific harm of a very grave nature which is sure to result if the publication of the information is not suppressed. It is highly likely that a narrowly drawn regulation affecting such dissemination would be constitutionally permissible.

### B. *Subsequent Punishment*

Although the Court seems adamant about its refusal to authorize prior restraints except under the most compelling situations, it seems to have no difficulty with the concept of criminal or civil sanctions.<sup>281</sup> In the Pentagon Papers case,<sup>282</sup> Justices Stewart,<sup>283</sup> White,<sup>284</sup> Marshall,<sup>285</sup> and Burger<sup>286</sup> expressed the idea that Congress had the power to enact specific and appropriate laws and that they would have no difficulty sustaining convictions under such laws. However, the precedents dealing with content regulation by criminal or civil sanction are few and distinguishable.<sup>287</sup>

Most recently, in *Smith v. Daily Mail Publishing Co.*,<sup>288</sup> the Court held that a state interest of the highest order was necessary to punish publication of truthful information lawfully obtained.<sup>289</sup> The statute in that case, punishing dissemination of the name of juvenile offenders, was held

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280. See Krattenmaker & Powe, *supra* note 59, at 1193-96; Bassiouni, *Perspectives, supra* note 41.

281. See, e.g. *N.Y. Times v. U.S.*, 403 U.S. 713, 730-33; *Near v. Minnesota*, 283 U.S. 697, 720 (1931); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 588 n.15 (1976) (Brennan, J., concurring).

282. *N.Y. Times*, *supra* note 254, 403 U.S. at 713.

283. *Id.* at 730 (Stewart, J., concurring).

284. *Id.* at 734-39 (White, J., concurring) ("However, these same members of Congress appeared to have little doubt that newspapers would be subject to criminal prosecution if they insisted on publishing information of the type Congress had itself determined should not be revealed...I would have no difficulty in sustaining convictions under these sections on facts that would not justify the intervention of equity and the imposition of a prior restraint.").

285. *Id.* at 743 (Marshall, J., concurring).

286. *Id.* at 752 (Burger, C.J., dissenting) ("I should add that I am in general agreement with much of what Mr. Justice White has expressed with respect to penal sanctions concerning communication or retention of documents or information relating to the national defense.").

287. See *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) (concerning publication of a juvenile offender's identity); *Beauharnais v. Illinois*, 343 U.S. 250 (1952) (dealing with a group libel law); *Winters v. New York*, 333 U.S. 507 (1948) (dealing with an unconstitutionally vague statute); *Landmark Commissioners v. Virginia*, 435 U.S. 829 (1978); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

288. *Daily Mail*, *supra* note 287, 443 U.S. at 97.

289. *Id.* at 103.

unconstitutional. Although finding the state interest of protecting the reputation of juveniles not compelling enough, the Court makes strong mention of the fact that the statute did not truly serve that state interest because by punishing newspapers only, it allowed dissemination by other sources.<sup>290</sup> It noted, too, that although other states had the same interest, they had found an alternative way of accomplishing their objective.<sup>291</sup> Very possibly, had the statute included all media in its prohibition and had the Court found no alternative means, the statute would have passed constitutional muster.

Civil action against the media is, again, a fairly undeveloped area, and usually deals with the electronic media. The cases tend to fall into two main categories: (1) where the content of the broadcast has an immediate impact on the viewer (direct harm), and (2) where the viewer of the broadcast engages in conduct that harms a third party (indirect harm).<sup>292</sup> The direct harm cases entail a factual situation where the viewer tries something he has seen done on television, has heard on the radio, or read in a book and consequently harms himself. The clear and present danger doctrine has been the analytical framework used by the court in these few cases,<sup>293</sup> although the test seems to turn on a reasonable man/likelihood of harm analysis.<sup>294</sup>

The indirect harm cases encompass the controversial "influence of television violence"<sup>295</sup> and imitative crime<sup>296</sup> cases. Incitement to

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290. *Id.* at 104-05.

291. *Id.* at 105.

292. Franklin, *supra* note 211, at 221.

293. *See* Walt Disney Productions, Inc. v. Shannon, 276 S.E.2d 580 (Ga. 1981). *See also* DeFilippo v. Nat'l Broadcasting Co., No. 79-3678 (R.I. Sup. Ct. June 8, 1980) (unpublished opinion). It is generally held, often as a result of "Printer's Ink Statutes," that publishers are not liable for harm caused to readers by advertisements unless the editor knew of the danger created by the advertised product. Franklin, *supra* note 211, at 225. Perhaps the same standard should be used with news reporting. Publishers will not be liable for harm caused by publication of a terrorist event (remember terrorists are using the media for publicity just as any vendor is) unless the editing reporter knew such publication was dangerous—either to the public at large (such "knowledge" at this date would be hard to prove) or to specific individuals (hostages or potential victims).

294. *See* Walt Disney, *id.*, 276 S.E.2d at 583 ("Pied Piper" discussion).

295. *See, e.g.*, Zamora v. Columbia Brdcast. Sys., 480 F. Supp. 199 (S.D. Fla. 1979) where a fifteen-year-old convicted of killing his eighty-three-year-old neighbor claimed that while he was between the ages of five and fifteen he had become desensitized to and intoxicated by violence because of extensive viewing of televised violence and that the network had incited him to duplicate the acts he saw on television. The trial judge dismissed the complaint. *See also* Franklin, *supra* note 211, at 232.

296. *See, e.g.*, Olivia N. v. Nat'l Broadcasting Co., 126 Cal App. 3d 488 (1981); Niemi v. Nat'l Broadcasting Co. Inc., 458 U.S. 1108 (1982) (involving the artificial rape of a 9 year old girl allegedly connected to the viewing of the show "Born Innocent"); Weirum v. RKO

violence<sup>297</sup> is the test being used and, so far, empirical data proving the causal link seems to be the missing factor in holding a station liable.<sup>298</sup> However, in a recent California Supreme Court case,<sup>299</sup> a radio station was held liable for a death caused by a teenage driver who was speeding to find a moving radio van whose driver was offering prizes to the first to find them. Liability was imposed on the broadcaster for urging listeners to act in an inherently dangerous manner.<sup>300</sup>

Particularly in ongoing situations involving hostages or potential victims, media reporters should be able to predict with a reasonable degree of certainty that a harmful act is likely to result from certain broadcasts.<sup>301</sup> That the act is physically perpetrated by a third party should make the media no less culpable.<sup>302</sup> Media corporations should be held financially responsible for harm caused to innocent victims through the fault of the media's employees. They profit from the broadcast of the incident and in a just and fair system, that profit should be made available to compensate the victim of the activity.<sup>303</sup> However, either a new judicially created tort theory of recovery or an adoption of a statute may be needed.<sup>304</sup> At least one commentator has suggested such a statute.<sup>305</sup>

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General, Inc., 539 P.2d 36 (Cal. 1975) (involving a traffic fatality allegedly caused by the enticement of a radio station promotion reward program).

297. See *Olivia N.*, *id.*, 126 Cal. App. 3d at 495. See also *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). Appellant's counsel in *Olivia N.* defined incitement as "telling someone to go out, encouraging them, directing them, advising them." 126 Cal. App. 3d at 491 n.1. See also Franklin, *supra* note 211, at 227, n.1.

298. See Michael I. Spak, *Predictable Harm: Should the Media Be Liable?*, 42 OHIO ST. LAW J. 671, 680 (1981).

299. *Weirum*, *supra* note 296, 539 P.2d 36.

300. In *Weirum*, the court emphasized that the youthful contestant's reckless behavior was "stimulated" by the radio station's broadcast, and that the broadcast repeatedly and actively encouraged listeners to speed to announced locations. *Id.*, 539 P.2d at 40.

301. See Spak, *supra* note 298, at 671.

302. See *Wierum*, *supra* note 296, 539 P.2d at 40.

303. See Spak, *supra* note 298 at 680-81.

304. See *id.* at 671.

305. "Any person, partnership, joint venture, or corporation that produces any work designed to be shown to the public will be liable for the physical harm caused to a member of the public as a result of the showing of that work if: (a) it is shown by clear and convincing evidence that the proximate cause of plaintiff's injuries was a reaction by some member of the public to viewing the work; (b) it is shown by clear and convincing evidence that the act that was reproduced was excessively violent in fact; and (c) the producers knew or should have known that the depiction of this violent act created a probability of its being reproduced in society." *Id.* at 679-80.

Any statute, criminal or civil,<sup>306</sup> must be narrowly and precisely drawn. It must show a compelling necessity for regulation<sup>307</sup> and that the government's objective cannot be achieved through any alternative means.<sup>308</sup> The regulation must be specific enough to withstand overbreadth, vagueness, and possible equal protection analysis,<sup>309</sup> and to put the affected actors on fair and sufficient notice that their conduct is illegal.<sup>310</sup> It should allow only limited official discretion.<sup>311</sup> A statute too vague or indefinite, in form or as interpreted, will be considered void on its face.<sup>312</sup>

### C. Access Restrictions

It has been repeatedly held that "the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."<sup>313</sup> However, in recent cases, the inquiry has begun to turn on what information the public *should* have access to. Furthermore, the role of the press seems to be evolving into that of a surrogate for the public.<sup>314</sup> The most recent cases have involved access to prisons<sup>315</sup> and access to court proceedings.<sup>316</sup> Both areas deal with public institutions; however, the Supreme Court has upheld regulations related to media access to prisons<sup>317</sup> while holding unconstitutional restraints on trial coverage.<sup>318</sup> Distinctions and similarities can be drawn between the two and history seems to be the biggest factor.

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306. The standards of certainty in statutes punishing offenses is higher than in those depending primarily upon civil sanction for enforcement. See *Winters v. New York*, 333 U.S. 507, 515 (1948).

307. See Juanita Jones & Abraham Miller, *The Media and Terrorist Activity: Resolving the First Amendment Dilemma*, 6 OHIO N. U. L. REV. 70, 79-81 (1979).

308. *Id.* at 79, 81.

309. See Bassiouni, *Perspectives*, *supra* note 41, at 41.

310. *Winters*, *supra* note 306, 333 U.S. at 509-10.

311. See Jones & Miller, *supra* note 307, at 79, 81.

312. *Winters*, *supra* note 306, 333 U.S. at 509.

313. *Branzburg*, *supra* note 276, 408 U.S. at 684. See also *Richmond Newspapers*, 448 U.S. 555; *Houchins*, *supra* note 239, 438 U.S. 1; *Pell v. Procunier*, 417 U.S. 817, 834 (1974); *Saxbe*, 417 U.S. 843.

314. See *Richmond Newspapers*, 448 U.S. at 573; *Houchins*, 438 U.S. at 39; *Pell*, 417 U.S. at 839-40, (Douglas, J., dissenting); *Saxbe*, *supra* note 177, 417 U.S. at 861-64 (Powell, J., dissenting).

315. See *Houchins*, *supra* note 239, 438 U.S. 1; *Saxbe*, *supra* note 177, 417 U.S. 843; *Pell*, *supra* note 313, 417 U.S. 817.

316. *Richmond Newspapers*, *supra* note 313, 448 U.S. at 555; *Gannet Co. v. DePasquale*, 443 U.S. 368 (1978); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

317. See cases cited *supra* note 316.

318. See cases cited *supra* note 317. Note, however, that no case in either of these areas has drawn a majority: *Richmond Newspapers* had six concurrences, one dissent and one

Historically, trials have been public. The Supreme Court has found that public trials are necessary to a proper functioning of our political system.<sup>319</sup> Where the public goes, so goes the press. Historically, the public has not had access to prisons; therefore, regulating media access would not be discriminatory against the press, but would merely eliminate a special privilege the press has vis-à-vis the public.<sup>320</sup> Similarly, restricting media access to the scene of a publicity-seeking crime would surely be within constitutional bounds. The Supreme Court has specifically said, "Newsmen have no constitutional right of access to scenes of crime or disaster when the general public is excluded."<sup>321</sup> Except to know whether they are in immediate danger, the public has no real interest in the details of a crime—other than morbid interest in the tragedy of others on which our society seems to thrive. Therefore, the press, having no greater access rights than the general public, could constitutionally be restricted in their access to publicity-seeking crimes and criminals.

In considering alternative measures available in the trial case, the Court found that the State rather than the media had viable alternatives to choose from for fulfilling its goal and that those alternatives were less restrictive than refusing access to the media.<sup>322</sup> In the prison cases, however, the Court noted that the media, rather than the government, had alternative means to fulfill its goals of getting information about prison conditions such as interviewing recently released prisoners, legal advisors, doctors, and others who were in and out of the prisons.<sup>323</sup> In much the same way, and for many of the same reasons, it is the press rather than the government who has alternative means to achieve its goals in a publicity-seeking crime situation. Information can be obtained from police officials during the incident and from released victims, hostages, and the criminals themselves after the incident.

The Court also considered the gravity of the threatened harm. Although expressing that fairness of trial was a concern of the highest order, the Court

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Justice took no part in the decision; *Nebraska Press* had six concurrences; *Gannett* had three concurrences, four concurrences in part and dissent in part; *Pell* had three dissents and one concurrence and dissent; *Saxbe* had four dissents; *Houchins* had one concurrence, two Justices took no part and three dissents.

319. See *Richmond Newspapers*, *supra* note 313, 448 U.S. at 573.

320. See *Pell*, *supra* note 312, 417 U.S. at 831.

321. *Branzburg*, *supra* note 276, 408 U.S. at 684-85. See also *Pell*, *supra* note 312, 417 U.S. at 834; *Prahl v. Brosamle*, 295 N.W.2d 768 (Wis. Ct. App. 1980).

322. *Richmond Newspapers*, *supra* note 313, 448 U.S. at 580-581.

323. *Saxbe*, *supra* note 177, 417 U.S. at 848.

also has noted that pretrial publicity did not always result in an unfair trial.<sup>324</sup> In addition, the result of an unfair trial could be cured through a reversal, although the Court noted that this was not the best remedy.<sup>325</sup> The harm threatened in the prison cases, however, was personal physical violence and once perpetrated could never be undone.<sup>326</sup> The Court was concerned with the fact that press attention made certain inmates virtually public figures within the prison society, gaining them a disproportionate degree of notoriety and influence among their fellow inmates. These inmates tended to become a source of substantial disciplinary problems. This fact, combined with the substantial security needs in an environment with such a large capacity for violence was considered a compelling state interest by the Court.<sup>327</sup> This is a strong point in favor of the constitutionality of restricted media access during publicity-seeking crimes.

The Court has never ruled directly on the problems with obtrusive equipment and the sheer numbers of reporters<sup>328</sup> although restrictions on numbers have been allowed if a reasonable basis for selective classification is given.<sup>329</sup> It seems, however, that in a case where such equipment and a crowd of reporters could directly jeopardize lives in an on-going situation,<sup>330</sup> restrictions on the use of cameras, the number of reporters,<sup>331</sup> the type of

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324. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 554 (1976). See also *Richmond Newspapers*, *supra* note 313, 448 U.S. at 564.

325. *Richmond Newspapers*, *supra* note 313, 448 U.S. at 555.

326. See *Pell*, *supra* note 312, 417 U.S. at 822-23, 826-27, 848-49.

327. *Id.*

328. Note, however, that at least one Justice has expressed an opinion on restrictions of media equipment. Justice Stewart, concurring in *Houchins v. KQED*, refers to "effective" access:

A person touring Santa Rita jail can grasp its reality with his own eyes and ears. But if a television reporter is to convey the jail's sights and sounds to those who cannot personally visit the place, he must use cameras and sound equipment. In short, terms of access that are reasonably imposed on individual members of the public may, if they impede effective reporting without sufficient justification, be unreasonable as applied to journalists who are there to convey to the general public what the visitors see.

*Houchins*, *supra* note 239, 438 U.S. at 17. The plurality opinion, however, upheld the restriction against the use of cameras and tape recorders on the monthly tours. *Id.* at 5, 16. See also *Sigma Delta Chi v. Speaker*, Maryland House of Delegates, 310 A.2d 156 (1973); *Garrett v. Estelle*, 556 F.2d 1274 (5th Cir. 1977).

329. *Los Angeles Free Press, Inc. v. Los Angeles*, 9 Cal App.3d 448 (1970); *Cable News Network, Inc. v. American Broadcasting Co.*, 518 F. Supp. 1238 (N.D. Ga. 1981).

330. See *supra* text accompanying notes 122-127.

331. One suggestion might be to limit the number of reporters to only those trained in terrorist events.

cameras, telephone access, helicopter coverage, etc., would be constitutionally permissible.

#### D. FCC Regulation

As has been detailed previously,<sup>332</sup> the Supreme Court, at least in areas other than news coverage, has been willing to make a distinction between the printed and electronic media.<sup>333</sup> It is time for that distinction to flow over into the area of news broadcasting. News broadcasting poses unique problems not present in the traditional free speech case<sup>334</sup> and certainly inconceivable to the framers of the Constitution.<sup>335</sup> It is pervasive,<sup>336</sup> becoming less and less edited,<sup>337</sup> and gives the impression of "authenticity per se."<sup>338</sup>

In addition to the above, the media wields unprecedented power.<sup>339</sup> And yet, access by the average citizen is extremely limited. As John F. Kennedy once said, "Those who make peaceful evolution impossible, make violent revolution inevitable."<sup>340</sup> In other words, those who make peaceful evolution possible, make violent revolution unnecessary. If publicity is what these criminals so desperately desire, why should the media be allowed to force them to violence to attain such publicity? Shouldn't those with full control of all the resources be made to share those resources, which are supposedly part of the public domain, to a small extent with the public?

Although the Court has never recognized a general right of public access to the airwaves,<sup>341</sup> it has recognized a limited right to reasonable

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332. See *supra* text accompanying notes 224-230.

333. See *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *Red Lion Broadcasting v. FCC*, 395 U.S. 367 (1969).

334. *Buckley v. Valeo*, 424 U.S. 1, 50, n.55 (1976) (citing *Red Lion*); *Columbia Broadcasting v. Democratic Nat'l Comm.*, 412 U.S. 94, 101 (1973). Television and radio have a greater impact than any other media. The public places heavy reliance on television as its primary source of information concerning public events. The psychological impact of television news is said to be far different from that of the printed press. Whereas a newspaper account provides a narration of an event, television news frequently purports to present the event as it actually occurred, with the impression conveyed to the viewer that he himself is perceiving the event. H.R. REP. NO. 349, 92nd Cong., 1<sup>st</sup> Sess. 61-63 (1971); *Regulation of TV News*, *supra* note 225; *The Coming Explosion in TV News*, *supra* note 75, at 46.

335. See Catton, *supra* note 55 at 704.

336. *Pacifica*, *supra* note 140, 438 U.S. at 726.

337. See Jaehnig, *supra* note 13, at 719.

338. See Bassiouni, *Perspectives*, *supra* note 41, at 21.

339. See note 59, *supra*.

340. See Bassiouni, *Perspectives*, *supra* note 41, at 12.

341. See *CBS, Inc. v. FCC*, 453 U.S. 367, 396 (1981).

access under the Fairness Doctrine.<sup>342</sup> The Fairness Doctrine is a requirement placed on radio and television broadcasters that adequate coverage be given to public issues and that such coverage must be fair in that it accurately reflect the opposing views. This must be done at the broadcaster's own expense and initiative if sponsorship and suggestions are available from no other source.<sup>343</sup> A number of years ago a proposal was made by the FCC<sup>344</sup> that would have allowed broadcasters to opt for public access to the airwaves system in lieu of complying with the commission's traditional standard for the Fairness Doctrine. Under the proposal, a broadcaster would presumptively be in compliance if four conditions were met: (1) one hour per week should be set aside for spot announcements and lengthier programming which would be available for the presentation of messages by members of the general public; (2) half of this time should be allotted on a first-come-first served basis on any topic whatsoever; (3) both parts of the allocation scheme should be "nondiscriminatory as to content with the licensee"; and (4) the broadcaster would still be required to ensure that spot messages or other forms of response to "editorial advertisements" are broadcast.<sup>345</sup> This proposal should be reappraised by the FCC and considered as a mandatory access rather than an option to the broadcasters in hopes that given a less violent opportunity at mass communication, many publicity-seeking criminals could be placated.<sup>346</sup>

The FCC is empowered to prescribe restrictions and conditions on obtaining a license based on a public interest, convenience, or necessity standard.<sup>347</sup> It is also possible, but not very likely, that television and radio licensees could be restricted in their coverage of publicity-seeking crime that relates to sensationalism, publication of "how to" information, and publication of the names of groups or individuals claiming responsibility for various crimes based on a public interest justification. However, it must be remembered that the FCC has no power of censorship nor any power to interfere with the right of free speech,<sup>348</sup> so just how far the regulations can go is probably limited by the same standards mentioned in the prior restraint, subsequent punishment, and access restrictions areas.

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342. *Id.* at 400.

343. *See Red Lion, supra* note 333, 395 U.S. 367, 377.

344. 41 RAD. REG. 22d 1311 (P & F 1977). *See also*, Terry, *supra* note 10, at 773-74.

345. 41 RAD. REG. 22d at 1335 (P & F 1977). *See also*, Terry, *supra* note 10, at 773-74.

346. *See Bassiouni, Perspectives, supra* note 41, at 30; Pohlmann & Foley, *supra* note 1, at 35; van der Vat, *supra* note 41, at 27.

347. 47 U.S.C. §§ 303, 307, 309 (1970).

348. *Id.* at § 326.

## VII. CONCLUSION

In summation, then, what can be done? The problems created by media coverage of publicity-seeking crimes are, again, that: (1) unbalanced media coverage enhances the environment of fear and coercion the terrorists seek to generate, (2) such coverage may encourage other individuals to engage in such conduct, (3) such coverage will dull the sense of outrage and contempt in the general public; and (4) such coverage can endanger hostage's lives and interfere with effective law enforcement.

Unfortunately, little can be done about the first three concerns within the parameters of the First Amendment, with the possible exception of the imitation factor. The courts have been unwilling to accept the imitation reasoning when applied to civil suits based on television viewing. However, with publicity-seeking crimes, the additional factor of gratification is added and the sociological data is a bit more developed and accepted. Were the Court to accept the information and related data on operant conditioning and vicarious reinforcement, it is possible that some form of prior restraint or subsequent punishment might be allowed. It is also doubtful that any prior restraint or subsequent punishment would be allowed in the other two areas because there is no empirical data proving such results. However, it is possible, though not probable, that in the public interest the FCC could require its licensees to provide balanced coverage of the phenomenon in the form of follow-up coverage relating to the sanctions imposed against the terrorist; information from official sources in answer to the criminal's self-serving statements; information concerning the relative infrequency of such acts; the impropriety of taking innocent lives; the non-romantic aspects of terrorism; and information emphasizing the individuality of the people involved. Of course, an additional aspect of FCC regulation includes the aforementioned mandatory access requirement under the Fairness Doctrine and promulgation of other restrictions and conditions to obtaining a license.

By limiting media access to the scenes of on-going crimes, all three concerns could be lessened in their impact. By not showing the actual crime being perpetrated on the screens of viewers' living room television sets, feelings of anxiety and fear could be lessened. By not showing the criminals in the act of committing the crime, much of the gratification is removed from the act for the criminal and for those who might imitate him. Again, by not continually showing the gory details as they happen, the viewing public becomes less immunized against the atrocities of crime. The reasons for limiting access are not related to the intimidation, imitation, or immunization factors but are based on the safety of potential victims. However, as long as

the regulation is justified by a sufficient state interest, any overflow benefits are a windfall.

When media coverage becomes an immediate threat to the lives of potential victims of publicity-seeking crimes, it is very possible that finely tailored government regulation is possible in all four forms: prior restraints, subsequent punishment, access restrictions, and FCC regulations.

First and foremost, the Government should require that on-the-scene coverage should be limited to only those reporters who have had training in terrorist situations. Such selective access could be supported as long as it furthers a compelling governmental interest identified by narrowly drawn standards.<sup>349</sup> Secondly, all suggestions made regarding broadcast areas, briefing areas, police hotlines, police spokespersons, direct contact with criminals during ongoing situations, and so forth<sup>350</sup> could be justified based on the fact that the public has no need or right to be at the scene and the press has no more rights than the public, the lack of governmental alternatives in dealing with the problem, and the gravity of the harm.<sup>351</sup>

It is quite possible that prior restraints could operate to restrain a newsman from publishing information such as police strategies, activities, or plans or the presence of hidden persons or escaping hostages. Such publication would "surely result in direct, immediate, and irreparable damage to [our Nation's]... people."<sup>352</sup>

However, it is more likely that subsequent punishment would be met with less resistance. The state interest in saving lives is of compelling importance, there are no less restrictive alternatives (as long as access is also being limited), and it would apply to all media. It is very likely that civil sanctions would be allowed in these situations. Media reporters, especially those trained in terrorist tactics, should know what information, if released, would endanger lives. Such knowledge should make them and their respective employers liable for any harm caused because of their actions.<sup>353</sup>

Three of the purposes for constitutionally guaranteeing freedoms of expression and of the press were 1) the advancement of knowledge and discovery of truth, as an essential element of self-governance, 2) the provision of a safety valve by substituting reason for force, and 3) the

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349. See *Sherril v. Knight*, 569 F.2d 124, 126 (D.C. CA 1977); *Watson v. Cronin*, 384 F. Supp. 652, 660 (D. Colo. 1974).

350. See discussion in text and notes 169-179, *supra*.

351. See discussion in text and notes 321, 267-275, *supra*.

352. *N.Y. Times v. U.S.*, 403 U.S. 713, 730 (1971) (Stewart, J., concurring with whom White, J. joins).

353. See discussion in text at notes 301-305, *supra*.

providing of a framework within which the conflict necessary to the progress of society could take place without destroying society.<sup>354</sup> Media coverage of publicity-seeking crimes *thwarts* all three objectives.

As to the purpose of advancement of knowledge, in the technological world of today, the majority of the public is informed through television news.<sup>355</sup> Should a person decide that he or she does not want his or her children to watch a publicity-seeking crime as it takes place — a decision which, given the chance, most persons would probably make — he must completely give up his constitutionally guaranteed source of information (since he has no control over the sequence of the news). Secondly, by giving publicity and gratification to these criminals, newsmen are encouraging substitution of force for reason — which is a complete contradiction to the very purpose they serve. And, finally, instead of providing a framework within which conflict can take place without destroying society, they provide a framework within which to destroy society. Justice Frankfurter summarized this idea in *Beauharnais*:

It may be argued, and weightily, that this legislation will not help matters; that tension and on occasion violence...must be traced to causes more deeply embedded in our society than [television news coverage] . . . . Only those lacking responsible humility will have a confident solution for problems as intractable as [publicity-seeking crime] . . . . This being so, it would be out of bounds for the judiciary to deny the legislature a choice of policy, provided it is not unrelated to the problem and not forbidden by some explicit limitation on the State's power. That the legislative remedy might not in practice mitigate the evil, or might itself raise new problems would only manifest once more the paradox of reform. It is the price to be paid for the trial-and-error inherent in legislative efforts to deal with obstinate social issues ....

Every power may be abused, but the possibility of abuse is a poor reason for denying [a state] the power to adopt [appropriate] measures....<sup>356</sup>

There is a problem created by the media's coverage of publicity-seeking crimes. Surely there is a solution. Government should be allowed to experiment with remedies—with the judiciary system an ever-present watchdog—until such solution can be found.

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354. See discussion in text at notes 128-131, *supra*.

355. See note 69, *supra*.

356. *Beauharnais v. Illinois*, 343 U.S. 250, 261-63 (1952).

VIII. APPENDIX A: NON-STATE SPONSORED TERRORIST CRIMES  
AFFECTING THE UNITED STATES AND/OR ITS CITIZENS  
COMMITTED FROM 1958 TO 1982.<sup>357</sup>

**1958:** June 27: Thirty U.S. Marines kidnapped by Communist guerillas on Cuba, near the U.S. naval base at Guantanamo Bay. All are eventually released unharmed; October 12: Bombing of the Hebrew Benevolent Congregation Temple in Atlanta.

**1961:** May 1: First ever U.S. aircraft hijacked and forced to fly to Communist Cuba by Puerto Rican born Abtullio Ramirez Ortiz.

**1963:** 16th Street Baptist Church bombing by a member of the Ku Klux Klan ("KKK") killing four girls aged eleven to fourteen; November 22: President John F. Kennedy is assassinated.

**1965:** February 21: Black power leader Malcolm X shot dead during a public meeting in New York City; The KKK murdered Viola Liuzzo, while transporting civil rights marchers; New York police thwart an attempt to dynamite the Statue of Liberty, Liberty Bell, and the Washington Monument by three members of the pro-Castro Black Liberation Front ("BLF").

**1966:** NAACP leader Vernon Dahme assassinated by the KKK.

**1968:** February 21: Delta Airlines DC8 hijacked to fly to Havana, Cuba for political asylum; April 4: Black civil rights activist Rev. Martin Luther King, Jr. shot dead in a hotel in Memphis by James Earl Ray; April 23: Students for a Democratic Society and Student Afro-American Society held a dean hostage at Columbia University; June 6: Senator Robert F. Kennedy assassinated by Jordanian terrorist, Sirhan Sirhan, in Los Angeles; Further terrorist threats were received from Arab groups attempting to obtain Sirhan's release; August: Abbie Hoffman threatened to spike the water of Chicago with LSD prior to Democratic Convention; August 28: John Gordon Meir, U.S. ambassador to Guatemala is murdered by a rebel faction, becoming the first ever American ambassador to be assassinated by terrorists; October 12: A U.S. Army officer serving as an advisor to the Brazilian army is gunned down in his home in Sao Paulo, Brazil by left-wing guerillas, who falsely claim he is a Vietnam "war criminal."

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357. List of Alleged Terrorist Acts 1945-2000, <http://www.southernct.edu/~seymour/cases/terror/terlst.htm> (last visited Mar. 23, 2008); List of Terrorist Incidents, [http://www.reference.com/browse/wiki/List\\_of\\_terrorist\\_incidents](http://www.reference.com/browse/wiki/List_of_terrorist_incidents) (last visited Mar. 23, 2008).

**1969:** September 4: American Ambassador Charles Elbrick kidnapped in Brazil by left-wing terrorists and freed after fifteen terrorists were released from jail; October: Members of the Weathermen, including Prof. Bill Ayers, staged riots over a four day period in Chicago resulting in one death and massive amounts of property damage.<sup>358</sup>

**1970:** March 6: The Greenwich Village Townhouse explosion was the premature detonation, by members of The Weathermen, of a bomb intended for an officers' dance at Fort Dix in New Jersey and for Butler Library at Columbia University; August 24: The Army Mathematics Research Center on the University of Wisconsin-Madison campus was blown up resulting in one death; October 22: An anti-personnel time bomb explodes outside a San Francisco church, the Black Liberation Army ("BLA") is suspected.

**1970-1972:** The Jewish Defense League ("JDL") was linked with a bomb explosion outside of Aeroflot's New York City office, and a detonation outside of Soviet cultural offices in Washington, D.C.; A JDL member allegedly fired a rifle into the Soviet Union's mission office at the United Nations ("U.N."); Conspiracy to blow up the Long Island residence of the Soviet Mission to the U.N. by JDL.

**1971:** The BLA is suspected (and in 2007 convicted) of shooting and/or bombing numerous police officers and/or cars and/or offices in various cities around the country and running a guerrilla warfare school in Georgia.

**1972:** January 27: Two policemen suspected to have been murdered by members of the BLA; May 11: U.S. Army headquarters in Frankfurt, Germany, attacked by Red Army Faction car bomb killing one American officer and injuring thirteen people; Three more U.S. servicemen injured in another Red Army Faction car bomb attack on the U.S. Army headquarters at Heidelberg, Germany, later that month; October 27: Police car bombing in Los Angeles claimed by Afro-American Liberation Army ("AALA"); December: A travel agency in Queens, New York is bombed by FIN, a Cuban exile group opposed to the government of Fidel Castro; December 11: The VA-Cuba Forwarding Company is bombed in New York City, FIN suspected; December 28: A Brooklyn, New York bartender is held for ransom by the BLA.

**1973:** January 7: Mark Essex, a former Black Panther, shot nineteen people at a Howard Johnson hotel in New Orleans and sets fire to the hotel; A New York City transit detective is killed and ten law enforcement personnel are

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358. WILLIAM AYERS, *FUGITIVE DAYS: A MEMOIR* (BEACON PRESS 2001).

shot (four by machine gun) in and around New York City by the BLA; Two members of BLA were arrested with a car full of explosives.

**1974:** February 4: American heiress Patricia Hearst kidnapped by Symbionese Liberation Army terrorists and participated in a raid on the Hibernia Bank in San Francisco; March 1: Saudi Arabian embassy in Khartoum, Sudan, seized by Black September terrorists who murdered two American diplomats; September 8: Bomb killed eighty-eight people on TWA Flight 841, attributed to Abu Nidal and his terror organization; December 11: Bomb set off by the Puerto Rican nationalist group FALN in East Harlem.

**1975:** January 24: FALN bomb the Fraunces Tavern in New York City, killing four and injuring more than fifty; April 19: FALN set off four bombs within a forty-minute period in Manhattan, New York injuring at least five people; December 29: Bomb explodes at New York's LaGuardia Airport, killing eleven and injuring seventy-five, no arrests made and the reason for this attack remains unknown.

**1976:** September 10-11: Croatian Freedom Fighters hijacked a TWA airliner from New York to Paris, a police officer was killed and three injured by a bomb that contained their communiqués in a New York City train station locker; September 21: Chilean exile Orlando Letelier was assassinated in Washington, D.C. by the Chilean government.

**1977:** March 9: Three buildings in Washington, D.C., including city hall, were seized by members of the militant African-American Muslim Hanafi sect and over 100 hostages were taken, one bystander was killed, civil rights activist Marion Barry was shot in the chest; August 3: FALN bombed the offices of Mobil and a Department of Defense building and warned that bombs were located in thirteen other buildings, including the Empire State Building and the World Trade Center. A bomb was later found in the AMEX building.

**1978-1995:** The Unabomber kills three and injures twenty-nine in a string of anti-technology bombings.

**1979:** June 9: FALN exploded a bomb outside of the Shubert Theatre in Chicago, injuring five people; June 18: NATO's Supreme Allied Commander Europe General Alexander Haig (an American) escaped death after a German Red Army Faction bomb exploded under a bridge just after his motorcade had passed over it; November 4: Iran hostage crisis, a 444-day standoff during which student proxies of the new Iranian regime held sixty-six diplomats and U.S. citizens hostage inside the U.S. embassy in

Tehran; November 15: Unabomber puts bomb on American Airlines Flight 444 which fails to detonate.

**1980:** March 15: Armed members of FALN raided the campaign headquarters of President Jimmy Carter in Chicago and the campaign headquarters of George H. W. Bush in New York City, tying up hostages and vandalizing the offices and later sent threatening letters to delegates; June 3: A bomb destroyed most of the exhibits in the Statue of Liberty Story Room, Croatian separatists were suspected; August 13: Air Florida flight from Key West to Miami hijacked by seven Cubans and flown to Cuba, six further U.S. airliners were hijacked to Cuba over the next month.

**1981:** May 16: Puerto Rican Resistance Army placed a bomb in the toilets at the Pan Am terminal of the John F. Kennedy Airport in New York; August 31: A large bomb exploded in the car park of the USAF base at Ramstein, Germany, injuring twenty people, the Red Army Faction claimed responsibility; September 15: Red Army Faction terrorists made an unsuccessful rocket attack on the car of a U.S. Army commander in West Germany.

**1982:** August 11: A bomb exploded on Pan Am Flight 830, en route from Tokyo to Honolulu, killing one teenager and injuring fifteen passengers; December 12: An anti-nuclear protestor held eight tourists hostage in the Washington Monument, in Washington, D.C. before he was shot dead by a police sniper.

#### IX. APPENDIX B: NON-STATE SPONSORED TERRORIST CRIMES AFFECTING THE UNITED STATES AND/OR ITS CITIZENS COMMITTED FROM 1982 TO PRESENT.<sup>359</sup>

**1983:** April 18: Sixty-three people, including the CIA's Middle East Director, were killed and 120 injured in a 400-pound suicide truck bomb attack on the U.S. Embassy in Beirut, Lebanon, responsibility was claimed by Islamic Jihad; October 23: A suicide truck bomb in Beirut, Lebanon destroyed a U.S. Marine Corps base killing 241 Americans, Islamic Jihad claimed responsibility; November 9: A time bomb consisting of several sticks of dynamite exploded at the U.S. Senate in response to the U.S. invasion of Grenada, a group known as the Armed Resistance Unit claimed responsibility; November 15: U.S. Naval officer was shot by terrorist group

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359. See List of Various Alleged Terrorist Acts 1945-2000, <http://www.southernct.edu/~seymour/cases/terror/terlst.htm> (last visited Mar. 23, 2008); [http://www.reference.com/browse/wiki/List\\_of\\_terrorist\\_incidents](http://www.reference.com/browse/wiki/List_of_terrorist_incidents) (last visited Mar. 23, 2008).

in Athens, Greece, when his car stopped at a traffic light; December 12: The U.S. Embassy in Kuwait was targeted by Iranian-backed Iraqi Shia terrorist who attempted to destroy the building with a truck bomb, the attack was foiled by guards and the device exploded in the Embassy forecourt killing five people; December 17: U.S. Army Brigadier General James Dozier was kidnapped from his home in Verona, Italy by Italian Red Brigades terrorists, he was held for forty-five days until Italian Special Forces rescued him.

**1984:** August: The Rajneeshee cult spreads salmonella in salad bars at ten restaurants in Oregon to influence a local election, 751 people were sickened and more than 40 were hospitalized.

**1985:** October 11: Arab anti-discrimination group leader Alex Odeh was killed when a bomb exploded in his California office.

**1988:** April 12: Japanese Red Army terrorist Yu Kikumura was arrested at a rest stop on the New Jersey turnpike in possession of pipe bombs on his way to New York.

**1990:** November 5: Meir Kahane, head of Israel's Koch party and founder of the American vigilante group, the Jewish Defense League, was assassinated in a New York hotel lobby by early elements of Al Qaeda.

**1993:** January 25: Mir Aimal Kansi, a Pakistani, fired an AK-47 assault rifle into cars waiting at a stoplight in front of the CIA headquarters, killing two and injuring three others; February 26: A coalition of five groups (Jamaat Al-Fuqra', Gamaat Islamiya, Hamas, Islamic Jihad, National Islamic Front), including Ramzi Yousef and financed by Khaled Shaikh Mohammed, killed six and injured over 1,000 people in a World Trade Center bombing; June: A New York City landmark bomb plot failed.

**1994:** March 1: Rashid Baz kills a Hasidic seminary student and wounds four on the Brooklyn Bridge in New York City in response to the Cave of the Patriarchs Massacre in Palestine.

**1995:** March 8: Terrorists in Karachi, Pakistan, armed with automatic rifles, murdered two American consulate employees and wounded a third as they traveled in the consulate shuttle bus; April 19: the Oklahoma City bombing kills 168 people, nineteen of them were children; October 9: An Amtrak Sunset Limited train is derailed by antigovernment saboteurs near Palo Verde, Arizona, one person is killed and seventy-eight are injured.

**1996:** July 27: Centennial Olympic Park was bombed, killing one and wounding 111.

**1997:** February 24: Ali Abu Kamal opens fire on tourists at an observation deck atop the Empire State Building in New York City, killing a Danish national and wounding visitors from the U.S., Argentina, Switzerland, and

France before turning the gun on himself; a handwritten note carried by the gunman claimed that this was a punishment attack against the "enemies of Palestine."

**1998:** August 7: Al-Qaeda bombed U.S. Embassies in Tanzania and Kenya, killing 225 people and injuring more than 4,000.

**1999:** April 20: Eric Harris and Dylan Klebold killed thirteen students and a teacher and wounded twenty-four others in the Columbine High School massacre; December 14: Ahmed Ressay is arrested on the U.S.-Canada border in Port Angeles, Washington, where he confessed to planning to bomb the Los Angeles International Airport as part of the 2000 millennium attack plots.

**2000:** The last of the 2000 millennium attack plots failed, as a boat meant to bomb *U.S.S. The Sullivans* sank; October 12: *U.S.S. Cole* is bombed, killing seventeen U.S. sailors and wounding forty off the port coast of Aden, Yemen, by Al-Qaeda.

**2001:** September 11: Attacks by Al-Qaeda kill 2,997 in a series of hijacked airliner crashed into the World Trade Center in New York City and the Pentagon in Virginia, a third plane crashed in Pennsylvania after an apparent revolt against the hijackers by the plane's passengers; October: Anthrax attacks on U.S. Congress and New York government offices and on employees of television networks and tabloids occurred; December 12: JDL plot by Chairman Irv Rubin and follower Earl Krugel to blow up the King Fahd Mosque in California and office of Lebanese-American Rep. Darrell Issa is foiled; December 22: Richard Reid, attempting to destroy American Airlines Flight 63, was subdued by passengers and flight attendants before he could detonate his shoe bomb.

**2002:** May: Luke Helder injures six people by placing pipe bombs in mailboxes in the Midwest; July 4: An Egyptian gunman opened fire at an El Al ticket counter in Los Angeles International Airport, killing two Israelis before being killed himself; October: John Allen Muhammad and Lee Boyd Malvo conducted the Beltway Sniper Attacks, killing ten people in various locations throughout the Washington, D.C. metropolitan area.

**2004:** August 28: Shahawar Matin Siraj and James Elshafay were arrested for planning to bomb the 34th Street-Herald Square subway station in New York City during the 2004 Republican National Convention.

**2006:** March 3: Mohammed Reza Taheri-azar, an Iranian-born graduate of the University of North Carolina, drove an SUV onto a crowded part of campus, injuring nine; August 10: A major antiterrorist operation disrupted an alleged bomb plot targeting multiple airplanes bound for the U.S. flying

through Heathrow Airport; August 30: An Afghani-Muslim hit nineteen pedestrians, killing one, with his SUV in the San Francisco Bay area.

**2007:** March 5: A Rikers Island inmate offered to pay an undercover police officer posing as a hit man to behead New York City Police Commissioner Raymond Kelly and bomb police headquarters in retaliation for the controversial police shooting of Sean Bell; Seung-Hui Cho killed thirty-three people including himself in the Virginia Tech Massacre; May 7: Six men inspired by jihadist videos were arrested in the U.S., in a failed homegrown terrorism plot to kill U.S. soldiers; June 3: A homegrown Islamist terrorism plot—intended to destroy the fuel supply system for John F. Kennedy Airport in New York City and cause a large amount of casualties by blowing up the connecting pipeline system that runs through densely populated neighborhoods—was thwarted.

# Reconciling *Red Lion* and *Tornillo*: A Consistent Theory of Media Regulation\*

Supreme Court Justice Potter Stewart recently remarked that among the guarantees of liberty contained in the Bill of Rights, the free press clause<sup>1</sup> is unique. The Bill of Rights generally protects the freedom of the individual, whereas "[i]n contrast, the Free Press Clause extends protection to an institution. The publishing business is, in short, the only organized private business that is given explicit constitutional protection."<sup>2</sup> It is a short step from this view to the proposition that any organized private business whose principal function is to convey expression, information, and opinion, ought also to be accorded the same constitutionally protected status as the publishing industry. Indeed, Justice Stewart seems to have made this step in *CBS v. Democratic National Committee*, where he considered that "[p]rivate broadcasters are surely part of the press."<sup>3</sup>

The course of public policy over the last half-century, however, has led to a situation in which government involvement in the affairs of the broadcast media is significantly greater than its involvement with the publishing industry.<sup>4</sup> Whether this difference in treatment is legally characterized as

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\* This Note is based in part on the author's work as a research assistant for Bruce M. Owen, Associate Professor of Economics, Stanford University. Professor Owen's ideas (see B. OWEN, *ECONOMICS AND FREEDOM OF EXPRESSION: MEDIA STRUCTURE AND THE FIRST AMENDMENT* (1975)) are often reflected in this Note, though the author retains responsibility for its shortcomings. Acknowledgment is also made to Richard Markovits, Associate Professor of Law, Stanford University, for his valuable comments and assistance.

1. "Congress shall make no law . . . abridging the freedom . . . of the press . . ." U.S. CONST. amend. I.

2. Address by Mr. Justice Stewart, Yale Law School Sesquicentennial Convocation, November 2, 1974, reprinted in Stewart, "Or of the Press", 26 *HASTINGS L.J.* 631 (1975).

3. 412 U.S. 94, 133 (1973) (Stewart, J., concurring). See also *id.* at 150-70 *passim* (Douglas, J., concurring in judgment).

4. Broadcasters are licensed by the Federal Communications Commission under the statutory standard of "public interest, convenience, and necessity," 47 U.S.C. §§ 307(a), 309(a) (1970), and licenses are subject to renewal every three years, 47 U.S.C. § 307(d) (1970). In addition to regulation of the technical aspects of broadcasting, the FCC imposes various controls on broadcast content, ownership of stations, transfer of licenses, and licensee relationships with networks.

Publishers enjoy considerably greater freedom. "The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others. He must answer for libel. He may be punished for contempt of court. He is subject to the antitrust laws. Like others he must pay equitable and nondiscriminatory taxes on his business." Associated Press v. National Labor Relations Board, 301 U.S. 103, 132-33 (1937) (footnotes omitted). However, newspapers enjoy a limited antitrust immunity, Newspaper Preservation Act, 15 U.S.C. §§ 1801-04 (1970), and are occasionally exempted from other general business regulations. See, e.g., 49 U.S.C. § 303(b)(7) (1970) (exempting vehicles used exclusively to distribute newspapers from the provisions of the Motor Carrier Act of 1935). Where general laws apply to functions performed uniquely or frequently by journalists, first amendment objections are sometimes raised. See, e.g., *Branzburg v. Hayes*, 408 U.S. 665 (1972) (newsman's testimonial privilege); *New York Times Co. v. United States*, 403 U.S. 713 (1971) (suppression of publication of state secrets). The editorial function enjoys complete legal immunity, *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258

a qualified admission of the broadcast media into the set of institutions comprising "the press," or as a partial abridgment of "the freedom" of the broadcast press,<sup>5</sup> the Supreme Court has tolerated the enhanced government control of the broadcast media.

This Note examines the Court's justification for this difference in treatment. Part I discusses the leading cases on the constitutionality of media regulation. These cases generally involve disputes concerning the allocation of editorial power—the power of the publisher or broadcaster to determine the contents of the message which he conveys. Part II argues that the existing constitutional rationale for broadcast regulation is based on inadequate distinctions between the print and broadcast media, and examines the sources and consequences of editorial power in each medium. Part III proposes a test for the constitutionality of media regulation which would shift the focus of the Court's approach from a concern with the allocation of editorial power to the equally important issue of how editorial power arises. The test is then applied to current and proposed regulatory schemes for several media institutions.

## I. THE CONSTITUTIONALITY OF MEDIA REGULATION

### A. Broadcast Regulation

The early history of broadcasting demonstrated that some limitation on the freedom of broadcasters was necessary for the medium to develop. In the period when broadcasters operated without any legal limitation whatsoever, mutual interference made it nearly impossible for any signal to be understood. After several "false starts," a scheme of federal regulation emerged providing for licensing of broadcasters by the Federal Radio Commission (FRC), whose functions were later inherited by the Federal Communications Commission (FCC).<sup>6</sup>

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(1974), and licensing of newspapers for any purpose is strictly limited. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936).

5. See Note, *Concepts of the Broadcast Media Under the First Amendment: A Reevaluation and a Proposal*, 47 N.Y.U.L. REV. 83 (1972). The idea that broadcasters are included in "the press" for first amendment purposes entered the law obliquely. In *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948), an antitrust prosecution of film producers and distributors, the Court said, "We have no doubt that moving pictures, like newspapers and radio, are included in the press whose freedom is guaranteed by the First Amendment." *Id.* at 166 (emphasis added). This dictum continues to be cited for the proposition that the broadcasting industry is entitled to first amendment protection. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 *passim* (1974); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 395 (1969).

6. See generally J. HERRING & G. GROSS, *TELECOMMUNICATIONS* (1936); L. SCHMECKEBIER, *THE FEDERAL RADIO COMMISSION* (1932). The dominant use of wireless communication before 1920 was for radio-telegraph and other forms of point-to-point communication. L. SCHMECKEBIER, *supra*, at 1-4. The value of ship-to-shore and ship-to-ship communication in protecting the safety of navigation, and problems caused by interference from unrestricted amateur use of radio, prompted Congress to enact the Wireless Ship Act of June 24, 1910, 36 Stat. 629, requiring most passenger vessels to be equipped with a radio capable of transmitting and receiving signals over a distance of 100 miles. Authority to

It might be contended that the requirement of a government license in order to transmit protected speech is itself an undue restriction of first amendment freedoms. Yet the licensing scheme has *never* faced a direct first amendment challenge. Such first amendment challenges as have arisen to the authority of the FCC have always involved the propriety of the particular considerations entering into licensing decisions or into FCC decisions to order broadcaster compliance with rules and regulations, under pain of license revocation or other sanctions.<sup>7</sup>

The first such case was *NBC v. United States*,<sup>8</sup> in which the network contended that FCC consideration of licensee contractual relations with networks was improper.<sup>9</sup> The Court took the opportunity to announce a constitutional justification for the licensing scheme, although the issue was the validity of a specific set of regulations. Pointing to the existence of an inherent limitation on the number of radio stations able to broadcast without destructive interference, it was said that government must choose the few that will be allowed to broadcast. Therefore, the denial of a broadcasting license is "not a denial of free speech."<sup>10</sup>

Until 1968, the FCC did not face another first amendment challenge to its authority.<sup>11</sup> Since *NBC*, the Commission had come to wield significant influence over broadcast content,<sup>12</sup> and it was this influence which

license operators and stations on land and to assign frequencies was given to the Secretary of Commerce in the Radio Communications Act of 1912, 37 Stat. 302.

Commercial broadcasting was virtually unknown until 1920; growth in the number of stations thereafter was dramatic. There were 60 stations in operation on March 1, 1922; before the end of that year, the number had increased to 564. L. SCHLESKEVIER, *supra*, at 4.

In response to the growth of the industry, Secretary of Commerce Hoover convened a series of National Radio Conferences which recommended complete government control of broadcasting. *Id.*, at 4-12. The Commerce Department continued to regulate station frequencies and power, but two court rulings effectively deprived the secretary of any authority to refuse to license stations, or to enforce frequency assignments. *Hoover v. Intercity Radio Co.*, 286 F. 1003 (D.C. Cir. 1923) (Secretary had no power to deny licenses); *United States v. Zenith Radio Corp.*, 12 F.2d 614 (N.D. Ill. 1926) (1912 Act held not to permit enforcement). Chaos prevailed until enactment of the Radio Act of 1927, 44 Stat. 1162, which established the regulatory structure that has persisted in the same basic form to the present day. See Minasian, *The Political Economy of Broadcasting in the 1920's*, 12 J. LAW & ECON. 391 (1969). The Federal Radio Commission established by the 1927 Act was superseded by the Federal Communications Commission with the passage of the Federal Communications Act of 1934, 47 U.S.C. §§ 151-55, 201-22, 301, 302(a), 303-31, 351-62, 381-86, 390-99, 401-16, 501-10, 601, 603-09 (Supp. III, 1973). The FCC has acquired authority over a variety of new electronic media which have since developed. These include broadcast television, FM radio, and cable television. 47 C.F.R. § 70 *et seq.* (1974).

7. The FCC has authority to suspend licenses for violation of its regulations, 47 U.S.C. § 303(m)(1)(A) (1970), and to impose fines for willful or repeated failure to comply with the provisions of the license, 47 U.S.C. § 503(b) (1970).

8. 319 U.S. 190 (1943).

9. The regulations stated that no license would be granted or renewed for stations having certain contractual relationships with the existing radio networks. See generally *id.*, at 196-209.

10. *Id.* at 227.

11. *Banzhaf v. FCC*, 405 F.2d 1082 (D.C. Cir. 1968), *cert. denied*, 396 U.S. 842 (1969) (upholding ban on broadcast cigarette advertising).

12. Although the framers of the 1927 Act clearly did not intend the government to censor the content of radio broadcasts, it seemed to be the universal view that in order for the medium to develop, government control was necessary. See Coase, *The Federal Communications Commission*, 2 J. LAW & ECON. 1, 2-5 (1959). The 1927 Act provided, "Nothing in this Act shall be understood or construed

formed the basis of the dispute in *Red Lion Broadcasting Co. v. FCC*,<sup>13</sup> the next first amendment challenge to reach the Supreme Court. In *Red Lion*, a radio licensee protested an FCC ruling requiring it to afford free reply time to an individual who had been "attacked" in one of its broadcasts.<sup>14</sup> Holding that the order was not an unconstitutional interference with the broadcaster's editorial discretion, the Court said that because of the limitation on the number of available frequencies, Congress and the FCC may impose "fiduciary" duties on the licensee "with obligations to present those views and voices which are representative of his community and which would otherwise, by necessity, be barred from the airwaves."<sup>15</sup> According to the Court, the fiduciary obligations which may be constitutionally imposed are those consistent with the public's right "to have the medium function consistently with the ends and purposes of the First Amendment."<sup>16</sup>

*Red Lion* can be read as a statement of permission, if not positive obligation, for the government to regulate the media in order to promote

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to give the licensing authority the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the licensing authority which shall interfere with the right of free speech by radio communication." § 29, 44 Stat. 1172. The 1934 Act contains a virtually identical provision. 47 U.S.C. § 326 (1970).

First amendment issues raised by the original proposals for government control may not have come to the fore because the potential importance of broadcasting as a speech medium was not fully recognized at that time. It was thought that enactment of the Radio Act of 1927 was clearly within the authority of Congress under the Commerce Clause, U.S. CONST. art. I, sec. 8. See, e.g., *Federal Radio Comm'n v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266 (1933).

From the earliest days of the regulatory structure, it was clear that the authority to secure broadcaster compliance with the public interest standard allowed the regulatory authority to consider past and proposed programming content in awarding and renewing licenses. See, e.g., *Great Lakes Broadcasting Co.*, 3 FRC ANN. REP. 32 (1929), *rev'd on other grounds*, 37 F.2d 993 (D.C. Cir.), *cert. dismissed*, 281 U.S. 706 (1930). Through the licensing practices of the FRC and FCC, and by the promulgation of rules and regulations directed at broadcast editorials, coverage of elections and other issues of public importance, the government has come to exercise a considerable degree of influence over the content of broadcast messages. See Kalven, *Broadcasting, Public Policy and the First Amendment*, 10 J. LAW & ECON. 15 (1967); Note, *The Limits of Broadcast Self-Regulation Under the First Amendment*, 27 STAN. L. REV. 1527 (1975). Recent challenges to FCC authority have centered on the legitimacy of FCC content regulation, and not the constitutionality of the licensing process itself. See *Banzhaf v. FCC*, *supra*, note 11; *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973).

13. 395 U.S. 367 (1969).

14. The "personal attack" rules, 47 C.F.R. §§ 73.123, 73.300, 73.679 (1974), requiring stations to afford free reply time to individuals attacked over the air, are one aspect of the fairness doctrine. See Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10416 (1964). "There is a twofold duty laid down by the FCC's decisions and described by the 1949 Report on Editorializing by Broadcast Licensees. The broadcaster must give adequate coverage to public issues, and coverage must be fair in that it accurately reflects the opposing views. This must be done at the broadcaster's own expense if sponsorship is unavailable. Moreover, the duty must be met by programming obtained at the licensee's own initiative if available from no other source." 395 U.S. at 377-78 (citations omitted). The equal time rules, requiring qualified candidates for office to be given equal treatment by licensees, 47 C.F.R. §§ 73.120, 73.290, 73.657 (1974), are promulgated pursuant to specific statutory authority. 47 U.S.C. § 315(a) (1970).

15. 395 U.S. at 389.

16. 395 U.S. at 390. Justice Douglas did not participate in the 8-0 decision and later claimed that he would not support it. *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 154 (1973). Justice Stewart has also qualified his adherence to *Red Lion*: "I agreed with the Court in *Red Lion*, although with considerable doubt, because I thought that that much Government regulation of program content was within the outer limits of First Amendment tolerability." *Id.* at 138.

the broader purposes of free expression. Yet it seems clear from historical experience that the prevention of undue government interference with the processes of free expression is itself a first amendment purpose.<sup>17</sup> If the basic objective of the first amendment is to maximize the free flow of ideas and information in society, interruption or diversion of this flow by government, under any guise, presents a risk of government control of expression that, until the advent of broadcasting, the Court had been unwilling to accept. Recent events illustrate that the risk taken in the broadcasting field may yet prove unacceptable.<sup>18</sup>

If the Court has not yet made the FCC feel the bit, neither has it used the crop, for in *CBS v. Democratic National Committee*,<sup>19</sup> the Court refused to order the FCC to provide a public right to purchase air time from broadcast licensees. The case originated when an AM radio station refused to sell air time for an editorial advertisement to an organization opposed to American involvement in Vietnam. The group complained to the FCC that the station had violated the fairness doctrine—which requires licensees to present diverse views on important public issues—in its coverage of the Vietnam war. Shortly thereafter, in a separate action, the Democratic National Committee requested a declaratory ruling from the FCC that a broadcast licensee's policy of flatly refusing all offers to purchase time for editorial advertisements violated the first amendment and the broadcaster's statutory obligation to serve the public interest.

After FCC rejection of these contentions,<sup>20</sup> the District of Columbia Court of Appeals reversed, holding that the first amendment mandated a limited "right of access" for editorial advertisers, and it remanded the cases to the Commission for formulation of "reasonable procedures and

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17. "Our nation's theory of democratic government is based on the principle that the power to make decisions affecting the flow of information to and from the individual must be dispersed so that irresponsible, inequitable, or simply bad decisions will not have a pervasive, irreversible effect. In view of this principle, both governmental power and excessive concentrations of private economic power over the flow of information have been viewed as inimical to the achievement of a free and open society. The long-standing and deeply-felt opposition to concentrated private power over the media stems not simply from a belief that such power inevitably must be antithetical to this central principle of our Government. Although this reason continues to be valid, traditionally the excessive concentration of private power also has been opposed because it has often been used as the pretext for Government's own intrusive entry into the communications media." CABINET COMM. ON CABLE COMMUNICATIONS, *CABLE* 19 (1974).

18. See Friendly, *What's Fair on the Air*, N.Y. Times, Mar. 30, 1975, § 6 (Magazine), at 11, suggesting that the FCC's pursuit of *Red Lion* was itself politically motivated. Efforts by Nixon administration officials to influence network political coverage and to encourage challenges to politically unsympathetic license holders are described in Whiteside, *Annals of Television*, THE NEW YORKER, March 17, 1975, at 41.

Aside from the potential for use of the regulatory process for partisan objectives, an equally serious objection to government involvement in the broadcast media is the effect of regulation on the range of views that is offered. See Baxter, *Regulation and Diversity in Communications Media*, AM. ECON. ASS'N PAP. & PROC. 392, in 64 AM. ECON. REV. (1974); Steiner, *Program Patterns and Preferences, and the Workability of Competition in Radio Broadcasting*, 66 Q.J. ECON. 194 (1952).

19. 412 U.S. 94 (1973).

20. *Democratic Nat'l Comm.*, 25 F.C.C.2d 216 (1970); *Business Executives' Move for Vietnam Peace*, 25 F.C.C.2d 242 (1970).

regulations determining which and how many 'editorial advertisements' will be put on the air."<sup>21</sup> The Supreme Court, in reversing the Court of Appeals 7-2, was unwilling to *require* the FCC to impose regulations that would be consistent with freedom of expression but which would clearly limit the editorial rights of broadcasters.<sup>22</sup> Whether it would have permitted the FCC to do so remains an open question.<sup>23</sup> The lack of consensus on the Court makes resolution of current constitutional doctrine regarding broadcast regulation problematical. Though several of the remarkably diverse opinions suggest a balancing of the need for government regulation against the dangers of government interference with editorial discretion,<sup>24</sup> there is little to illuminate the Court's view of how this balance

21. *Business Executives' Move for Vietnam Peace v. FCC*, 450 F.2d 642, 646 (D.C. Cir. 1971).

22. The case presented four basic questions. First, was the governmental involvement in the action of the broadcaster sufficient to warrant a finding of state action? Second, if there was state action, did the broadcaster violate the first amendment rights of the would-be advertisers or of the public? Third, if state action is not found, does the public interest standard impose the same obligations which the first amendment would have imposed if state action could have been found? Fourth, what is the precise content of the public interest standard, how does it differ from the first amendment standard, and was the former violated in this case?

Justice Burger, with whom Justice Rhenquist concurred, did not find state action, but assuming state action could have been found, thought that a right of access was not mandated by the first amendment or the public interest standard. Justice Stewart, agreeing with Justice Burger on the state action determination, found the public interest standard broader than the requirements of the first amendment, but not to the point of requiring access. Justices White, Blackmun, and Powell found it unnecessary to decide the state action issue, and failed to find an access requirement.

Justice Douglas came close to a complete *laissez-faire* theory of broadcast regulation. See note 16, *supra*. In dissent, Justices Brennan and Marshall found state action and thought that a right of access was required by the first amendment.

23. 412 U.S. at 119 (opinion of Burger, C.J.). The Court gave considerable deference to the judgment of the FCC, despite the disclaimer: "[I]n evaluating the First Amendment claims of respondents, we must afford great weight to the decisions of Congress and the experience of the Commission. . . . That is not to say we 'defer' to the judgment of the Congress and the Commission on a constitutional question . . ." 412 U.S. at 102-03 (plurality opinion). And see *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 395 (1969). But see *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973) (dissent of Bazelon, C.J.).

24. Cf. Note, *Conflict Within the First Amendment: A Right of Access to Newspapers*, 48 N.Y.U.L. Rev. 1200 (1973). If it could be assumed that freedom of the press is consistent with the broader first amendment purpose of ensuring the free flow of information and opinion in our society, the task of interpreting the free press clause would be a matter of balancing the speech and press freedoms against other societal interests. Preservation of public security, see, e.g., *Gitlow v. New York*, 268 U.S. 652 (1925), the right to a fair trial, see, e.g., *Sheppard v. Maxwell*, 384 U.S. 333 (1966), protection of personal reputation, see, e.g., *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and respect for personal modesty, see, e.g., *Ginsberg v. New York*, 390 U.S. 629 (1968), *rehearing denied*, 391 U.S. 971, are examples of interests with which freedom of speech, and thus freedom of the press, have long competed in the courts. Aside from the definition of protected speech, the need for broadcast and newspaper content regulation is often characterized as a conflict between rights of free speech and those of the free press, but such a characterization is in several respects misleading. Abridgments of editorial freedom infringe both the press rights—rights to engage in the activity of supplying information and opinion to a public audience—and the speech rights of the press institution, the right of the operator of a broadcast station or newspaper to say what he wishes to say and exclude what he wishes to exclude. The fairness obligation at issue in *Red Lion* was said to have been a vindication of the public's right "to have the medium function consistently with the ends and purposes of the First Amendment." 395 U.S. at 390. Yet this is not strictly a speech right. See Note, *The Listener's Right to Hear in Broadcasting*, 22 STAN. L. REV. 863 (1970). A more useful approach would follow from a recognition on one hand that the first amendment reserves a high place for the policy of maximizing the flow of information and opinion, and on the other, that regulation of the mass media can often promote this policy if accompanied by certain limitations on the role of government. On the press-speech distinction, see Stewart, *supra* note 2; Nimmer, *Introduction—Is Freedom of the Press a*

is to be achieved. The basic rationale for the existence of the licensing process again escaped unquestioned.

### B. *Print Regulation*

The emphasis in *Red Lion* on the first amendment as a guarantee of effective public debate, rather than as a barrier between press and government, had a significant impact on attitudes toward regulation of newspapers.<sup>25</sup> The fairness doctrine had been proclaimed as a constitutional, even a necessary means of preventing "monopolization" of broadcast editorial power. Of all localities in the United States having a daily newspaper, more than 96 percent have only one newspaper establishment.<sup>26</sup> The question naturally arises, if "monopolization" of broadcast frequencies requires enforced sharing of broadcast facilities, can a "monopoly" newspaper be constitutionally subjected to regulations similar to those found in the broadcasting field?<sup>27</sup> This was the issue raised in *Miami Herald Publishing Co. v. Tornillo*,<sup>28</sup> in which the Court unanimously invalidated a Florida right-to-reply statute applicable to newspapers as a violation of freedom of the press.<sup>29</sup>

The Court struck down the statute on three grounds. First, it acknowl-

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*Redundancy: What Does it Add to Freedom of Speech?*, 26 HASTINGS L.J. 639 (1975); Lange, *The Speech and Press Clauses*, 23 U.C.L.A.L. REV. 77 (1975).

25. Citations to the extensive "access" debate spawned by *Red Lion* may be found in Lange, *The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment*, 52 N.C.L. REV. 1, 2, n.5 (1973).

26. Rosse, *Daily Newspapers, Monopolistic Competition, and Economies of Scale*, AM. ECON. ASS'N PAP. & PROC. 522, in 57 AM. ECON. REV. (1967). The importance of this figure can be exaggerated, since the remaining localities in which competition still exists account for 32% of total U.S. daily circulation. B. OWEN, *ECONOMICS AND FREEDOM OF EXPRESSION: MEDIA STRUCTURE AND THE FIRST AMENDMENT* 49 (1975).

27. The considerations upon which government intervention in local newspaper monopolies ought to turn are closely related to those upon which antitrust intervention should also depend. A consideration of the geographic and product market in which the newspaper operates leads also to a correct first amendment focus. Are there alternative sources of information or audience access to which readers and advertisers may turn? Do other available media perform as well as the newspaper in providing ideas and audience access? A fuller discussion of the causes and consequences of newspaper "monopoly" is contained *infra*, text accompanying notes 89-105.

28. 418 U.S. 241 (1974).

29. FLA. STAT. ANN. § 104.38 (1973): "Newspaper assailing candidate in an election; space for reply—If any newspaper in its columns assails the personal character of any candidate for nomination or for election in any election, or charges said candidate with malfeasance or misfeasance in office, or otherwise attacks his official record, or gives to another free space for such purpose, such newspaper shall upon request of such candidate immediately publish free of cost any reply he may make thereto in as conspicuous a place and in the same kind of type as the matter that calls for such reply, provided such reply does not take up more space than the matter replied to. Any person or firm failing to comply with the provisions of this section shall be guilty of a misdemeanor of the first degree . . ." The provision closely resembles the "equal time" provision of the Communications Act. 47 U.S.C. § 315 (1970): "Candidates for public office; facilities; rules. (a) If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. . . . (b) The charges made for the use of any broadcasting station for any of the purposes set forth in this section shall not exceed the charges made for comparable use of such station for other purposes."

edged that enforcement of a right to reply imposes costs on newspapers which they might not otherwise bear.<sup>30</sup> These costs are incurred either in expanding the size of the newspaper or in omitting content that might otherwise be printed, in order to accommodate material which the law forces it to include.<sup>31</sup>

Second, the Court accepted an important implication of the costliness of an access statute: that a newspaper publisher, if forced to provide free space to those opposing his published views, might be disinclined by the loss of revenue to allow discussion of controversial issues which would be likely to trigger the access obligation.<sup>32</sup>

The third ground relied upon in *Tornillo* more clearly reveals the basic conflict in the Court's first amendment treatment of publishing and broadcasting.

Even if a newspaper would face no additional costs to comply with a compulsory access law . . . the Florida statute fails to clear the barriers of the First Amendment because of its intrusion into the function of editors. A newspaper is more than a passive receptacle or conduit for news, comment, and advertising. The choice of material to go into a newspaper, and the decisions made as to limitations on the size of the paper, and content, and treatment of public issues and public officials—whether fair or unfair—constitutes the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.<sup>33</sup>

### C. *The Conflict*

On one level, *Tornillo* conflicts with the broadcasting cases in its treatment of the editorial function as sacrosanct. On a somewhat deeper level, it is more disturbing that the Court was willing to ignore the consequences of editorial regulations—the increases in cost and the corresponding reduction in incentives to include material triggering the access or fairness obligation—in the broadcast field, while making these consequences one of the explicit grounds for decision in the print field.

30. 418 U.S. at 256-57.

31. Other costs of access which were not discussed in the opinion are (1) loss of readership due to alienation of members of the newspaper audience, (2) risk of liability for defamation by the access recipient.

32. Identical arguments with respect to the costs and adverse incentives imposed by access obligations were made in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 392-93 (1969), but there the Court relied on the FCC's finding that blunted coverage of controversial issues arising out of enforcement of the fairness doctrine was "at best speculative," *id.*, at 393, noting: "if present licensees should suddenly prove timorous, the Commission is not powerless to insist that they give adequate and fair attention to public issues." *Id.* But see *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 187-88 (1973) (Brennan, J., dissenting). The response is circular, since it assumes the FCC's power over content that was at issue in the case. And see Statement of Lewis Engman, Chairman, Federal Trade Commission, quoted in *ENA ANTITRUST & TRADE REG. REP.*, Nov. 4, 1975, at A-6: "[T]here have been instances in which the fairness doctrine has worked to inhibit rather than encourage dissemination of opinions—there have been instances in which broadcasters have elected to ignore an event or even a whole issue rather than assume the obligations its broadcast might impose."

33. 418 U.S. at 258.

Finally, and perhaps most significant, is the Court's view of the source and significance of editorial power in each medium. *Red Lion* emphasized that the need for access obligations depends constitutionally upon the peculiar mechanics of the frequency allocation system, and the Court seemed to defer to the FCC's judgment that the resulting editorial power of the broadcast licensee justified interference with the editorial process.<sup>34</sup> Yet the *Tornillo* Court, while acknowledging the change in structure that has occurred in the local newspaper industry since the early part of this century,<sup>35</sup> refused to regard the drastic decline in the number of newspapers and the corresponding increase in the editorial power of the remaining newspaper publishers as a sufficient reason for allowing penetration of the traditional barrier between press and government in general, and that between government and the editorial process in particular.<sup>36</sup>

If there is a principled distinction to be made between the first amendment standards applied to print and broadcast media, it could plausibly be made on at least three grounds. The first would depend on a purely factual issue: is the ability of the broadcast editor to limit and select the content of his message more serious, as a practical matter, than the corresponding ability of the newspaper editor?<sup>37</sup> Manifestly, the Court does not place the distinction on this ground.

The second basis for the distinction may be that in the print field, editorial power arises on account of the vicissitudes of publishing as a business enterprise,<sup>38</sup> whereas the broadcast media depend on the availability of a resource that is controlled by the government. This is a circular argument

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34. See 395 U.S. at 385.

35. 418 U.S. at 249-50.

36. 418 U.S. at 257-58.

37. The first amendment cases are notably lacking in consistent analysis of the factors that indicate whether any medium of expression possesses excessive editorial power. Again, the process of market definition under the antitrust laws might be appealed to as the initial basis for a legal test of the existence of excessive editorial power. It is apparent that if audiences and advertisers have access at all times to many broadcast stations or publications, and if the various outlets are reasonably suited for their purposes, there is no cause for policy concern because no single outlet has control over the ability of advertisers to reach audiences.

Attempts to analyze editorial power appear frequently in the literature and opinions on press regulation in the form of comparisons between the number of newspapers on the one hand and the number of broadcasting stations on the other. See, e.g., Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67 (1967); *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 144 (1973) (Stewart, J., concurring). It also has been suggested that the appropriate comparison is between the number of individuals and groups wishing to broadcast and the number of presses. T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 657 (1970), and even further refinements of this argument have been suggested. Note, *supra* note 12, at 1542, n.65. Such comparisons are inherently misleading since they ignore important differences between the capacity of broadcast stations and newspapers to provide diverse sources of expression. Broadcasts must be delivered in normal patterns of human speech, whereas the word capacity of a newspaper of typical size is much greater than that of a broadcast day. Furthermore, newspaper content is available in full view at all hours, allowing the reader to scan newspaper contents at his leisure, giving more or less attention to various items as he chooses. See Baxter, *Regulation and Diversity in Communications Media*, *supra* note 18.

38. J. ROSSE, *ECONOMIC LIMITS OF PRESS RESPONSIBILITY* (Stanford Studies in Industry Economics No. 56, 1975).

that has been strongly criticized elsewhere.<sup>39</sup> If government rationing of resources vital to media institutions could serve as a basis for government invasion of the editorial function, it would be impossible to avoid the result that nationalizing the paper supply also would allow the print media to be subjected to editorial regulations. Yet, if outright licensing of newspaper publication is prohibited,<sup>40</sup> it seems anomalous to say that the same result could be achieved through government control of a resource upon which newspaper publication is completely dependent.

A more persuasive distinction to be derived from *Red Lion* is based on differences in the nature of the economic resources used by each medium. If the physical and economic characteristics of the broadcast spectrum are such that government rationing of the right to broadcast is necessary,<sup>42</sup> then government is automatically involved to a greater degree than it has ever been in the affairs of the publishing industry. However, it is still unclear whether the unique position of the broadcasting industry should justify increased editorial control. Justice Douglas, who did not participate in *Red Lion*,<sup>43</sup> appeared in *CBS v. Democratic National Committee* to accept the necessity of government licensing, but thought that the role of the government should go no further than rationing of the spectrum<sup>44</sup>—a position similar to that urged by the network in *NBC*.<sup>45</sup> The opposite position was taken by the dissenters in *CBS v. Democratic National Committee*.<sup>46</sup> They argued that because the airwaves constituted the most effective means of conveying ideas, the appropriate remedy was to take the licensee out of the business of editing, to an extent, and to allow some amount of nondiscriminatory access to air time.<sup>47</sup> Their position finds considerable support in several cases mandating access to public forums.<sup>47</sup>

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39. See, e.g., Robinson, *supra* note 37.

40. See note 4, *supra*.

41. Even the most vigorous judicial opponents of FCC content regulation seem to accept the idea that there must be government control of broadcast spectrum allocation. See, e.g., Chief Judge Bazelon's dissent in *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973). "Many reasons have been given for the regulation of broadcasting. But behind all formulations lies the simple fact that a broadcast license is a scarce resource. Regulation by government cannot, under the First Amendment, be divorced from the threat to the marketplace [of ideas] posed by the unique characteristic of scarcity." *Id.* at 67 (emphasis in original) (footnote omitted).

42. See note 16, *supra*.

43. "Licensing is necessary for engineering reasons; the spectrum is limited and wavelengths must be assigned to avoid stations interfering with each other. The Commission has a duty to encourage a multitude of voices, but only in a limited way, *viz.*, by preventing monopolistic practices and by promoting technological developments that will open up new channels. But censorship or editing or the screening by Government of what licensees may broadcast goes against the grain of the First Amendment." *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 157-58 (footnotes omitted) (citation omitted) (Douglas, J., concurring in judgment).

44. 319 U.S. at 220.

45. 412 U.S. at 170-204 (Brennan, J., dissenting).

46. *Id.* at 194-96.

47. See, e.g., *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972); *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969); *Amalgamated Food Employees Union v. Logan Valley Plaza*,

If the distinction between broadcast and print media rests on this third ground, it may properly be asked whether there is something in the nature of the broadcast spectrum that requires government allocation, and it is at this point that the licensing question casts a long shadow over the territory roamed by *Red Lion*. If the true basis for public policy concern is the existence of excessive editorial power, the power to influence content and to control what significant segments of the public are able to say and hear, the process by which this power is accumulated, no less than that by which it is exercised, ought to be a proper subject for constitutional scrutiny. Yet the constitutionality of the licensing process has never been questioned on first amendment grounds, and given existing equities that have arisen as a consequence of the past existence of the licensing process,<sup>48</sup> it is not likely to be challenged by those affected most directly, the licensees themselves.

Similarly, if there is something inherent in the economic structure of the print media that leads to excessive editorial power,<sup>49</sup> that structure, and the role of government in maintaining it, should also be of first amendment concern. If the Court is to reject affirmative government assaults on the editorial function itself, that is, on the exercise of editorial power, perhaps corrective legislative and regulatory action is better directed at the process by which editorial power arises. Because *Tornillo* and other access cases focus on the exercise of editorial discretion, it is unclear how the Court would respond to this approach.

## II. SOURCES OF EXCESSIVE EDITORIAL POWER

### A. *The Broadcast Media*

Regardless of one's view of the correct relationship between press and government, the *NBC-Red Lion* theory of the constitutionality of broadcast regulation is based on several misconceptions of the nature of the broadcast medium. These misconceptions impede development of a consistent constitutional treatment of media regulation, as reflected by the irreconcilable analyses in *Red Lion* and *Tornillo*.<sup>50</sup> This Section attempts to identify these errors, and to point out a number of incorrect factual as-

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391 U.S. 308 (1968). *But see* *Lehman v. Shaker Heights*, 418 U.S. 298 (1974). The public forum analogy has been explicitly rejected by several newspaper access cases. *See, e.g., Chicago Joint Bd. v. Chicago Tribune Co.*, 435 F.2d 470, 474 (7th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971) (quoting district court opinion). "[T]he function of the press from the days the Constitution was written to the present time has never been conceived as anything but a private enterprise, free and independent of government control and supervision. Rather than state power and participation pervading the operation of the press, the news media and the government have had a history of disassociation."

48. *See* note 88 *infra*.

49. *See* J. Rosse, *supra* note 38.

50. *See* text accompanying notes 33-49 *supra*.

sumptions, some of them hidden, that have been made in the literature and opinions on broadcast regulation.

At the heart of the *NBC-Red Lion* theory is the basic idea that there is a limitation on the ability of the broadcast spectrum to perform first amendment functions. However, the precise nature, origin, and practical significance of this limitation are inadequately identified. In order to make clear the precise sense in which the spectrum is limited, some discussion of the physical process of broadcasting is presented.<sup>51</sup>

It is possible for a broadcaster to successfully communicate an understandable message by generating a stream of electromagnetic radiation from a transmitter, having superimposed a series of variations on this radiation which can be deciphered by the listener's receiver in a way that is understandable to the human senses. Thus, an AM radio station broadcasts a signal whose strength is varied moment-to-moment in such a way that an AM receiver picking it up will translate these variations into an electrical impulse which is used to set a speaker in motion, thus transforming the content of the signal into ordinary understandable sounds. The ability of the receiver to perform this task depends on the strength of the signal at the point where it is received, which in turn depends on the strength and other characteristics of the original signal, the type and location of the broadcasting antenna, topographical and atmospheric conditions, and other natural and man-made electrical phenomena. The receiver is usually designed to be "tuned" to a particular frequency, so that it will receive, interpret, and amplify the content of any signal at the particular frequency selected. The receiver cannot distinguish between signals having the same frequency, thus successful communication to any particular point of reception is impossible if more than one signal is present on the same frequency at that point.<sup>52</sup> The ability of the signal to retain strength and clarity over distance and under various weather and geographic conditions depends on its frequency, which implies not only that antenna and receiver design will depend on the frequency used, but also that some frequencies will be better suited for uses in broadcasting than others.<sup>53</sup>

It is important to recognize that an individual broadcast signal is never confined to one precise frequency, but occupies a more or less narrow

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51. See generally Coase, *supra* note 12; Barrow & Manelli, *Communications Technology—A Forecast of Change (Part I)*, 34 *LAW & CONTEMP. PROB.* 205 (1969).

52. The statement in the text must be qualified to a certain extent: an appropriately equipped receiver may distinguish between two signals with identical frequency if these signals (1) come from different geographical directions at the point of reception, (2) have different polarization at the point of reception, (3) are modulated in different ways (e.g., strength (amplitude) or frequency modulation), or (4) are superimposed on the same frequency by multiplexing.

53. See Barrow & Manelli, *Communications Technology—A Forecast of Change (Part I)*, *supra* note 51.

range of frequencies.<sup>54</sup> Some of this frequency spread or "band-width" is controllable, by improvement of transmitting and antenna quality and design, and some is not, since it is due to the interaction of the signal with features of the environment, or because the method chosen in varying the signal to carry a decipherable message requires alteration of the signal's frequency.

The bandwidth phenomenon implies that there are two ways in which the number of broadcast stations can be increased. The first is to find unused frequencies or to allow frequencies used for purposes other than broadcasting to be utilized for broadcast purposes. This process may be referred to as "extensive" spectrum utilization. The second is to improve the quality of transmitters and receivers so that some signals occupy narrower bandwidths, thus placing more stations on the same range of frequencies. This process may be referred to as "intensive" spectrum utilization.<sup>55</sup>

Although there is no strict physical limitation on intensive and extensive spectrum utilization, it would be misleading to say that the spectrum is unlimited. Increasing the number of broadcasting stations can be accomplished only at the cost of improving the quality of receivers and transmitters, or of depriving other users of their ability to employ the spectrum for non-broadcasting purposes. However, it is no basis for a distinction between the broadcast and print media that the resources used by one are limited, and the resources used by the other are not. Communication through the print media is as dependent on the availability of paper, presses, and delivery trucks as broadcast communication is upon the availability of frequencies, antennas, cameras, and microphones. There is a limitation on each of these resources, not just the electromagnetic spectrum resource used by the broadcast media.<sup>56</sup>

The point should also be made that the question of physical limitation is irrelevant in a very important sense. If there are 100 broadcasting channels available, and only 50 who wish to broadcast, the limitation is of no real significance. The critical relationship, as the Court appears to recognize,<sup>57</sup> is between the number of available channels and the number who wish to use them. One form of the Court's justification for the existence of the licensing scheme incorporates this recognition in the argument that government rationing of the spectrum is required because there are more

54. *Id.* at 211-12.

55. More strictly, more intensive spectrum use is possible whenever the information content of a given spectrum interval can be increased. Thus, differentiation of signals by directionality, polarization, or multiplexing would all be examples of intensifying techniques that do not increase extensive spectrum use.

56. See *Coase*, *supra* note 12.

57. "Nothing in this record, or in our own researches, convinces us that the resource is no longer one for which there are more immediate and potential uses than can be accommodated . . ." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 399 (1969).

wishing to use the spectrum than there are channels available for use.<sup>58</sup> This is equivalent to a determination that the broadcast spectrum is "scarce," in the strict economic meaning of that term.<sup>59</sup> However, the argument has at least four serious defects. First, it is clearly inadequate to distinguish the broadcast and print media because the print media also employ scarce resources.<sup>60</sup> Second, it is difficult to attach precise meaning to the demand for use of the broadcast spectrum because licenses are available free of charge to the successful combatant in an FCC hearing. Any scarce good, if made available through such a process, would produce results similar to those found in broadcasting. Imagine a situation, for instance, in which paper was made available free of charge to those newspaper publishers who most convincingly demonstrated their ability to serve the public interest. The fact that newspapers are in demand would mean that the license would become a valuable asset. Prospective publishers would be willing to expend considerable effort in making the required showing, and to the body hearing conflicting claims, it would appear that there existed a drastic shortfall between the amount of paper available and the amount of paper needed.<sup>61</sup> Because paper is in reality traded on the market, the amount available and the amount needed tend to come into balance, and the market price can be easily interpreted as indicating the monetary value of paper at any time. On the other hand, because the electromagnetic spectrum is handed out for free, need always appears to exceed availability, and there is no equivalent measure of its value. For this reason alone, the Court ought to be less eager to say that because of the large numbers of would-be broadcasters, extraordinary government interference in the process of free expression is justified.

The third criticism relates to the effect of government allocation of the spectrum on the number of available channels. It was shown earlier that there are two basic means for increasing the availability of frequen-

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58. "It is enough to say that the resource is one of considerable and growing importance whose scarcity impelled its regulation by an agency authorized by Congress." *Id.*

59. If scarcity is to be used as a justification for government regulation, then scarcity must exist in the absence of regulation. Thus the relevant question is not whether a government license is a scarce resource, but whether the right to broadcast is scarce in the absence of government regulation. The chaos pervading the early broadcasting industry is probably sufficient demonstration that the spectrum is scarce in this strict economic sense. See note 6 *supra*.

60. "Economic resources are scarce, while free resources, such as air, are so abundant that they can be obtained without charge. The test of whether a resource is an economic resource or a free resource is price: economic resources command a nonzero price but free resources do not." E. MANSFIELD, *MICROECONOMICS* 9 (1970). Clearly, resources used by the print media, such as paper, presses, labor, and real estate, satisfy this test since they can be obtained only at a price.

61. So long as the price of the license were to be held at zero, there would be competing applicants. See Johnson, *Towers of Babel: The Chaos in Radio Spectrum Utilization and Allocation*, 34 *LAW & CONTEMP. PROB.* 505, 506-07, n.6 (1969). The cost of a license hearing is not negligible, however, and one would predict that applicants would continue to appear only as long as the value of the license, representing a time- and risk-discounted stream of revenues to be collected from newspaper publication, did not exceed the sum of the cost of operating the newspaper (similarly discounted) plus the cost of the license proceeding.

cies for use by broadcasters, "intensive" and "extensive" spectrum utilization. Government controls "extensive" spectrum use by determining the ranges of frequencies that are available to the broadcast licensing process.<sup>62</sup> A serious defect in this state of affairs is that the absence of a clear indicator of spectrum value makes it impossible to tell whether "enough" of the spectrum is allocated to broadcasting uses.<sup>63</sup>

The current allocation scheme also makes "intensive" spectrum utilization difficult by limiting the rights of licensees to transfer or subdivide their interests in the spectrum.<sup>64</sup> For example, suppose that Broadcaster A has an FCC license to broadcast on a 10 Hz (1 Hz = one Hertz = one signal oscillation per second) bandwidth in the AM region of the spectrum. If Broadcaster B, currently unlicensed and therefore not operating, has developed a method whereby an understandable AM signal can be broadcast in a 5 Hz bandwidth, it would be possible in principle for two stations to be operated on the frequency interval now occupied only by Broadcaster A. The point that bears emphasis is that the current allocation procedure provides no meaningful guarantee that such improvements in spectrum use will be adopted.<sup>65</sup> Current licensees have no authority to transfer or to subdivide their interests in the spectrum, and again, because of the absence of a measure of spectrum value, there is no convenient way to know whether current spectrum use is intensive "enough."<sup>66</sup> The implications for the Court's analysis are the same as those from the previous argument.

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62. See Coase, *The Interdepartmental Radio Advisory Committee*, 5 J. LAW & ECON. 171 (1962). No single regulatory authority oversees the allocation of frequencies between governmental and civilian uses. Spectrum allocation among governmental uses is made by the Interdepartmental Radio Advisory Committee in its advisory capacity to the Director of the Office of Telecommunications Policy, Executive Office of the President. See Exec. Order No. 11556, 34 Fed. Reg. 14193 (1970). The FCC oversees civilian use, with allocations among the various classes of users governed by the rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. § 553 (1970). International coordination is the responsibility of the International Telecommunications Union. See G. CODDING, *THE INTERNATIONAL TELECOMMUNICATIONS UNION* (1952).

63. Again, because paper and other resources used by the print media are allocated by the market, the amount of paper used for newspapers, drinking cups, paper towels, etc., will be determined by demand and supply.

64. 47 U.S.C. §§ 301, 304, 307(d) (1970).

65. AM broadcast stations are still placed at 10 Hz intervals, the same interval that was allowed at the time of the initial allocation of the AM band in 1928. J. HERRING & G. GRASS, *supra* note 6, at 253. It is not unreasonable to suppose that advances in technology over time have made decreases in AM station bandwidth feasible at tolerable cost.

66. In the example given in the text, the adoption of the more intensive use of the AM band, if private bargaining between Broadcaster A and B were possible, would depend upon (1) the cost of the new technology, (2) the profits lost by Broadcaster A due to the competition introduced by Broadcaster B, (3) Broadcaster B's prospective profits. Broadcaster A would be willing to contract for the sharing of his 10 Hz interval if (1) plus (2) is less than the amount Broadcaster B would be willing to pay A to adopt the new technology. The latter amount is determined by the size of (3) (defining profit in the economic sense of revenues minus cost, including the opportunity cost of invested capital and entrepreneurial effort). Broadcaster B would be willing to pay any amount up to (3), but may be able to pay a lesser amount if established broadcasters are competing for the contract that he offers. Another cost which would be necessary in any calculation of social costs and benefits from the intensified use of A's 10 Hz interval would be the cost of improving receivers in order to distinguish between AM stations placed at 5 Hz rather than 10 Hz intervals. This cost already enters indirectly in the calculation of the three quantities defined above.

Channel limitation should probably not serve as the constitutional basis for interference in the editorial process before it can be shown that such a limitation exists in a meaningful sense.<sup>67</sup>

The fourth criticism is related to government involvement *per se* in the spectrum allocation process. Even assuming that there are not enough channels to go around, there is no compelling reason why it is the government that should perform the rationing function. Few economic or "scarce" goods are allocated through government rationing, and if one were making the initial choice of how to allocate the spectrum, it would be a compelling argument *against* government allocation that the spectrum is an important input to private business institutions with functions related primarily to free speech.<sup>68</sup> So long as the Court continues to view FCC licensing as a *necessary* remedy to spectrum "scarcity,"<sup>69</sup> it tolerates too great a role for government in the process of free expression.

## B. *The Print Media*

Sources of editorial power in the print media are different from those in the broadcast media, since resources used by newspapers and magazines are generally allocated through the market. The statistics cited earlier

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67. Private parties wishing to participate in intensifying spectrum use are currently remitted to cumbersome administrative procedures. See note 62 *supra*. More importantly, it is not clear that private parties ever face incentives which would lead them to propose intensive spectrum use when this would be desirable from a social standpoint. Because increased competition would be inimical to the interests of established broadcasters taken as a whole, current licensees have more at stake in keeping newcomers out than the individual newcomer has in entering. The most that can be said for current procedures is that roughly coequal groups of established licensees and prospective beneficiaries of new licenses have equal access to the administrative process, although the latter group is unlikely to be as cohesive and influential as the former.

68. See *Brandywine-Main Line Radio, Inc. v. FCC*, 473 F.2d 16 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973). "Certainly government might claim ownership of the airwaves, just as it has claimed ownership of parks and streets and postal facilities, for the public good. But it cannot, unlike a private owner, place restraints upon the First Amendment rights of those who use this property simply by declaring 'I own it.' The very fact of public ownership or control brings into play the First Amendment, which requires that governmental authority may not be used in and of itself to justify deprivation of freedoms of speech and press." *Id.* at 68 (footnote omitted) (Bazelon, C.J., dissenting). Chief Judge Bazelon's assumption that government could claim ownership of the airwaves might be challenged on several grounds. As the discussion in the text indicates, where government controls a resource whose use is indispensable to a major first amendment institution, this fact alone threatens infringement of speech and press rights first because government management may be less efficient than other forms of market-adjusting regulation that might be adopted. Second, the justification for ownership of parks, streets and postal facilities is quite different than that for ownership of the airwaves. The development of streets, parks, and postal facilities is arguably a function that is performed *more* efficiently by government, or at least unitary, ownership of the facility in question than by market mechanisms. Put another way, where allocation of a resource used for first amendment purposes can be performed either by direct government management, or by indirect government involvement through the enforcement of private bargains according to the principles of property and contract law, the traditional wariness toward government oversight of first amendment processes provides an argument for favoring less detailed government involvement. *A fortiori*, where government management of resource allocation decreases the ability of the resource to be used effectively for first amendment purposes, less detailed government involvement should be favored. See text accompanying notes 81-83 *infra*.

69. *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 104 (1973) (plurality opinion); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 399 (1969). Judicial hostility to the idea of market allocation

support the view that one of the most important sources of news and opinion, the local newspaper, appears to be distributed quite sparingly. The most plausible explanation of this phenomenon is found in the gradual evolution of printing technology. At the time that the first amendment was adopted, newspaper publication required a small investment in capital and labor, head-to-head newspaper competition was the rule in all but the smallest settlements, and publications came and went in rapid succession.<sup>70</sup> Through time, the speed and efficiency of presses increased dramatically, and the cheapest way to produce a newspaper came to be the use of a plant of sufficient scale to service the entire readership of all but a few of the largest cities.<sup>71</sup> Thus, the situation of a newspaper that had outlasted its rivals in a battle for maximum readership came to resemble that of an unregulated utility.<sup>72</sup>

The more important debate in the newspaper access cases is over the consequences of a local newspaper monopoly. Newspapers face significant competition from radio and television, national-distribution weeklies and monthlies, and a wide variety of neighborhood newspapers, trade journals,

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of scarce resources is a *leitmotif* of the broadcasting cases. See, e.g., *CBS v. Democratic Nat'l Comm.*, 412 U.S. at 123; *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 392. No comparable tendency is apparent in cases involving the print media.

70. Although it might be unwarranted to conclude, on the basis of the evidence available, that the framers of the constitution and the bill of rights had in mind the structure of the colonial publishing industry, it is plausible that the constitutional mandate of a policy of *laissez-faire* was perfectly consistent with first amendment ends and purposes because of the industry's competitive structure at that time. B. OWEN, *supra* note 26, at 37-43 (1975). The printing press in the 18th century had not changed basically since Gutenberg's time, and a one-press shop could be acquired by a frugal journeyman out of, perhaps, a few years' wages. L. WROTH, *THE COLONIAL PRINTER* (2d ed. 1938). Freed by the revolution from English inhibitions of domestic manufacture of presses, type, and paper, and from direct press repression, the number of newspapers increased from about 40 in 1780 to more than 200 in 1800. A.M. LEE, *THE DAILY NEWSPAPER IN AMERICA* 711 (1937). In the period 1783-1801, 450 newspapers were started. F. MOTT, *AMERICAN JOURNALISM* 113 (3d ed. 1962). Thus, within the experience of the early republic, the policy adopted was consistent with economic competition in the publishing industry, and the competitive structure of the publishing industry was consistent with free-swinging public discussion, as the character of the early American press, wildly partisan by current standards, amply illustrates. See generally *id.* The small scale of the early print shop, the competitiveness of the printing industry, and the resulting ease of access to the printing press during the 18th century may also explain to some extent why the framers drew no very firm distinction between speech and press freedoms. See Lange, *supra* note 24, at 88-99.

71. Several factors have contributed to replacement of the competitive structure of the newspaper industry and strong partisan editorial policies with editorially centrist single newspapers published in the majority of American localities presently served by newspapers. The most important of these factors is the presence of economies of large scale in the newspaper production and distribution process, which is in turn attributable to changes in urban structure and communications technology. See Rosse, *Daily Newspapers, Monopolistic Competition, and Economies of Scale*, *supra* note 26. Industries characterized by declining pre-unit cost at levels of output which are large relative to the entire market for the product are "natural monopoly" industries. It is generally believed that economic competition is not feasible in such industries, and that some form of regulation is generally desirable. F. SCHERER, *INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE* 519-23 (1970). But see Demsetz, *Why Regulate Utilities?*, 11 *J. LAW & ECON.* 55 (1968).

The absence of economic and ideological competition in the broadcast media, however, is to some extent the result, as well as the rationale, of government regulation of broadcasting. See Baxter, *Regulation and Diversity in Communications Media*, *supra* note 18. The cost structure of cable television is similar to that of local newspaper industries. See text accompanying notes 106-07 *infra*; CABINET COMM. ON CABLE COMMUNICATIONS, *supra* note 17.

72. A case study of this process is given in Barber, *Newspaper Monopoly in New Orleans: The Lessons for Antitrust Policy*, 24 *L.A. L. REV.* 503 (1964).

and pamphlets and flyers addressing particular events and issues. Given current uncertainty over the degree of control which a local monopoly newspaper possesses in determining the views reaching its readership, the Court is justified in preventing direct government interference in the editorial process.

### III. A PROPOSED TEST FOR THE CONSTITUTIONALITY OF MEDIA REGULATION

This Part proposes a test for evaluating the constitutionality of media regulation under the first amendment, and then applies it to problems of regulation in three different mass media: broadcasting, newspapers, and cable television.

#### A. *Strict Scrutiny*

The Court consistently has held that legislation and regulations which inhibit first amendment freedoms are permissible only when they accomplish a compelling purpose by the narrowest possible means.<sup>73</sup> It is unfortunate that challenges to the constitutionality of the broadcast licensing process have never been made on this basis, since the current regime of broadcast regulation is in many respects a poor solution to a pressing problem. "Strict scrutiny" has the intrinsic merit of providing a sound legal and logical basis for distinguishing preferable regulatory methods from among a number of alternatives if the Court requires, as a constitutional matter, that the least restrictive alternative to accomplish a permissible regulatory purpose be chosen.<sup>74</sup>

##### 1. *Compelling justifications.*

This Note argues, and the early history of broadcasting illustrates,<sup>75</sup> that whenever a media activity employs economically "scarce" resources, there is a compelling need for an orderly system of allocation for those resources. The system for allocating rights to use the broadcast spectrum embodied in the Communications Act of 1934 thus has a compelling justification since without *some* method for orderly allocation of the electromagnetic spectrum, broadcast speech would be incomprehensible.<sup>76</sup> Simi-

73. See, e.g., *United States v. Robel*, 389 U.S. 258, 265 (1967); *Ashton v. Kentucky*, 384 U.S. 195, 200-01 (1966); *Dombrowski v. Pfister*, 380 U.S. 479, 486-87 (1965); *NAACP v. Alabama*, 377 U.S. 288, 307-08 (1964); *NAACP v. Button*, 371 U.S. 415, 432-33 (1963); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960). Cf. *Cantwell v. Connecticut*, 310 U.S. 296, 304-05 (1940).

74. Justifications for editorial regulations are found *within* the first amendment, unlike regulations protecting interests found in other constitutional provisions. See note 24 *supra*. The proposed balancing test is unusual in this sense.

75. See note 6 *supra*.

76. However, the Act is arguably unconstitutional on other grounds. See text accompanying notes 84-88 *infra*.

larly, decisions holding that newspapers, like other businesses, are subject to general non-discriminatory business regulations might be rationalized on this ground.<sup>77</sup> Contract and property law, in particular, are the mechanisms chosen to insure that the allocation of goods and services necessary to the conduct of publishing, like any other business activity, proceeds in the most efficient manner possible.

Because publishing and broadcasting are both economic activities which are carried out by private business enterprises, monopolization of reader or advertiser markets (properly defined) for broadcast time and column-inches can have direct harmful effects on the free flow of information and opinion. It is a well-verified prediction of economic theory,<sup>78</sup> and an accepted underpinning of American antitrust law,<sup>79</sup> that monopolists have strong incentives to raise prices and restrict output, thus making their product available to fewer consumers, and that the interests of economic efficiency demand that unrestricted monopoly power not be tolerated. Where the "product" is the content of a newspaper or broadcast, monopoly means that fewer individuals have access to the ideas contained in them, and that fewer advertisers have access to audiences. Where there is competition, there is a greater chance that a variety of views will find some outlet to the public. The monopolist is the sole arbiter of the ideas that reach his audience. It is therefore assumed that the elimination of monopoly power in media markets is a compelling justification for media regulation.<sup>80</sup>

### 2. *Permissible regulatory means.*

Where a compelling justification for media regulation can be found, at least three bases for distinguishing preferable regulatory strategies can be discerned.

*The activity regulated.* The activities performed by the mass media can be roughly classified into three categories: creation of content (news gathering), editing of content, and production and transmission of copies or

77. See note 4 *supra*.

78. F. SCHERER, *supra* note 71, at 13-19.

79. See, e.g., *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945).

80. The connection between monopoly and freedoms of speech and press was recognized in the context of postal services as early as President Andrew Jackson's administration, when a proposal to restrict access to the mail by publications supporting slave insurrection was rejected by Congress. It was clearly seen that so long as the government retains control over the mail, restrictions on postal access amounted to censorship. See *Hannegan v. Esquire, Inc.*, 327 U.S. 146, at 156-57, n.18 (1946). Similarly, where a governmental authority has a monopoly of access to a particular audience, or where access is granted to a private monopoly of a public forum, courts have generally imposed a requirement of nondiscrimination in content selection. Perhaps this is the vision of the dissent in *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 170 (1973): accepting the existence of the current FCC licensing scheme, imposing common carrier status on broadcasters may be the simplest way to guarantee diversity and simultaneously avoid detailed government supervision of broadcast content. See B. OWEN, J. BEEBE & W. MANNING, *TELEVISION ECONOMICS*, *supra* note 15, at 130-37.

images of edited content. Clearly the first two are far more sensitive to government supervision than is the third.<sup>81</sup>

The first basis for judging the constitutionality of the means of media regulation should therefore be whether the regulation in question affects the less sensitive production and transmission aspects of media activity. Statutes or regulations which can accomplish their purpose without intruding upon the creative and editorial functions should be more likely to pass constitutional muster.

*Structure and behavior.* The second basis for distinguishing preferable regulatory strategies is whether the regulation in question is addressed to the economic structure of the activity sought to be regulated, or involves more detailed government supervision. Regulations that determine the general framework in which individual transactions take place, achieving the regulatory goal by the gradual, cumulative effect of many transactions between private parties—as distinct from rules “commanding” desired behavior and enforcing the command by sanctions—are less likely to lead to unnecessarily detailed government interference with first amendment processes.<sup>82</sup>

*The regulatory institution.* Finally, it should be recognized that different legal and political institutions are subject to different degrees of political control, and if it is a valid assertion that the media perform their function best when government involvement is minimal, this concern can be reflected by administering whatever regulatory strategy is adopted by means of legal institutions posing the least danger of political control of the media.<sup>83</sup>

## B. *The Communications Act of 1934 Under Strict Scrutiny*

It has already been suggested that the purpose of the Communications Act, the orderly allocation of the electromagnetic spectrum, is a compelling

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81. See note 86 *infra*.

82. Cf. *CBS v. Democratic Nat'l Comm.*, 412 U.S. 94, 155 (1973) (Douglas, J., concurring in judgment): “The standards of TV, radio, newspapers, or magazines—whether of excellence or mediocrity—are beyond the reach of Government. Government—acting through courts—disciplines lawyers. Government makes criminal some acts of doctors and of engineers. But the First Amendment puts beyond the reach of Government federal regulation of news agencies save only business or financial practices which do not involve First Amendment rights.”

A very similar structure-conduct distinction was proposed in Note, *Offensive Speech and the FCC*, 79 YALE L.J. 1343, 1357-59 (1970). The authors point out that regulations which appear to be structural but actually control content must be carefully identified and restricted. “Examples of this type of regulation would be statutes requiring that the FCC grant licenses only to persons loyal to government, or to persons not members of labor unions, or to people who are white.” *Id.* at 1358. The proposal apparently assumes the constitutionality of the license allocation scheme.

83. Cf. *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (discussing the purpose and importance of regulatory agency autonomy from executive branch control); *Lehman v. Shaker Heights*, 418 U.S. 298 (1974) (denying right to purchase city-run transportation-system ad space for political advertisement, partly on the ground that access would involve risk of partisan abuse or favoritism by city authorities). Political control of law enforcement and the administrative process are currently under study by the American Bar Association. See Spann, *Removing Political Influence from Federal Law Enforcement Agencies*, 61 AM. BAR ASS'N J. 1208 (1975).

one.<sup>84</sup> The critical issue then becomes whether the means chosen for allocation pose the least possible danger of government control of media content.

A number of students of the broadcasting field have proposed alternative means of spectrum allocation which are superior to those embodied in the Communications Act on two of the three proposed criteria for evaluating the propriety of regulatory means.<sup>85</sup> These proposals generally suggest that economic competition be substituted for FCC regulation, and that allocation of the spectrum be performed by recognizing private property rights in the spectrum, exchanged according to property and contract law and enforced at private initiative in the courts, rather than by government rationing to those whom it considers worthy. This regulatory strategy would remove the government from direct determination of the particular individuals who are allowed to broadcast, leaving this decision to market forces, and would avoid the need for specific behavioral commands and sanctions now necessary to secure compliance by broadcasters with the various obligations imposed by the public interest standard.<sup>86</sup> Primary responsibility for allocation decisions would be given to private parties, or in cases of dispute, to the courts, which heretofore have been least sensitive to political influence.<sup>87</sup> Thus, according to the second and third criteria for evaluating regulatory means, the proposed property right schemes are superior to the current regime of broadcasting regulation. Under strict scrutiny, then, the existence of this clearly identifiable less restrictive alternative indicates that the Communications Act is unconstitutional.<sup>88</sup>

84. See text accompanying notes 75-77 *supra*.

85. DeVany, Eckert, Meyers, O'Hara & Scott, *A Property System for Market Allocation of the Electromagnetic Spectrum*, 21 STAN. L. REV. 1499 (1969); Coase, *supra* note 12; Minasian, *Property Rights in Radiation: An Alternative Approach to Radio Frequency Allocation*, 18 J. LAW & ECON. 221 (1975). Cf. Owen, *Spectrum Allocation: A Survey of Alternative Methodologies*, Apr. 1972 (Staff Research Paper OTP-SP-4, Office of Telecommunications Policy, Executive Office of the President). But see Hinchman, *The Electromagnetic Spectrum*, in PRESIDENT'S TASK FORCE ON COMMUNICATIONS POLICY, I THE USE AND MANAGEMENT OF THE ELECTROMAGNETIC SPECTRUM Appendix A (June 1969).

86. "Under [current broadcasting regulation], the FCC enforces affirmative programming obligations upon the broadcaster to regulate exercise of his power over program content. While it is difficult to take issue with many of the goals underlying such Government-imposed program requirements, they result in a regulatory framework in which the Government has the power to oversee the content of a medium of communications and expression. The existence of the power affects the relationship between the Government and the broadcast media, and creates the constant danger of unwarranted governmental influence or control over what people see and hear on television broadcast programming." CABINET COMM. ON CABLE COMMUNICATIONS, *supra* note 17, at 20.

87. See generally A. BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

88. A significant question that arises is whether the Court will ever have the opportunity to judge the constitutionality of the Communications Act. Current licensees are the beneficiaries of a government-granted right whose value is in many cases millions of dollars. Greenberg, *Station Profitability and FCC Regulatory Policy*, 17 J. INDUS. ECON. 210 (1969). Compliance with FCC rules governing permissible content is a small price for such a right, and current licensees would therefore appear to have little incentive to challenge the licensing process itself. The license applicant would not wish to destroy the value of the right for which he is contending, and if unsuccessful, would have only a perverse interest in tearing down the system that has rejected him. Consistent judicial rejection of direct interferences in the editorial process, as in *Red Lion* and *CBS*, would remit legislators to the structural remedies that are less dangerous in terms of potential government influence of broadcast content, and more importantly, to those remedies which ultimately will be more effective in eroding excessive editorial power in the long run.

### C. Tornillo Under Strict Scrutiny

#### 1. *The Florida statute.*

It was argued above that the elimination of monopoly power in media markets is a compelling justification for media regulation.<sup>89</sup> There remain, however, significant doubts as to the ability of newspapers facing little competition from other newspapers to exercise any effective, and therefore undesirable, monopoly power.<sup>90</sup> Even if only one newspaper serves a particular locale, this is not a cause for concern if both advertisers and readers can resort to other publications and the electronic media as means of access to audiences and ideas.

Let it be assumed for purposes of discussion, however, that local newspapers do indeed possess significant monopoly power. The access statute in *Tornillo* would still fail under two of the three tests of permissible regulatory means. First, it is a direct regulation of the editorial function and would therefore create the serious disincentives to cover controversial issues that were identified in *Tornillo* and identified but ignored in *Red Lion*.<sup>91</sup> Second, it is a "command" type of regulation: the offending newspaper is ordered to include a specific element of content, and this command is enforced by specific sanctions.<sup>92</sup> The enforcement mechanism is less suspect, however: the Florida statute was to have been enforced by the courts, which would have made all decisions of fact and law.

#### 2. *The antitrust laws.*

The excessive breadth of the access statute at issue in *Tornillo* is shown by the existence of a clearly identifiable less restrictive alternative for the elimination of monopoly power in media markets. Legal rules for the elimination of monopoly restraints are already embodied in the antitrust laws.<sup>93</sup> The Supreme Court in *Associated Press v. United States*<sup>94</sup> held

89. See text accompanying notes 78-80 *supra*.

90. See Rosse, *supra* note 38.

91. See note 32 *supra*.

92. See note 7 *supra*.

93. 15 U.S.C. §§ 1-16 (1970).

94. 326 U.S. 1 (1945). Since the *Associated Press* case, antitrust decisions involving print media firms have not seriously questioned the constitutionality of the application of the Sherman or Clayton Acts to these enterprises. See, e.g., *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969); *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951).

The *Associated Press* case presented great potential for a finding of conflict between the antitrust laws and the free press clause. Appealing a summary judgment for the government, the defendant argued that, even admitting the content and meaning of the allegedly restrictive contracts entered into by its members, the determination of whether an unreasonable restraint of trade resulted from them was too subtle and complex to be decided except at a trial, especially where first amendment values were involved. Rejecting the argument, the Supreme Court refused to acknowledge that the summary judgment standard should differ because of the complex nature of antitrust claims and *Associated Press's* entitlement to first amendment protection, saying, "It would be strange indeed . . . if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom. The First Amendment,

that a national news wire service, like any other business, was subject to general business and police regulations, and that the antitrust laws could therefore constitutionally be applied to it. The antitrust laws are particularly well suited to eliminate monopoly restraints in media markets because their enforcement is aimed at allowing the forces of competition to perform the "regulatory" function, thereby obviating the need for detailed government intervention in first amendment processes. Additionally, a strict scrutiny approach would invite Court inquiry into the possible political abuse of the antitrust enforcement mechanism. Private antitrust suits prosecuted through the courts are the least dangerous method of enforcement.<sup>95</sup> On the other hand, suits by the Department of Justice, whose leadership serves at the pleasure of the President, pose a greater potential for prosecutorial harassment.<sup>96</sup> Yet the courts, generally less susceptible to political pressure, render all decisions of fact and law in antitrust cases.

Antitrust enforcement by the Federal Trade Commission raises a similar problem. Although as an independent regulatory agency the Commission is more isolated from executive control than the Justice Department,<sup>97</sup> it has some independent authority to define substantive elements of violations of section 5 of the Federal Trade Commission Act.<sup>98</sup> One might imagine the FTC defining persistent criticism of government policy as an "unfair method of competition," and it would be necessary to consider the likelihood of this type of agency action in deciding whether this aspect of the FTC's authority, as distinct from its authority to assist in antitrust enforcement, is consistent with the first amendment.<sup>99</sup>

### 3. *The limits of antitrust.*

The goal of antitrust enforcement is to foster economic competition, yet competition may not be feasible in several important media industries.

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far from providing an argument against application of the Sherman Act, here provides powerful reasons to the contrary. That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public, that a free press is a condition of a free society. Surely a command that the government itself shall not impede the free flow of ideas does not afford non-governmental combinations a refuge if they impose restraints upon that constitutionally guaranteed freedom. . . . Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests." 326 U.S. at 20.

95. A question might arise as to the constitutionality of allowing private treble damage actions against media enterprises. As a form of "subsidy" to antitrust suits, treble damages present a risk of harassment. Yet so long as the decision to bring suit is in private hands, and all decisions of fact and law remain the responsibility of the courts, this danger is probably minimal. The effects of the treble damage provision, 15 U.S.C. § 15 (1970), are analyzed in Breit & Elzinga, *Antitrust Enforcement and Economic Efficiency: The Uneasy Case for Treble Damages*, 17 J. LAW & ECON. 329 (1974).

96. See note 83 *supra*.

97. But see Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47, 52-53 (1969).

98. 15 U.S.C. § 45 (1970).

99. The FTC has on several occasions challenged the business practices of the periodical distribution and retailing industry. See, e.g., *American News Co. v. FTC*, 300 F.2d 104 (2d Cir. 1962), but there is no evidence that these challenges were politically motivated or in any way related to the views expressed in the publications involved.

There exists strong and as yet un rebutted evidence that the process of printing and distributing a local general circulation daily newspaper may be such an industry. In simplest terms, the evidence suggests that it is far less expensive for one printing establishment to produce, and for one distribution system to distribute, all newspapers in a particular locality than for several printing and distributing establishments to coexist, each producing its own separate publication.<sup>100</sup> As a result, the first newspaper to achieve the largest circulation will have a decisive cost advantage over smaller publications or prospective publications. If this is the case, then antitrust enforcement is bound to be ineffective in achieving competitive local newspaper markets, since competition is inherently unstable.<sup>101</sup> Traditionally, in this so-called "natural monopoly" situation, the response has been to allow production by one firm, but with strict controls on pricing and other aspects of service (e.g., electricity generation, telephone communication) or to nationalize the industry and operate it as a publicly owned monopoly (postal service).<sup>102</sup>

Whether a similar strategy should be taken with respect to local newspapers depends most critically on the issue outlined above, the extent to which competition from other media reduces the need for concern about local newspaper monopoly.<sup>103</sup> But assuming that the monopoly problem is of genuine policy concern, strict scrutiny may still provide the basis for evaluating proposed remedial measures. The monopoly problem occurs because of the technology of printing and distributing newspapers, hence the remedy can and should be limited to those stages of production, and excluded from the content creation or editorial functions.

The Newspaper Preservation Act is a significant step toward such a regulatory strategy.<sup>104</sup> The Act grants newspapers a specific antitrust immunity where a merger of production facilities is necessary to the economic survival of one of the newspapers. The basic approach of the Act is to

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100. See Rosse, *Daily Newspapers, Monopolistic Competition, and Economies of Scale*, *supra* note 26; B. OWEN, *supra* note 26, at 33-59.

101. See Barber, *supra* note 72.

102. F. SCHERER, *supra* note 71, at 519-23.

103. See Rosse, note 26 *supra*; Rosse, note 38 *supra*.

104. 15 U.S.C. §§ 1801-04 (1970). "(a) It shall not be unlawful under any antitrust law for any person to perform, enforce, renew, or amend any joint newspaper operating arrangement entered into prior to July 24, 1970, if at the time at which such arrangement was first entered into, regardless of ownership or affiliations, not more than one of the newspaper publications involved in the performance of such arrangement was likely to remain or become a financially sound publication: *Provided*, That the terms of a renewal or amendment to a joint operating arrangement must be filed with the Department of Justice and that the amendment does not add a newspaper publication or newspaper publications to such arrangement. (b) It shall be unlawful for any person to enter into, perform, or enforce a joint operating arrangement, not already in effect, except with the prior written consent of the Attorney General of the United States. Prior to granting such approval, the Attorney General shall determine that not more than one of the newspaper publications involved in the arrangement is a publication other than a failing newspaper, and that approval of such arrangement would effectuate the policy and purpose of this chapter." 15 U.S.C. § 1803 (1970).

regulate the economic structure of the production and distribution stages of the press, without requiring detailed regulation of the editorial process. It is submitted that the basic concept of "sharing" local newspaper printing and distribution facilities might be employed to provide a diversity of editorial voices, while still exploiting cost advantages of unified printing and distribution facilities.<sup>105</sup>

#### D. Cable Television

Another media industry in which competition is not a feasible regulatory alternative is the local distribution of cable television (CATV) programs. Because CATV systems provide large channel capacity, it is far less costly for all CATV services to be carried on one wire to each household than it is for each CATV programmer to install a separate wire<sup>106</sup> This is a true "natural monopoly" problem, but fortunately, it arises only at the stage of local distribution. Thus, regulation of the source of cable programming is unnecessary, and under strict scrutiny would be unconstitutional.

Furthermore, regulation need involve only the structural features of the industry. Probably the most realistic regulatory proposal is to impose common carrier status on the cable owner, requiring the owner to carry programs at set rates to anyone requesting this service, regardless of the content of the proffered message.<sup>107</sup> The advantage of the strict scrutiny approach is that it provides the legal basis for preferring this less restrictive

105. Cf. *Associated Press v. United States*, 326 U.S. 1 (1945) (requiring equal treatment of newspapers wishing to join the news-gathering organization); *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912) (railroads controlling all available facilities for Mississippi River crossing at St. Louis ordered to allow all railroads to use facilities on equal basis); *Air Cargo, Inc.*, 9 C.A.B. 468 (1948) (requiring airlines owning ground facilities to allow use by all authorized aircraft on equal terms). Reader demand for morning and evening editions might give rise to a situation in which publisher demand for use of a shared printing facility would concentrate at certain hours of the day. See Steiner, *Peak Loads and Efficient Pricing*, 71 Q.J. Econ. 585 (1957). Higher user charges during the "peak" periods might force publications for which the time element is not critical to publish at off-peak hours. Thus one might find late news and sports in one or more publications printed at peak hours, another with entertainment notices, another with classified advertising, and several off-peak publications containing political commentary for which the time between writing and delivery is less important.

106. "Economically, two factors are relevant. First, the cost of providing a cable channel is relatively low and is likely to decrease as improving technology expands the number of usable channels and lowers the cost of electronic equipment the customer may use in conjunction with cable. Thus, the cost of communications capacity is likely to be a small component of the overall cost of producing and distributing television programming, or of many other information services that might be offered . . . . Second, the apparent economies of scale involved as the number of channels and customers increases on a cable system mean that, in any particular neighborhood or community, only one cable system is likely to be viable and efficient. Thus, cable will be a natural monopoly in each locality." CABINET COMM. ON CABLE COMMUNICATION, *supra* note 17, at 10 (emphasis added).

107. "By separating the distribution function in cable, which is a natural monopoly, from the programming functions, which can be highly competitive, the dangers of government intrusion and influence in programming can be avoided while the wide variety of competitors vying for the public's attention can be expected to produce a diversity of programming.

"This policy would create an essentially neutral distribution medium . . . . The cable system operator would be obliged to deliver the messages of channel users with as little regard to content as the Postal Service has for the content of print media." *Id.* at 20.

common carrier remedy to a fairness doctrine, access rules, and more direct forms of content regulation that might otherwise be needed to overcome the cable owner's ability to control content by controlling access to the cable.

#### IV. CONCLUSION

The explosive growth of the electronic media and the evolution of printing technology have obscured the fact that the broader purposes of free expression have come into conflict with the express policy embodied in the first amendment of prohibiting government regulation of the press. Since the goals of free expression would be as thoroughly frustrated by complete avoidance of government regulation of the media as they would be by complete government control, a sensible way of balancing the benefits and dangers of regulation must be found. This Note has argued that a balance can be achieved by strictly scrutinizing asserted justifications offered for specific regulatory schemes, and by requiring that permissible purposes be accomplished in ways that preserve, as far as possible, the traditional independence of press and government. "Government regulation of editors is more tactful than the colonial practice of throwing editors into jail, and in that respect we may be said to have progressed since 1776."<sup>108</sup> We must not wait another 200 years to progress further.

*Abbott B. Lipsky, Jr.*

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108. Owen, *AM. ECON. ASS'N PAP. & PROC.* 400, 402, in 64 *AM. ECON. REV.* (1974).

## FAIR TRIAL OR FREE PRESS: LEGAL RESPONSES TO MEDIA REPORTS OF CRIMINAL TRIALS

BRONWYN NAYLOR\*

IN June 1993 in *R. v. Taylor*<sup>1</sup> the Court of Appeal quashed the murder convictions of two young women on grounds (inter alia) of prejudicial press coverage of the original trial. In October 1993 three police officers charged with conspiring to pervert the course of justice following the release of the Birmingham Six had their prosecution stayed. The court accepted the argument that adverse publicity made a fair trial impossible.<sup>2</sup>

Are more checks on the press needed to ensure fair trial? Is media sensationalism forcing the courts to provide new protections? Or are recent developments unnecessarily endangering free speech and a free press?

Debate about the freedom of the press has had a high profile in Britain in recent years. The press defends its corner energetically, aligning its interests with the "public interest" and claiming that restraint of the press allows corruption and abuse to flourish. In the context of criminal trials the press points to the fundamental principle of open decision making. These are persuasive arguments. All too often, however, the commercial character of the industry dominates, with "news values" which favour conflict and sensationalism, with potentially serious consequences for their subjects.

This article reviews *Taylor* and other recent cases and discusses their implications for the free press/fair trial debate.

### R. v. TAYLOR

Michelle Taylor and her sister Lisa were prosecuted for the murder of Alison Shaughnessy, who was stabbed to death late one afternoon after coming home from work. Michelle Taylor had been having an affair with the victim's husband. The trial took place in July 1992.

The sisters denied being anywhere in the vicinity. The evidence was

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<sup>1</sup> *R. v. Taylor* [1993] *The Times*, 15 June.

<sup>2</sup> *R. v. Reade* [1993] *The Independent*, 19 October.

extremely circumstantial and the timing was very tight. There were around 23 minutes in which time the Taylor sisters were to have entered the flat, stabbed the victim 54 times, destroyed all scientific evidence and disposed of their blood-stained clothes, and driven four miles in peak traffic back to Michelle's workplace. The prosecution case focused on the relationship between Michelle and the husband of the murdered woman. So did the newspaper coverage. Many papers had her convicted of the murder from the start.

Several newspapers published a still from a video of the victim's wedding, showing Michelle Taylor kissing the groom (her lover), a peck on the cheek turned into a passionate kiss by creative editing. Headlines proclaimed "CHEAT'S KISS" and "JUDAS KISS". The video was of no relevance to the killing itself, and it was never actually put in evidence at the trial.

The jury convicted the two women. An appeal was lodged, initially based on the prejudicial press coverage. When preparing their appeal defence lawyers obtained police documents which had not previously been made available. One document was a police record of a message from a crucial witness. This witness said at the trial that he had seen two blonde girls leaving the victim's house and jogging away down the road. His first statement to the police, however, had been that one of the women whom he saw might have been black. The accused women are both white. He also originally said that they were walking away from the house, rather than jogging.

In addition, the defence discovered, a short time before the appeal, that the witness had claimed a reward being offered by the victim's employer for help in solving the murder. This had been known to the police, but not to any counsel in the case, nor to the Crown Prosecution Service.

The appeal went ahead in June 1993 on two grounds:

1. That the prosecution failed to make available their witness's contradictory statements. He was an extremely impressive witness for the prosecution, an impression which would have been different had the defence been able to cross-examine him on his contradictory statements and the possible motive for changing his evidence.

2. That the press coverage was extremely prejudicial.

The Court of Appeal quashed the convictions as unsafe and unsatisfactory. It concluded (and the prosecution conceded) that failure to disclose the inconsistent witness statement was a significant irregularity.

The court also took the view that the coverage had been "unremitting, extensive, sensational, inaccurate and misleading". Despite warnings by the judge to the jury, it was impossible to say that the jury were not influenced in their decision by what they had read, and the

court was satisfied that "the press coverage of the trial did create a real risk of prejudice". On the basis of its findings on the press coverage, the court did not order a retrial.

#### NARRATIVES OF VIOLENCE

Violent events challenge fundamental social structures and expectations. People seek explanations to reduce the contradictions they introduce. Explanations take the form of "stories" or "narratives". In the context of the criminal justice system, explanatory narratives are constructed as police and lawyers compile facts, follow up particular lines of enquiry, select witnesses and call experts, as they put a case together for a trial. Addresses to the jury and pleas in mitigation of sentence also offer narratives about the event and the offender. These (and alternative) narratives are then reported and developed in the news media. There may of course be competing narratives; those of defence and prosecution counsel, of the judge when sentencing, and those of rival newspapers.

The process of preparing a case for trial inevitably involves selection and construction of a case.<sup>3</sup> In a sense this is not peculiar to lawyers or police (though it has specific consequences of particular interest here). It is simply a corollary of the widely accepted observation that all experience is mediated by the human subject, and that *everyone* is therefore engaged in the ongoing process of constructing their own reality.<sup>4</sup>

In a case such as this, where there is no direct evidence as to who actually killed the victim, a prosecution depends on persuading a jury that the prosecution scenario is believable, that the circumstantial material adds up to proof of guilt, that the projected events and motivations are predictable. In this case, the witness who saw two young women leaving the victim's house at the relevant time may originally have thought one was black, but as he now thought they were both blonde (as were Michelle Taylor and her sister Lisa) his earlier statement could be ignored by the police and not disclosed. It could even, on the most generous analysis, genuinely be regarded as irrelevant.<sup>5</sup>

The press adopted the prosecution story with gusto. It provided a scenario—the jealous woman killer—well known in myth although

<sup>3</sup> See Mike McConville, Andrew Sanders and Roger Leng, *The Case for the Prosecution: Police Suspects and the Construction of Criminality* (London, 1991).

<sup>4</sup> See for example P. Berger and T. Luckmann, *The Social Construction of Reality* (London, 1967).

<sup>5</sup> The Court of Appeal commented, however, "We can only conclude that [the Detective Superintendent] did not disclose it to the prosecution legal team, because he knew that if he did, in accordance with the Bar's high tradition, they would in turn disclose it to the Defence." (Transcript, 12–13).

statistically rare, and popularised in films such as *Fatal Attraction*. The story had all the features tabloid (and other) newspapers regard as most newsworthy. They gave the trial enormous coverage, with headlines such as "THE 'KILLER' MISTRESS WHO WAS AT LOVER'S WEDDING" and "LOVE CRAZY MISTRESS BUTCHERED RIVAL WIFE COURT TOLD". It is not suggested that this was a conspiracy against the Taylor sisters themselves. But it provided a "script", and excluded other scripts, in a way which the Court of Appeal concluded was powerfully prejudicial.

### THE POWER OF THE PRESS

The media give a lot of space to death and violence, as is widely recognised. The main national UK papers devote 64.5 per cent. of their crime reporting to stories of personal violence, although official figures suggest that only 6 per cent. of crime actually involves personal violence.<sup>6</sup> Violence incorporates the drama, the human emotion, the shattering of "normal" expectations, which are required for a story to be newsworthy.<sup>7</sup>

Crime coverage promotes a perception that violent crime is increasing particularly rapidly (contrary to the official statistics), that disorderly youth is running rampant and that the social order is under threat, a message which is then reflected in calls for tougher sanctions and increased policing.

News reporting is effective ideologically because it presents explanations as self-evident and unchallengeable.<sup>8</sup>

. . . the power of newspaper interpretations lies in their ability to make events intelligible at a mundane, "commonsense" level, to provide a guide for practical activity and to alleviate the need for further investigation and consideration . . . This commonsense mode of understanding trades off myths and stereotypes which provide simple, comfortable, ready-made pictures and explanations of things.<sup>9</sup>

Britain has a large newspaper-reading public. Around 11.5 million people buy a tabloid newspaper each day and 2.5 million buy a

<sup>6</sup> Williams, Paul and Julie Dickinson, "Fear of Crime: Read All About It? The Relationship between Newspaper Crime Reporting and Fear of Crime" (1993) 33 *British Journal of Criminology* 33.

<sup>7</sup> See Richard Ericson, Patricia Baranek and Janet Chan, *Visualizing Deviance: A Study of News Organization* (Milton Keynes, 1987).

<sup>8</sup> See for example Stuart Hall, Chas Critcher, Tony Jefferson, John Clarke and Brian Roberts, *Policing the Crisis: Mugging, the State, and Law and Order* (Basingstoke, 1978); Colin Sumner and Simon Sandberg, "Press censure of 'dissident minorities'" in Colin (ed.), *Censure, Politics and Criminal Justice* (Milton Keynes, 1990).

<sup>9</sup> Steve Chibnall, *Law-and-Order News: An Analysis of Crime Reporting in the British Press* (London 1977), p. 44.

broadsheet.<sup>10</sup> The popular tabloid newspapers are written in simple language, requiring only basic reading skills, and are therefore likely to be particularly effective vehicles for the dissemination of written information—and the values inextricably embedded.

The power of the media image is illustrated in the case of Myra Hindley, convicted of several murders in the early 1960s. She has become an “evil icon”, her story regularly retold in the tabloids and the famous picture routinely republished.<sup>11</sup> Arguably the campaigning stance taken by some papers has made it difficult, or impossible, for her parole to be considered.<sup>12</sup>

The press tends to claim that it is in a legal straitjacket. It points to the Calcutt inquiries into privacy (1990) and press self-regulation (1993), increasing powers of the Press Complaints Commission, contempt legislation and so on.<sup>13</sup> Kelvin McKenzie (then editor of the *Sun*) complained, when criticised by the Court of Appeal for the *Sun*'s coverage of the *Taylor* case, that the court did not understand how popular newspapers worked, and “Justice would be better served if there were fewer judges from Brasenose College, Oxford, and more *Sun* readers from the University of Life on the bench”.<sup>14</sup>

In fact much press activity still falls outside legal regulation. And judges in some cases take a fairly robust view of jurors' vulnerability. Lawton J. might have found himself in agreement with the editor of the *Sun*, commenting in *R. v. Kray*,<sup>15</sup> “I have enough confidence in my fellow-countrymen to think that they have got newspapers sized up”.

Robertson and Nicol, in their text *Media Law*, argue that juries are “remarkably resilient” to newspaper comments, citing the acquittals of Jeremy Thorpe, the Kray twins and Janie Jones.<sup>16</sup> Lawton J. in the *Kray* case relied on short memories and the concentration required in a trial to limit the impact of press coverage:

It is, however, a matter of human experience, and certainly a matter of experience of those who practice in the Criminal Courts, first, that the public's recollection is short, and, secondly, that the drama, if I may use that term, of a trial almost always has the effect of excluding from recollection that which went before.<sup>17</sup>

The passage of time was found to reduce the impact of some forms

<sup>10</sup> December 93–May 94 averages: *Media Guardian* 20 June 1994. During this period 4 million people bought the *Sun* each day, and 2.5 million bought the *Daily Mirror*, the two top-selling national newspapers.

<sup>11</sup> Mike Nellis, “Myra Hindley: The Hated Icon” (1985) 20 *The Abolitionist*, p. 9.

<sup>12</sup> David Astor, “A witch-hunt that demeans us all”, *The Observer*, 25 April 1993.

<sup>13</sup> See for example Association of British Editors, *An Alternative White Paper: Media Freedom and Media Regulation* (February 1994).

<sup>14</sup> Quoted in the *Guardian* 12 June 1993, p. 1. Was this an admission that people do not believe what they read in the tabloid press?

<sup>15</sup> (1969) 53 Cr.App.Rep. 412, 414.

<sup>16</sup> Geoffrey Robertson and Andrew Nicol, *Media Law* (3rd ed.) (London, 1992), p. 263.

<sup>17</sup> (1969) 53 Cr.App.Rep. 412, 415.

of media coverage in a recent American experimental study.<sup>18</sup> Lapse of time eliminated the effect of prejudicial "factual" publicity (a report of previous convictions) on jurors' deliberations. "Emotional" material (such as the graphic description of a victim's injuries) however was not so readily excluded from memory and continued to produce hostile jury decisions. Interestingly, the most common protective device used in this country, the judicial instruction to the jury, was found to be quite ineffective as a cure for prejudicial press reporting.

#### LEGAL REMEDIES FOR PREJUDICIAL PUBLICITY

The legal system recognises in various ways the proposition that decision makers may be adversely affected, or influenced, by information which may be presented in the press. It has long taken account of such concerns, for example in evidentiary rules excluding (at least *prima facie*) what is recognised to be highly prejudicial information, for instance: exclusion of previous convictions at trial; the similar fact rule; recent developments in the restriction of prior sexual history evidence in rape trials; provision for severance of indictments.

Three substantive areas of direct statutory or judicial intervention are pre-emptive restrictions on reporting, action for contempt, and appeals based on prejudicial press coverage.

##### *1. Pre-emptive restrictions on reporting*

Journalists can be prevented from publishing what they have heard in court, either for all time or temporarily, under various rules.<sup>19</sup> For example, reporting of committal proceedings is limited essentially to the names of parties, the charges and the decision to commit, restrictions which apply until the trial has been completed.<sup>20</sup> The identity of children involved in court proceedings is generally protected,<sup>21</sup> and since 1976 a complainant in a rape case must in general remain anonymous.<sup>22</sup>

Section 11 of the Contempt of Court Act 1981 embodies the power to prohibit the publication of names of parties or witnesses, or other matters.<sup>23</sup> There must, however, be a strong case for suppression in the interests of the administration of justice—and not simply individual

<sup>18</sup> Geoffrey P. Kramer *et al.*, "Pretrial Publicity, Judicial Remedies, and Jury Bias" (1990) 14 *Law and Human Behaviour*, p. 409.

<sup>19</sup> See Robertson and Nicol, pp. 323ff; C.J. Miller, *Contempt of Court* (2nd ed.) (Oxford, 1990), ch. 10.

<sup>20</sup> Magistrates Courts Act 1980, s. 8. A defendant has a right to have the restriction lifted.

<sup>21</sup> Children and Young Persons Act 1933 (as amended), ss. 39(1) and 49(1).

<sup>22</sup> Sexual Offences (Amendment) Act 1976, s. 4; since extended to victims of other sexual offences by the Sexual Offences (Amendment) Act 1992.

<sup>23</sup> Miller, pp. 315ff.

interests—before any reviewing court will endorse overriding the central principle of open justice.<sup>24</sup>

In general a fair and accurate report of matters in open court cannot be contempt of court.<sup>25</sup> A court can however order the postponement of publication of certain matters to avoid “a substantial risk of prejudice to the administration of justice”.<sup>26</sup> The Court of Appeal has, however, been critical of too sweeping a use of these gagging orders by trial courts, and emphasised the need to show a *substantial* risk of serious prejudice, which could not be otherwise reduced.<sup>27</sup>

## 2. Proceedings for contempt

The law of contempt is meant to deter: it is concerned with the *potential* effect of publication.<sup>28</sup> A publication is in contempt if it “creates a substantial risk that the course of justice in particular proceedings will be seriously impeded or prejudiced”.<sup>29</sup>

In a recent case involving a trial for murder of a police officer, it was accepted that media reports of the defendant’s previous conviction for murder would be seriously prejudicial if jurors were aware of it at the trial.<sup>30</sup> However the court held that the Attorney-General had not shown that there was a “substantial risk” of the prejudice occurring, because of the lapse of a likely nine months or more before the trial, during which potential jurors would have forgotten the story, and because of the limited circulation of the offending newspapers.

Contempt is a strict-liability offence if committed in relation to an “active” case, one presently before the courts.<sup>31</sup> Intent is therefore irrelevant, unless the public interest or other defence applies.<sup>32</sup> A prosecution can only be brought by the Attorney-General or with the Attorney-General’s consent.

Contempt of court is the only serious criminal offence triable without a jury; it carries a maximum penalty of two years’ imprisonment and unlimited fine. Imprisonment is rare, though sometimes threatened by a court; fines are more likely to be imposed. More commonly however a judge may warn members of the press about certain evidence, or require the editor of an offending publication or broadcaster to attend the court.

<sup>24</sup> See *R. v. Evesham Justices, ex parte McDonagh* [1988] Q.B. 553. See generally Robertson and Nicol, pp. 339–340.

<sup>25</sup> Contempt of Court Act 1981, s. 4(1).

<sup>26</sup> Contempt of Court Act 1981, s. 4(2).

<sup>27</sup> See for example *Re Central Television plc.* [1991] 1 W.L.R. 4.

<sup>28</sup> *Attorney-General v. English* [1983] 1 A.C. 116, 141.

<sup>29</sup> Contempt of Court Act 1981, s. 2(1). See generally, Miller, *Contempt of Court*, Robertson and Nicol, *Media Law*, ch. 6.

<sup>30</sup> *Attorney-General v. Independent TV News Ltd.* [1994] *The Times*, 12 May.

<sup>31</sup> See Miller, ch. 6, Robertson and Nicol, pp. 278–8 on when a case is *sub judice* or “active.”

<sup>32</sup> Contempt of Court Act 1981, s. 5.

In the *Taylor* case, the trial judge gave several warnings to the jury to decide the case on the evidence alone, but complained at one point that "I do not want to preface every day's hearing with a little homily to the jury [about] not looking at the press."<sup>33</sup>

On appeal, the Court of Appeal expressed concern that the defence had not asked for the jury to be discharged. However it accepted that in this case counsel would be reluctant to ask for a retrial as it would entail holding the two young women in custody for a further considerable period to allow the publicity to be dispelled.

More recently, in the trial of Beverley Allitt, a nurse charged with the murders of several young children in her care, the judge castigated several media representatives at the end of the trial. The judge had ruled early in the trial that evidence that the defendant apparently suffered from the personality disorder Munchausen's Syndrome should not be admitted at the trial. It would obviously have been highly prejudicial. The press had therefore been able to prepare material on the disorder but could not publish it while the trial was in progress. Apologies were accepted from local TV and newspaper representatives for using background material before all verdicts were given, and from the *Guardian* for a leader published while the jury was still out, referring to the defendant as a psychopath.

Counsel for the *Observer*, however, argued that its article on Munchausen's Syndrome, published whilst the jury was still out, did not pose a serious risk of substantial prejudice. The judge disagreed. He referred the alleged contempt to the Attorney-General, stating "If the jury had in fact seen the page it would have caused the most appalling problem."<sup>34</sup>

### 3. Prejudice as a ground of appeal

Media publicity is adverted to in the course of many trials, with a view to having the judge caution the press, warn the jury, or, more drastically, to having the jury dismissed. Contempt proceedings against the offending media may follow. But it is extremely rare for press coverage itself to provide the grounds, after conviction, for a successful appeal. This is so—perhaps surprisingly—even when the publisher of the article has been held to be in contempt.<sup>35</sup> Two recent cases have, however, seen convictions quashed due to prejudicial publicity.

In *R. v. McCann, Cullen and Shanahan*<sup>36</sup> convictions were overturned following highly prejudicial press coverage of a related issue.

<sup>33</sup> Transcript, p. 10; 10 July 1992.

<sup>34</sup> Quoted in *The Times* 29 May 1993.

<sup>35</sup> See Miller, *op. cit.*, p. 191. The author cites *Dyson* (1943) 29 Cr.App.Rep. 104 as the "only modern recorded instance" where a conviction was quashed at p. 192.

<sup>36</sup> (1991) 92 Cr.App.Rep. 239.

Three Irish defendants were tried in 1988 for conspiracy to murder the (then) Secretary of State for Northern Ireland, Tom King. The day after the defendants exercised their right to silence during the trial, the Home Secretary announced in Parliament the government's intention to change the law on the right to silence. There was much press coverage. Tom King (and Lord Denning, whose views the Court of Appeal noted "were bound to be influential") were widely quoted as claiming in strong terms "that in terrorist cases a failure to answer questions or to give evidence was tantamount to guilt".<sup>37</sup>

The trial judge refused to discharge the jury, but warned jurors to disregard any press coverage of this issue. The defendants were convicted, and appealed. The Court of Appeal considered the likely impact of the statements (and the "coincidence" of their timing) such that the jury should have been discharged.

*R. v. Taylor*, discussed above, appears to be the only other such case in recent times, and the first where media reporting of a trial itself has been held to be so prejudicial as to lead (at least in part) to the quashing of the convictions obtained. The Court of Appeal in *Taylor* endorsed the opinion of the judge giving leave to appeal that the coverage had been extensive, sensational and misleading. The court was particularly critical of the publication of the stills from the wedding video, which had never been in evidence at the trial, and the accompanying headlines. The Court of Appeal concluded that the press had gone far beyond the matters raised at the trial, presenting comment rather than reports, and assuming guilt on the part of the young women in the dock, with apparently no appreciation of the fact that this was the matter at issue in the trial: "the Press is no more entitled to assume guilt in what it writes during the course of a trial, than a police officer is entitled to convince himself that a defendant is guilty and suppress evidence . . .".<sup>38</sup>

The court adopted the principle enunciated in *McCann* that if the media coverage at a trial created a real risk of prejudice against the defendants, which was not capable of cure by jury direction or delay, the convictions should be regarded as unsafe and unsatisfactory. The nature of the press coverage also meant that no retrial was possible.

#### CONCLUDING COMMENTS

Are "fair trial" and "free press" mutually exclusive concepts? The courts are on the whole very conscious of their competing demands. Whilst mechanisms exist for much greater control of the media, the

<sup>37</sup> *R. v. McCann, Cullen and Shanahan* (1991) 92 Cr.App.Rep. 239, 245, 250.

<sup>38</sup> Transcript, p. 18.

courts, at least at the level of review, tend to be reluctant to endorse their use.

A recent case involved an application for stay of proceedings on the grounds of abuse of process, where it was claimed that a fair trial on a charge of murder was impossible due to delay coupled with adverse publicity.<sup>39</sup> The court dismissed the application, finding that the press coverage, though adverse and at times overwhelming, was unlikely to be remembered by any potential juror outside the local area. Scott Baker J. commented acerbically: "Increasingly these days publicity is advanced as a reason why it is impossible for the defendant to have a fair trial . . . In most cases, one day's headline is the next day's firelighter."

The courts have also been unwilling to link sanctioning the media through contempt proceedings with the consequences of that reporting on the trial.

It is clear that some media reporting poses a threat to the fair trial of the defendant. The commercial imperatives of the press will ensure that this will always be a closely-fought boundary. Controversial cases such as *Taylor* are important demonstrations of the legal system's willingness to take a step towards remedying the consequences of particularly sensational reporting. They need not, and probably can not, be seen as challenging the fundamental freedoms of the press.

<sup>39</sup> *R. v. Derby Stipendiary Magistrate, ex parte Brooks* (unreported), 17 February 1994.

# The Media in the Courtroom: Attending, Reporting, Televising Criminal Cases†

PAUL MARCUS\*

[F]ree speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them.<sup>1</sup>

Americans have always been fascinated by the criminal trial,<sup>2</sup> as demonstrated by the enormously successful novels,<sup>3</sup> plays,<sup>4</sup> films,<sup>5</sup> and television shows<sup>6</sup> based on these trials. Criminal trials, however, are not only the subject of popular forms of entertainment; they are news. Whether the public is involved nationally in a case, such as the Patty Hearst or Richard Speck trial, or only locally, the public's interest in the criminal trial is great.<sup>7</sup> As Justice Douglas stated: "A trial is a public

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<sup>1</sup> *Bridges v. California*, 314 U.S. 252, 260 (1941).

<sup>2</sup> While the public may well be quite concerned with the criminal trial, most criminal cases do not go to trial. As has been consistently pointed out, the vast majority of criminal cases are disposed of either through dismissal by the prosecution or through a guilty plea arrangement. See Stephenson, *Fair Trial, Fair Press: Rights in Continuing Conflict*, 46 BROOKLYN L. REV. 39, 39 n.5 (1979). Still, when one thinks of the criminal justice system, it is the trials of people such as Charles Manson, Jean Harris, or the ABSCAM defendants which immediately come to mind.

<sup>3</sup> *E.g.*, J. D. VOELKER, *ANATOMY OF A MURDER* (1958), an intense account of a murder trial.

<sup>4</sup> *E.g.*, M. LEVIN, *COMPULSION* (1957) (based upon Leopold and Loeb trial).

<sup>5</sup> *E.g.*, *INHERIT THE WIND* (1960), *AND JUSTICE FOR ALL* (1979).

<sup>6</sup> Television has perhaps been the most widely used medium. Films appearing on television have ranged from stories of nationally known trials, *e.g.* *HELTHER-SKELTER* (Charles Manson Family case), to cases involving particularly violent crimes such as rapes, to proceedings concerning incompetent defendants, *e.g.*, *DUMMY* (story of Donald Lang).

<sup>7</sup> This interest can remain for considerable periods of time. It would appear that the interest in the Bruno Hauptmann case has never died. The defendant there was convicted of kidnapping and murdering the Lindbergh child. Questions are still being raised as to whether the defendant received a fair trial and whether he actually committed the crimes as charged. On October 6, 1981, Governor Brendan T. Byrne of New Jersey announced that secret files maintained on the case would be opened in response to claims that an innocent man was executed in the "crime of the century." Sullivan, *Byrne to Release Lindbergh Files, 49 Years After the Kidnapping*, N.Y. Times, Oct. 7, 1981, § B, at 1, col. 4. For good discussions of the Hauptmann case, see Portman, *The Defense of Fair Trial from Shepard to Nebraska Press Association: Benign Neglect to Affirmative Action and Beyond*, 29

event. What transpires in the court room is public property."<sup>8</sup>

The interest of the media in criminal trials is among the "purest" in the press or speech arena. In such trials one need not be concerned with reporting which tends to incite,<sup>9</sup> is offensive to the general public,<sup>10</sup> may unfairly injure reputation,<sup>11</sup> or involves purely private activities.<sup>12</sup> The reporting of the criminal trial is factual, usually timely, and invariably newsworthy. As a result, the courts have taken great pains to ensure that any interference with media reporting of the criminal trial is minimal. The difficulty is that the public interest—albeit entitled to great weight—may not be the only interest present when a person stands to be deprived of his or her liberty through the criminal justice system. There are also interests in a fair trial, the rehabilitation of the accused, and the privacy of the witnesses and victims.

While consistently recognizing the news content of criminal trials, courts have been faced in recent years with a barrage of claims asking for limitation of media coverage of criminal trials. The Supreme Court has explored the claims in some detail in three principle areas: first, the reporting of certain facts in a trial, such as the names of the defendants or witnesses; second, the proposed limitation of attendance by media representatives at pretrial or trial proceedings; and third, the electronic broadcasting of criminal trials to the public. In this article I will initially explore the strong first amendment basis for media coverage of criminal trials. I will then consider these three areas as they converge with the first amendment interest in news gathering. My conclusion is that by recognizing this strong first amendment interest, the Supreme Court has treated the media with great deference, perhaps too much deference vis-à-vis certain defendants as well as witnesses and victims.

### THE FIRST AMENDMENT INTEREST

Few would argue with Thomas Jefferson's famous remark, "Our liberty depends on freedom of the press, and that cannot be limited without being lost."<sup>13</sup> As the Supreme Court said in one of the most famous first amendment cases ever decided, the United States has "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . ."<sup>14</sup> The first amendment principle

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STAN L. REV. 393 (1977); Seidman, *The Trial and Execution of Bruno Richard Hauptmann: Still Another Case that "Will Not Die"*, 66 GEO. L.J. 1 (1977).

<sup>8</sup> *Craig v. Harney*, 331 U.S. 367, 374 (1947).

<sup>9</sup> See generally *Dennis v. United States*, 341 U.S. 494 (1951) (conspiracy); *Terminiello v. Chicago*, 337 U.S. 1 (1949) ("fighting words").

<sup>10</sup> See generally *Miller v. California*, 413 U.S. 15 (1973) (obscenity).

<sup>11</sup> See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (defamation).

<sup>12</sup> See *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (invasion of privacy).

<sup>13</sup> 9 THE PAPERS OF THOMAS JEFFERSON 239 (J. Boyd ed. 1954).

<sup>14</sup> *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). In *Sullivan* the Court held

of free and open speech is readily accepted, and few restrictions will generally be allowed.<sup>15</sup> The difficulty of applying this basic notion in the criminal context is that the criminal defendant often vigorously argues that the principles of free speech conflict with his own personal right to a fair trial attended by due process. Such a claim has been with this country from its earliest roots. The defense lawyer for Aaron Burr claimed that jurors could not properly decide the 1807 case because of prejudicial articles carried in numerous newspapers.<sup>16</sup> Chief Justice Marshall was careful to consider the defendant's claims: "The jury should enter upon the trial with minds open to those impressions which the testimony and the law of the case ought to make, not with those preconceived opinions which will resist those impressions."<sup>17</sup>

While understanding the potential dangers to the workings of the criminal justice system, the courts have been consistently vigilant in upholding press rights when arguably in conflict with the rights of the defendant. Judges have stressed the great values served by media reporting of criminal trials. The Supreme Court has stated: "The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."<sup>18</sup> Similarly, Justice Brennan has written:

Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government. Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability.<sup>19</sup>

In spite of continued media criticism and skepticism concerning the judiciary's view of the so-called free press versus fair trial issue,<sup>20</sup> the

that the Constitution requires public officials in defamation cases to prove that the statement of the defendant had been published with actual malice—knowledge of the falsity or reckless disregard for the truth. The doctrine was later expanded to cover public figures as well. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

<sup>15</sup> For excellent discussions of the first amendment policy considerations, see Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191; Nimmer, *The Right to Speak From Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935 (1968).

<sup>16</sup> *United States v. Burr*, 25 F. Cas. 49, 49 (C.C.D. Va. 1807) (No. 14,692g).

<sup>17</sup> *Id.* at 50. See *Report of the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue*, 45 F.R.D. 391, 394 n.2 (1968).

<sup>18</sup> *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966).

<sup>19</sup> *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan J., concurring).

<sup>20</sup> Consider for instance, the comments of well-known journalist Bob Woodward as quoted

record of the courts in this regard has generally been impressive. A good example of the courts' attention to this matter is the ABSCAM cases.<sup>21</sup> In several of these cases, media representatives have asked that the tapes, which were shown to the jury,<sup>22</sup> be turned over to the media so that they could be shown on television news. The defendants have argued strenuously that the tapes, if shown to the public, could prejudice jury pools available for the cases or for retrials, and have contended that a delay in showing them on television would not seriously infringe first amendment rights. The courts have consistently rejected the defendants' claims.<sup>23</sup> Judges in these cases have recognized the defendants' interests, yet have stressed that these interests must be balanced against the public interest in immediately seeing matters of such great import.<sup>24</sup>

This is not to suggest that courts do not restrict the media in the reporting of criminal trials. There have been numerous instances of restrictions. Nevertheless, these have been in relatively narrow and unusual circumstances. For instance, hearings on pretrial evidentiary matters may

in *Stephenson*, *supra* note 2, at 66: "[T]here is an intense perception within the Court that the press is operating outside the public interest, that it is the big guy, the bully.' If the press will not police itself . . . 'then somebody else will, and the . . . Supreme Court is poised and anxious to do so.'"

<sup>21</sup> "ABSCAM" [is] a coined word from the first two letters of Abdul Enterprises, Ltd. and the word 'scam' . . . . *In re Application of Nat'l Broadcasting Co.*, 635 F.2d 945, 947 (2d Cir. 1980). Abdul Enterprises was the fictional business used in the FBI's "sting" operation. *Id.*

<sup>22</sup> Or in some cases, which were to be shown to the jury at a later time.

<sup>23</sup> *In re Application of Nat'l Broadcasting Co.*, 653 F.2d 609 (D.C. Cir. 1981); *United States v. Criden*, 648 F.2d 814 (3d Cir. 1981); *In re Application of Nat'l Broadcasting Co.*, 635 F.2d 945 (2d Cir. 1980).

<sup>24</sup> The trial judge in the District of Columbia Circuit case had rejected the broadcasters' position:

In denying the broadcasters' application the court relied primarily upon the defendants' interest in securing a fair and impartial jury should their cases be retried. The court noted that several defense motions were pending before it which the court characterized as "not frivolous." If new trials were granted, the court stated, release of the tapes would jeopardize the defendants' rights because (1) the broadcasters probably would play portions of the tapes at or near the beginning of any retrial, accompanied by references to the prior verdicts and the court's rulings on the defendants' motions and (2) the broadcasters probably would not play the tapes in their entirety, due to time restrictions, but would air only selected portions of the tapes in a manner presenting the defendants in the most unfavorable light.

*In re Application of Nat'l Broadcasting Co.*, 653 F.2d 609, 614-15 (D.C. Cir. 1981) (footnotes omitted). The appeals court disagreed:

Although the trial court characterized the motions filed . . . as "nonfrivolous", the prospect of a retrial remains speculative. We accordingly still remain wary of sanctioning denial of a posttrial application to copy and inspect judicial records based on the pendency of new trial requests that may ultimately be denied, although they cannot be dismissed at the threshold as frivolous. This is not a case where the court has indicated it is inclined to grant a new trial.

Furthermore, should the presently hypothetical second trial become a reality, we find nothing in the record to indicate that there would be significant difficulty in assembling a panel of the "impartial, 'indifferent' jurors" to which

be closed to the press and the public.<sup>25</sup> Moreover, in contrast to the ABSCAM cases, some trial judges refuse the media physical access to items of evidence. In *United States v. Gurney*,<sup>26</sup> the widely publicized trial of the former United States Senator, the media were denied access to "(1) exhibits not yet admitted into evidence; (2) transcripts of bench conferences held *in camera*; (3) written communications between the jury and the judge; (4) list of names and addresses of jurors; and (5) Mr. Gurney's grand jury testimony."<sup>27</sup> Recognizing that the trial judge could not restrain news coverage of the public trial or deny the media access to any information already within the public domain, the court of appeals affirmed the district judge's ruling since he had "merely refused to allow the appellants to inspect documents not a matter of public record."<sup>28</sup> Quoting from Chief Justice Warren's concurring opinion in the Billie Sol Estes case,<sup>29</sup> the court noted that "[w]hen representatives of the communications media attend trials they have no greater rights than other members of the public."<sup>30</sup> The basic notion of *Gurney* was established in the Richard Nixon tapes case, *Nixon v. Warner Communications, Inc.*<sup>31</sup> There, too, the media had asked to be able to make copies of items which had never been made physically available to the public. The Court specifically reaffirmed its first amendment holdings in the area of the criminal trial and repeated the words of Justice Black that the public trial is "a safeguard against any attempt to employ our courts as instruments of persecution."<sup>32</sup> Nevertheless, the Court refused the media access to the tapes:

[T]he press . . . was permitted to listen to the tapes and report on

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the defendants would be constitutionally entitled. . . . We . . . think it likely . . . that a significant percentage of the potential jury pool will not see or hear the tapes, or if they do, will quickly forget much of what they saw. In the words of the Second Circuit, we think there is somewhat of a tendency to "frequently overestimate the extent of the public's awareness of news".

*Id.* at 616 (footnotes omitted). *But see In re Application of KSTP Television*, 504 F. Supp. 360 (D. Minn. 1980). In *KSTP*, the judge refused to release to television stations videotape recordings of the kidnapper and his victim which had been shown at trial. The court recognized the "general right to inspect and copy public records," *id.* at 361, but found that the public release of the tapes would infringe on the victim's privacy. The court distinguished the ABSCAM cases because of the public interest in the tapes shown there. *Id.* at 363. *See also Belo Broadcasting Corp. v. Clark*, 654 F.2d 423 (5th Cir. 1981) (refusing access to tapes in "Brilab" sting operation case).

<sup>25</sup> *Capital Newspapers Div. of Hearst Corp. v. Clyne*, 82 A.D.2d 963, 440 N.Y.S.2d 779 (1981) (mem.); *see text accompanying notes 95-178 infra*.

<sup>26</sup> 558 F.2d 1202 (5th Cir. 1977), *cert. denied sub nom. Miami Herald Publishing Co. v. Krentzman*, 435 U.S. 968 (1978).

<sup>27</sup> *Id.* at 1207.

<sup>28</sup> *Id.* at 1208.

<sup>29</sup> *Estes v. Texas*, 381 U.S. 532, 584 (1965) (Warren, C.J., concurring).

<sup>30</sup> 558 F.2d at 1208 n.9.

<sup>31</sup> 435 U.S. 589 (1978).

<sup>32</sup> *Id.* at 610 (quoting *In re Oliver*, 333 U.S. 257, 270 (1948)).

what was heard. Reporters also were furnished transcripts of the tapes, which they were free to comment upon and publish. . . . Thus, the issue presented in this case is not whether the press must be permitted access to public information to which the public generally is guaranteed access, but whether these copies of the White House tapes—to which the public has never had *physical* access—must be made available for copying. . . .

The First Amendment generally grants the press no right to information about a trial superior to that of the general public.<sup>33</sup>

Thus, the courts will not hesitate to impose some curbs on the ability of the media to report the criminal trial. Still, these curbs are imposed in relatively rare cases where the public's right to know the circumstances of the trial will not be affected. The courts may be unwilling in some cases to give up videotapes; they are not willing to issue orders restricting press coverage or barring media representatives from the criminal trial. When the claim of restrictions on the substantive news is raised, the press normally prevails.

### PRETRIAL PUBLICITY

The allegiance of the courts to the media interest has been demonstrated quite saliently in several areas, but nowhere as significantly as in the pretrial publicity cases. The argument of the defendants in these cases is deceptively simple. The Constitution guarantees the defendant a fair and public trial in which the state's case will be evaluated by a jury of impartial citizens. In cases in which substantial publicity develops after the incident in question but before the trial, members of the jury pool may become so inundated with information that they cannot fairly review the evidence. Such a claim, if proven, would indicate a constitutional violation. "A fair trial in a fair tribunal is a basic requirement of due process."<sup>34</sup> "The theory of the law is that a juror who has formed an opinion cannot be impartial."<sup>35</sup>

Few experienced lawyers and judges doubt that the defense claim is correct, at least in some cases. Justice Brennan stated: "No one can seriously doubt, however, that uninhibited prejudicial pretrial publicity may destroy the fairness of a criminal trial . . ."<sup>36</sup> A committee of federal judges chaired by the Honorable Irving R. Kaufman remarked: "[T]he Com-

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<sup>33</sup> 435 U.S. at 609. *But see* United States *ex rel.* Latimore v. Sielaff, 561 F.2d 691 (7th Cir. 1977), *cert. denied*, 434 U.S. 1076 (1978). In *Sielaff* spectators were excluded during a rape victim's testimony at trial, but members of the media were allowed to attend. Upholding this ruling, the court of appeals emphasized the trauma to the victim and the lack of any harm to the defendant or the general public.

<sup>34</sup> *In re Murchison*, 349 U.S. 133, 136 (1955).

<sup>35</sup> *Reynolds v. United States*, 98 U.S. 145, 155 (1878).

<sup>36</sup> *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 587 (1976) (Brennan, J., concurring).

mittee cannot ignore the fact that it has become increasingly apparent that in a widely publicized or sensational case, the right of the accused to trial by an impartial jury can be seriously threatened by the conduct of news media prior to and during trial."<sup>37</sup> In his concurring opinion in *Irvin v. Dowd*,<sup>38</sup> Justice Frankfurter warned that "such extraneous influences, in violation of the decencies guaranteed by our Constitution, are sometimes so powerful that an accused is forced, as a practical matter, to forego trial by jury."<sup>39</sup>

During the 1960's, at a time when the Supreme Court was carefully construing constitutional rights of the accused at trial,<sup>40</sup> the Court was faced with numerous cases in which strong defense claims were made with respect to prejudicial pretrial publicity. Three of these cases, in particular, were to guide lawyers and judges.<sup>41</sup> In *Irvin v. Dowd*<sup>42</sup> residents of a small town received an incredible amount of inflammatory publicity about the defendant for a six-month period prior to trial, including: defendant's confession to burglaries and murders (made public by an official press release), information as to prior convictions of the defendant, and his offer to plead guilty to avoid the death penalty, an offer which was turned down by the government. The trial judge granted a defense motion for a change of venue, but under state statute the change could only be to an adjacent county which had received basically the same news coverage. Defense counsel was able to show bitter citizen prejudice against the defendant.<sup>43</sup> Four-hundred thirty persons were called for jury service

<sup>37</sup> Report on the Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue, *supra* note 17, at 394.

<sup>38</sup> 366 U.S. 717, 729-30 (1961) (Frankfurter, J., concurring).

<sup>39</sup> *Id.* at 730.

<sup>40</sup> During this period the Court decided the following cases: *United States v. Wade*, 388 U.S. 218 (1967) (defendant entitled to counsel at postindictment lineup); *Miranda v. Arizona*, 384 U.S. 436 (1966) (fifth amendment requires substantial warnings to accused undergoing custodial interrogation); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (sixth amendment right to counsel applies to states); *Mapp v. Ohio*, 367 U.S. 643 (1961) (exclusionary rule applies to states in fourth amendment search and seizure cases).

<sup>41</sup> The list of important pretrial publicity cases could be far longer. *See, e.g.*, *Murphy v. Florida*, 421 U.S. 794 (1975) (conviction affirmed where 20 veniremen indicated belief of defendant's guilt; no showing of community "poisoned" against defendant); *Marshall v. United States*, 360 U.S. 310 (1959) (defendant's conviction reversed because seven sitting jurors exposed to news accounts of defendant's prior convictions and arrests); *Stroble v. California*, 343 U.S. 181 (1952) (conviction affirmed where defendant failed to show that publicity was such as to "necessarily prevent fair trial").

<sup>42</sup> 366 U.S. 717 (1961).

<sup>43</sup> *Id.* at 720, 725-27. Sadly, this type of unfortunate atmosphere continues. In *People v. Botham*, \_\_\_ Colo. \_\_\_, 629 P.2d 589 (1981), 89 jurors were explicitly questioned about pretrial publicity in a case of widely reported homicides. Eighty-six of the 89 admitted to seeing substantial news coverage of the story before being called as jurors. Fifty-seven admitted that they felt, prior to trial, that the defendant was guilty as charged. Seven of the 14 jurors called to hear the case believed, at one time or another, that the defendant was guilty. *Id.* at 599-600. The Colorado Supreme Court reversed the conviction, finding that the "pattern of prejudice throughout the community could not be overcome by the jurors' assurances of impartiality." *Id.* at 600.

at trial. Two-hundred sixty-eight were excused because they had made up their minds with regard to guilt. Eight of the twelve who served as jurors thought the defendant was guilty, but indicated that they could nevertheless render an impartial verdict. One juror said, "You can't forget what you hear and see."<sup>44</sup> The defendant's conviction was reversed. The Court stated: "With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion . . . ."<sup>45</sup>

*Rideau v. Louisiana*<sup>46</sup> involved a similar extreme situation. The defendant there was a confessed bank robber who had killed a bank employee during the course of the robbery. He was given the death sentence after trial. The defendant's confession had been obtained in the jail where he was being held the morning following the robbery and murder.<sup>47</sup> "A local television station had been allowed, perhaps invited, to videotape the confession and the station then broadcast it to tens of thousands of members of the community from which the jury was drawn."<sup>48</sup> Without explicitly finding any actual prejudicial impact on the jury itself,<sup>49</sup> the Court reversed the defendant's conviction. "Any subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality."<sup>50</sup>

No doubt the leading pretrial publicity case is *Sheppard v. Maxwell*.<sup>51</sup> The defendant, a well-known Cleveland doctor, was charged with the murder of his wife. During the investigation and the trial, the local newspapers covered the story in detailed and inflammatory fashion. There were daily headlines and editorials indicating the defendant's guilt. Revealing evidence from the state's case was presented, and public officials were accused of "mollycoddling" the defendant.<sup>52</sup> Despite the fact that the

<sup>44</sup> 366 U.S. at 727-28.

<sup>45</sup> *Id.* The defendant had argued in a sweeping fashion that his conviction should be reversed simply because the public had received such a large amount of information about him and about the case. This view the Court rejected:

It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case.

*Id.* at 722.

<sup>46</sup> 373 U.S. 723 (1963).

<sup>47</sup> *Id.* at 724-25.

<sup>48</sup> *Martin v. Warden, Huntingdon State Correctional Inst.*, 653 F.2d 799, 805 n.5 (3d Cir. 1981) (discussing *Rideau*).

<sup>49</sup> Stephenson, *supra* note 2, at 49. For an interesting debate on the need for such a finding, compare the majority and dissenting opinions in *United States v. Poludniak*, 657 F.2d 948 (8th Cir. 1981).

<sup>50</sup> 373 U.S. at 726.

<sup>51</sup> 384 U.S. 333 (1966).

<sup>52</sup> *Id.* at 338-42. The Court described the rather incredible pretrial and trial situation:

Supreme Court did not hear the case until twelve years later,<sup>53</sup> it ordered a new trial for the defendant.<sup>54</sup> The Court found that "this deluge of

During the inquest . . . a headline in large type stated: "Kerr [Captain of the Cleveland Police] Urges Sheppard's Arrest." In the story, Detective McArthur "disclosed that scientific tests at the Sheppard home have definitely established that the killer washed off a trail of blood from the murder bedroom to the downstairs section," a circumstance casting doubt on Sheppard's accounts of the murder. No such evidence was produced at trial. The newspapers also delved into Sheppard's personal life. Articles stressed his extramarital love affairs as a motive for the crime. The newspapers portrayed Sheppard as a Lothario, fully explored his relationship with Susan Hayes, and named a number of other women who were allegedly involved with him. The testimony at trial never showed that Sheppard had any illicit relationships besides the one with Susan Hayes.

On July 23, an editorial entitled "Why Don't Police Quiz Top Suspect" demanded that Sheppard be taken to police headquarters. It described him in the following language:

"Now proved under oath to be a liar, still free to go about his business, shielded by his family, protected by a smart lawyer who has made monkeys of the police and authorities, carrying a gun part of the time, left free to do whatever he pleases. . . ."

A front-page editorial on July 30 asked: "Why Isn't Sam Sheppard in Jail?" It was later titled "Quit Stalling—Bring Him In."

. . . Twenty-five days before the case was set, 75 veniremen were called as prospective jurors. All three Cleveland newspapers published the names and addresses of the veniremen. As a consequence, anonymous letters and telephone calls, as well as calls from friends, regarding the impending prosecution were received by all of the prospective jurors.

. . . On the sidewalk and steps in front of the courthouse, television and newsreel cameras were occasionally used to take motion pictures of the participants in the trial, including the jury and the judge. Indeed, one television broadcast carried a staged interview of the judge as he entered the courthouse. In the corridors outside the courtroom there was a host of photographers and television personnel with flash cameras, portable lights and motion picture cameras. This group photographed the prospective jurors during selection of the jury. After the trial opened, the witnesses, counsel, and jurors were photographed and televised whenever they entered or left the courtroom.

*Id.* at 340-44.

<sup>53</sup> After the Ohio Supreme Court affirmed Sheppard's conviction, *State v. Sheppard*, 165 Ohio St. 293, 135 N.E.2d 340 (1956), the United States Supreme Court denied certiorari, 352 U.S. 910 (1956). Eight years later the United States district court found, on a writ of habeas corpus, that Sheppard had been denied due process. *Sheppard v. Maxwell*, 231 F. Supp. 37 (S.D. Ohio 1964). The court of appeals reversed, 346 F.2d 707 (6th Cir. 1965), allowing the United States Supreme Court to grant certiorari and affirm the granting of the writ by the district court.

<sup>54</sup> As the Third Circuit properly pointed out, the Supreme Court in *Sheppard* did not "say that Sheppard was denied due process by the judge's refusal to take precautions against the influence of pretrial publicity alone" . . . [R]ather the Court ordered that a writ of habeas corpus issue because the trial judge permitted bedlam to reign at the trial, failed to prevent serious disruptive influences in the court, and allowed the intrusion of the media on the deliberative processes occurring in the courtroom." *Martin v. Warden, Huntingdon State Correctional Inst.*, 653 F.2d 799, 805 n.5 (3d Cir. 1981) (citation omitted) (quoting *Sheppard v. Maxwell*, 384 U.S. 333, 354 (1966)).

publicity reached at least some of the jury"<sup>55</sup> and that "bedlam reigned at the courthouse during the trial and newsmen took over practically the entire courtroom . . ."<sup>56</sup> The Court<sup>57</sup> chastised the trial judge for failing to protect the defendant's rights. It suggested several protective measures: first, limiting the number of reporters in the courtroom and regulating their conduct;<sup>58</sup> second, "insulating" the witnesses from public interviews;<sup>59</sup> and third, making "some effort to control the release of leads, information, and gossip to the press by police officers, witnesses, and the counsel for both sides."<sup>60</sup> The Court added:

[W]here there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should *continue the case* until the threat abates, or *transfer it* to another county not so permeated with publicity. In addition, *sequestration of the jury* was something the judge should have raised *sua sponte* with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. . . . The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. *Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the court should be permitted to frustrate its function. Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.*<sup>61</sup>

It is not enough for the defendant to show pretrial publicity. As later noted, "pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial."<sup>62</sup> The ultimate question is narrow, as stated in the Richard Speck case: "The basic consideration, however, is not the amount of publicity in a particular case, but whether the defendant in that case received a fair and impartial trial . . ."<sup>63</sup> The courts'

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<sup>55</sup> 384 U.S. at 357. For a more recent version of this sort of pretrial publicity problem, see *Commonwealth v. Daugherty*, 493 Pa. 273, 426 A.2d 104, 106 (1981).

<sup>56</sup> 384 U.S. at 355.

<sup>57</sup> Only Justice Black dissented, without opinion. *Id.* at 363.

<sup>58</sup> *Id.* at 358.

<sup>59</sup> *Id.* at 359.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 363 (emphasis in original). The handling of the trial of Dr. George Nichopoulos, Elvis Presley's doctor, who was charged with overprescribing drugs for Presley and others, is instructive. In that case, the Memphis trial judge, cognizant of the immense publicity, issued detailed and careful orders regulating the use of cameras and sound equipment in the lobbies of the courtroom. *N.Y. Times*, Oct. 1, 1981, § A, at 16, col. 6.

<sup>62</sup> *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 554 (1976). In some cases there will be no prejudice even with great pretrial publicity due to the passage of time between the underlying incident and the court proceedings. In *State v. Beavers*, 394 So. 2d 1218 (La. 1981), the crime was alleged to have been committed in January 1972. The testimony showed that most coverage of the incident had died down in Baton Rouge following the original trial in April 1973. Certainly, in 1980 (at the time of the retrial) evidence would fail "to establish clearly the existence of such prejudice in the collective mind of the community as to make a fair trial impossible." *Id.* at 1225.

<sup>63</sup> *People v. Speck*, 41 Ill. 2d 177, 183, 242 N.E.2d 208, 212 (1968).

adherence to this principle, as well as the general deference given to the rights of the media in criminal cases, is demonstrated in the case which arose after a trial judge attempted to eliminate all difficulties with prejudicial pretrial publicity.

*NEBRASKA PRESS ASSOCIATION v. STUART*<sup>64</sup>

The state trial judge in *Nebraska Press Association v. Stuart* took the Supreme Court's suggestions to heart and "acted responsibly, out of a legitimate concern, in an effort to protect the defendant's right to a fair trial."<sup>65</sup> The defendant was accused of murdering six members of a family in a Nebraska town of about 850 people. The crime attracted widespread news coverage, locally and nationwide. Three days after the crime, both the prosecuting attorney and the defense counsel asked the trial court to enter an order relating to "'matters that may or may not be publicly reported or disclosed to the public'" due to the "'mass coverage by news media' and the 'reasonable likelihood of prejudicial news which would make difficult, if not impossible, the impaneling of an impartial jury and tend to prevent a fair trial.'"<sup>66</sup> After hearing argument, the judge entered an order which prohibited all persons in attendance from "'releas[ing] or authoriz[ing] the release for public dissemination in any form or manner whatsoever any testimony given or evidence adduced."<sup>67</sup> The Nebraska Supreme Court altered the order somewhat,<sup>68</sup> but defended the restrictions which were being imposed because of the defendant's vital interest in a trial by an impartial jury.<sup>69</sup> The modified order prohibited reporting of three items: first, confessions or admissions made by the defendant to law enforcement officers; second, confessions or admissions made to other persons (except members of the press); and third, other facts "strongly implicative of the accused."<sup>70</sup> The order expired when the jury was impaneled.<sup>71</sup>

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<sup>64</sup> 427 U.S. 539 (1976). For good discussions of the case, see NOWAK, ROTUNDA & YOUNG, CONSTITUTIONAL LAW 765-67 (1978); Barnett, *The Puzzle of Prior Restraint*, 29 STAN. L. REV. 539 (1977); Schmidt, *Nebraska Press Association: An Expansion of Freedom and Contraction of Theory*, 29 STAN. L. REV. 431 (1977).

<sup>65</sup> 427 U.S. at 555.

<sup>66</sup> *Id.* at 542.

<sup>67</sup> *Id.* The lower court, though not the state supreme court, also required members of the press to observe the Nebraska bar-press guidelines, which were voluntary standards adopted by members of the state bar and news media to deal with the reporting of crimes in criminal trials. *Id.* at 542, 545, n.1. Members of the media expressed great skepticism as to the likely result of this case when it reached the United States Supreme Court. See note 99 *infra*.

<sup>68</sup> *State v. Simants*, 194 Neb. 783, 801, 236 N.W.2d 794, 805 (1975).

<sup>69</sup> *Id.* at 799-801, 236 N.W.2d at 804-05.

<sup>70</sup> *Id.* at 801, 236 N.W.2d at 805.

<sup>71</sup> 427 U.S. at 546. Though the order expired, the Court concluded that the case was not moot because the defendant could be retried and because similar orders could be entered in the State of Nebraska. *Id.* at 546-47.

Chief Justice Burger, writing for the Court, began by noting that the conflict between the right to a free press and the right to a fair trial was "almost as old as the Republic."<sup>72</sup> After looking to the many pretrial publicity cases,<sup>73</sup> he concluded that the cases showed that pretrial publicity, even adverse publicity, would not necessarily lead to an unfair trial. Instead, it was the judge's responsibility to make sure that the jury impaneled could fairly and impartially resolve the issues in the case.<sup>74</sup>

Balanced against this right to a fair trial was the constitutional restriction against limitations on freedom of the press. The Court was especially troubled by "orders that prohibit the publication or broadcast of particular information or commentary—orders that impose a 'previous' or 'prior' restraint on speech."<sup>75</sup> After exploring earlier first amendment decisions,<sup>76</sup> the Court concluded that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."<sup>77</sup> Although the Court refused to hold that prior restraints on news agencies in criminal trials were per se unconstitutional,<sup>78</sup> it was careful to evaluate the facts in the record to determine whether such facts supported "the entry of a prior restraint on publication, one of the most extraordinary remedies known to our jurisprudence."<sup>79</sup> Looking to three important factors, the Court decided that the prior restraint in this case was unjustified.

The first question was whether the trial judge was correct in determining that there would be intense pretrial publicity about the case. All members of the Court had little trouble concluding that the trial judge was right.<sup>80</sup> The news media were overwhelming the small Nebraska town, subjecting the case to intense scrutiny and publicity. The next question was whether measures other than a prior restraint would have reduced the pretrial publicity. Placing the burden heavily on the state, the Court found that there was no finding that alternatives would have failed to protect the defendant's rights. The alternatives were change of venue,

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<sup>72</sup> *Id.* at 547.

<sup>73</sup> In particular, the Chief Justice considered the *Irvin, Rideau*, and *Sheppard* cases. *Id.* at 551-55. For discussion of these cases, see text accompanying notes 42-61 *supra*.

<sup>74</sup> 427 U.S. at 554-55.

<sup>75</sup> *Id.* at 556.

<sup>76</sup> The Court relied heavily on *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931) ("[I]t has been generally, if not universally, considered that it is the chief purpose of the [first amendment] to prevent previous restraints upon publication."), and on *New York Times Co. v. United States*, 403 U.S. 713 (1971). 427 U.S. at 556-62.

<sup>77</sup> *Id.* at 559.

<sup>78</sup> *Id.* at 570. *But see id.* at 572-617 (Brennan, J., concurring in the judgment) (discussed in text accompanying notes 75-79 *infra*). Media representatives argued strongly that a per se rule should be adopted because of the large number of prior restraints and gag orders which had been issued in response to adverse pretrial publicity claims. See 65 ILL. B.J. 469, 471 (1977).

<sup>79</sup> 427 U.S. at 562.

<sup>80</sup> *Id.* at 562-63.

postponement of the trial, substantial questioning of respective jurors, and instructions to the jurors on their sworn duties.<sup>81</sup> Additionally, the Justices wondered how effective the restraining order in this case would have been in preventing prejudicial publicity. Noting that the trial court could not have jurisdiction over news agencies not physically present in court, and further noting that areas not specified in the order might well prove to be prejudicial, the Court found it unlikely that the judge's order would have protected the defendant's rights.<sup>82</sup>

The Chief Justice stopped short of holding that a prior restraint order could never be issued in connection with adverse pretrial publicity,<sup>83</sup> but made clear that it would be the rare case in which such an order would be constitutionally valid.<sup>84</sup> In the instant case, the Court held:

[W]ith respect to the order entered in this case prohibiting reporting or commentary on judicial proceedings held in public, the barriers have not been overcome; to the extent that this order restrained publication of such material, it is clearly invalid. To the extent that it prohibited publication based on information gained from other

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<sup>81</sup> *Id.* at 563-65 (citing *Sheppard v. Maxwell*, 384 U.S. 333, 357-62 (1966)). Justice Erickson of the Colorado Supreme Court explores these alternatives in Erickson, *Fair Trial and Free Press: The Practical Dilemma*, 29 STAN. L. REV. 485 (1977).

<sup>82</sup> 427 U.S. at 566-67. In addition, the Court expressed some question as to the impact of media coverage as opposed to the normal rumor mill present in a small community. In a community of 850 people, "rumors would travel swiftly by word of mouth [and] could . . . be more damaging than reasonably accurate news accounts. But . . . a whole community cannot be restrained. . . ." *Id.* at 567. One commentator argues that pretrial publicity will rarely affect the jury:

The short of my conclusions is that newspaper publicity, or any other assertions of the facts of a case made outside of court, have virtually no impact upon the jury trying the case. It is not that all jurors are without prejudice. . . . In deciding the case before them, however, the jurors almost invariably assumed as a matter important to their status that they knew more about the facts of the case than any newspaper reporter and that their superior understanding was due to their close observation of the trial itself. Moreover, I have reason to believe that jurors, like most other Americans, mistrust the accuracy of specific statements reported in the press and have a poor memory for these things. They seem to be much more influenced by other jurors' arguments, during deliberations, and generally the debates and social pressures of deliberation determine the verdict.

Kaplan, *Of Babies and Bathwater*, 29 STAN. L. REV. 621, 623 (1977). For excellent discussions of the empirical evidence in this area, see Simon, *Does the Court's Decision in Nebraska Press Association Fit the Research Evidence on the Impact on Jurors of News Coverage?*, 29 STAN. L. REV. 515 (1977); J. Buddenbaum, D. Weaver, R. Holsinger & C. Brown, *Pretrial Publicity and Juries: A Review of Research* (Indiana University School of Journalism, March 1981).

<sup>83</sup> The Chief Justice stated:

However difficult it may be, we need not rule out the possibility of showing the kind of threat to fair trial rights that would possess the requisite degree of certainty to justify restraint. This Court has frequently denied that First Amendment rights are absolute and has consistently rejected the proposition that a prior restraint can never be employed.

427 U.S. at 569-70.

sources, we conclude that the heavy burden imposed as a condition to securing a prior restraint was not met. . . .<sup>85</sup>

The Chief Justice's opinion strongly reaffirmed the important first amendment interest in the reporting of criminal trials in a timely and unrestricted fashion. Still, other members of the Court had an even stronger view of the first amendment guarantee, though they recognized the important rights of the defendant to a fair trial. Justice White stated that there was "grave doubt" in his mind "whether orders with respect to the press such as were entered in this case would ever be justifiable."<sup>86</sup> Justice Powell wrote:

In my judgment a prior restraint properly may issue only when it is shown to be necessary to prevent the dissemination of prejudicial publicity that otherwise poses a high likelihood of preventing, directly and irreparably, the impaneling of a jury meeting the Sixth Amendment requirement of impartiality. This requires a showing that (i) there is a clear threat to the fairness of trial, (ii) such a threat is posed by the actual publicity to be restrained, and (iii) no less restrictive alternatives are available. Notwithstanding such a showing, a restraint may not issue unless it also is shown that previous publicity or publicity from unrestrained sources will not render the restraint inefficacious. The threat to the fairness of the trial is to be evaluated in the context of Sixth Amendment law on impartiality, and any restraint must comply with the standards of specificity always required in the First Amendment context.<sup>87</sup>

The strongest position in favor of the media was taken by Justice Brennan, with whom Justices Stewart and Marshall joined. He began by conceding that the right to a fair trial was "the most fundamental of all freedoms"<sup>88</sup> and "essential to the preservation and enjoyment of all other rights, providing a necessary means of safeguarding personal liberties against government oppression,"<sup>89</sup> and that "uninhibited prejudicial pretrial publicity may destroy the fairness of a criminal trial."<sup>90</sup> Nevertheless, he concluded that courts cannot impose any prior restraints "on the reporting of or commentary upon information revealed in open court proceedings, disclosed in public documents, or divulged by other sources with respect to the criminal justice system . . . ."<sup>91</sup> As the Chief Justice had written, Brennan found that there were numerous alternatives to prior restraint. Justice Brennan did not find that there was any in-

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<sup>84</sup> *Id.* at 570. See also Note, *Prior Restraint on Media Publication to Protect Criminal Trial Must Meet Strict Requirements*, 25 U. KAN. L. REV. 258 (1977).

<sup>85</sup> 427 U.S. at 570.

<sup>86</sup> *Id.* at 570-71 (White, J., concurring).

<sup>87</sup> *Id.* at 571-72 (Powell, J., concurring).

<sup>88</sup> *Id.* at 586 (Brennan, J., concurring) (quoting *Estes v. Texas*, 381 U.S. 532, 540 (1965)).

<sup>89</sup> *Id.* at 586 (Brennan, J., concurring).

<sup>90</sup> *Id.* at 587.

<sup>91</sup> *Id.* at 612.

herent conflict between the free press and fair trial rights,<sup>92</sup> but he made clear that the potential for harm resulting from prior restraints was great and the interests of the first amendment were paramount in resolving whatever conflict might exist:

Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government. Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability.<sup>93</sup>

Some may argue that the majority of the Court in *Nebraska Press* did not go far enough in rejecting the notion of prior restraints in the pretrial publicity cases even though all members of the Court heavily emphasized the first amendment interest in news media coverage of criminal trials. In the period immediately after the case numerous groups of lawyers, judges, and journalists were formed to study the matter and all "deferred" to the first amendment interests by suggesting methods for the elimination of potentially unfair pretrial publicity other than the prior restraint.<sup>94</sup> With respect to the competing interest of the fair trial, the

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<sup>92</sup> But I would reject the notion that a choice is necessary, that there is an inherent conflict that cannot be resolved without essentially abrogating one right or the other. . . . For although there may in some instances be tension between uninhibited and robust reporting by the press and fair trials for criminal defendants, judges possess adequate tools short of injunctions against reporting for relieving that tension.

*Id.* at 611-12.

<sup>93</sup> *Id.* at 587. Justice Stevens chose not to answer the question of whether a per se rule against prior restraints was required under the Constitution. He indicated, however, that he subscribed to most of what Justice Brennan said and "if ever required to face the issues squarely, [I] may well accept his ultimate conclusion." *Id.* at 617 (Stevens, J., concurring).

<sup>94</sup> See Stephenson, *supra* note 2, at 51-52. Typical of the study groups' approaches is Standard 8-3.5 of 2 ABA STANDARD FOR CRIMINAL JUSTICE, FAIR TRIAL AND FREE PRESS (2d ed. 1980), which provides as follows:

(a) If there is a substantial possibility that individual jurors will be ineligible to serve because of exposure to potentially prejudicial material, the examination of each juror with respect to exposure shall take place outside the presence of other chosen and prospective jurors. An accurate record of this examination shall be kept by court reporter or tape recording whenever possible. The questioning shall be conducted for the purpose of determining what the prospective juror has read and heard about the case and how any exposure has affected that person's attitude toward the trial, not to convince the prospective juror that an inability to cast aside any preconceptions would be a dereliction of duty.

(b) Both the degree of exposure and the prospective juror's testimony as to state of mind are relevant to the determination of acceptability. A prospective juror testifying to an inability to overcome preconceptions shall be subject to challenge for cause no matter how slight the exposure. If the prospec-

first amendment interest put forth by media representations has fared well in the pretrial publicity cases, at least when confronted with prior restraints. In very different areas the approaches taken by trial judges have not been as extreme as in *Nebraska Press*. In these areas interests other than the fair trial claim are powerfully asserted. Again, however, the first amendment interest as manifested in free press access to criminal trials normally fares quite well.

## THE BALANCE OF COMPETING INTERESTS

### A. Closing the Proceedings

After *Nebraska Press* it became apparent that a prior order restricting coverage of the pretrial and trial proceedings would be difficult, if not impossible, to obtain.<sup>95</sup> On the other hand, the Court in *Nebraska Press* had made clear that in many cases prejudicial pretrial publicity will seriously and adversely affect the opportunity of the defendant to receive a fair trial. The question then became: How should the courts proceed with respect to protecting the defendant's interest without unduly restricting the news media coverage of the public event? The obvious answer for many judges was to close portions of the proceedings. If closure were successful, information available only during those proceedings would not become generally available to the public. The argument in favor of closure became particularly compelling when the news reports by the media related to evidence which would be inadmissible at trial. Such inadmissible evidence could include "the past criminal record of the defendant [and]

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tive juror remembers information that will be developed in the course of the trial, or that may be inadmissible but does not create a substantial risk of impairing judgment, that person's acceptability shall turn on the credibility of testimony as to impartiality. If the formation of an opinion is admitted, the prospective juror shall be subject to challenge for cause unless the examination shows unequivocally the capacity to be impartial. A prospective juror who has been exposed to and remembers reports of highly significant information, such as the existence or contents of a confession, or other incriminating matters that may be inadmissible in evidence, or substantial amounts of inflammatory material, shall be subject to challenge for cause without regard to the prospective juror's testimony as to state of mind.

(c) Whenever there is a substantial likelihood that, due to pretrial publicity, the regularly allotted number of peremptory challenges is inadequate, the court shall permit additional challenges to the extent necessary for the impaneling of an impartial jury.

(d) Whenever it is determined that potentially prejudicial news coverage of a criminal matter has been intense and has been concentrated in a given locality in a state (or federal district), the court shall have authority in jurisdictions where permissible to draw jurors from other localities in that state (or district).

<sup>95</sup> Recall that in *Nebraska Press* it was not at all certain whether a majority said that a prior restraint would ever be valid. See notes 86-93 & accompanying text *supra*.

illegally seized evidence or confessions that . . . are constitutionally inadmissible."<sup>96</sup> This type of argument led to revised American Bar Association standards allowing for the exclusion of the public from pretrial as well as trial hearings which would normally be held outside the presence of the jury.<sup>97</sup>

If the closure cases had been limited to cases in which it was vital for the fairness of the trial to close the hearings,<sup>98</sup> and if it was clear that no alternative would solve the problem,<sup>99</sup> the major constitutional debate might not have occurred. The cases were not so limited. As Carl Stern, NBC news correspondent and also an attorney, put it,

The courts were not placed outside the sort of public supervision that lies at the very heart of self-government. . . . Yet, lawyers . . . are trained to think in terms of secrecy. [The lawyer's] first instinct is

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<sup>96</sup> Kaplan, *Free Press/Fair Trial Rights in Conflict: Freedom of the Press and the Rights of the Individual*, 29 OKLA. L. REV. 361, 361-62 (1976).

<sup>97</sup> 2 ABA STANDARDS FOR CRIMINAL JUSTICE FAIR TRIAL AND FREE PRESS, *supra* note 94, at Standard 8-3.6(d). This standard provides:

If the jury is not sequestered, the defendant shall be permitted to move that the public, including representatives of the news media, be excluded from any portion of the trial that takes place outside the presence of the jury if:

(i) the dissemination of information from the hearing would pose a clear and present danger to the fairness of the trial, and

(ii) the prejudicial effect of such information on the jurors cannot be avoided by any reasonable alternative means. With the consent of the defendant, the court may take such action on its own motion or at the suggestion of the prosecution. Whenever such action is taken, a complete record of the proceedings from which the public has been excluded shall be kept and shall be made available to the public following the completion of the trial or earlier if consistent with trial fairness. Nothing in this recommendation is intended to interfere with the power of the court, in connection with any hearing held outside the presence of the jury, to caution those present that dissemination of specified information by any means of public communication, prior to the rendering of the verdict, may jeopardize the right to a fair trial by an impartial jury.

<sup>98</sup> In the terms of the ABA Standards, "a clear and present danger to the fairness of the trial." *Id.*

<sup>99</sup> The obvious alternatives would be an intensive voir dire or a change of venue. For views of the effectiveness of these techniques, compare the statements made by news correspondent Carl Stern with those by law professor John Kaplan:

But right now there are very few barriers to a judge closing his courtroom or moving a substantial portion of a proceeding into chambers. . . . The judges say it happens only in controversial cases, and of course, that is true. But it probably is the controversial ones (where the judges are most likely to impose restraints) that are precisely the ones the public has the greatest need and right to know about. . . .

. . . The Task Force in which I participated found there was no reason to close pretrial proceedings or to issue gag orders except in those rare cases where the life of an informant or witness might be endangered. While the voir dire may not be a perfect device, the evidence is persuasive that a jury can be found in virtually every case that has not been influenced by pretrial publicity. Most pretrial publicity occurs months before the actual date of trial and has subsided or been dissipated in a swirl of conflicting accounts. . . . I remember that in the Mitchell-Haldeman-Erichman trial, approximately three prospective jurors out of each 75-member panel swore they'd never even heard

to ask to see the judge privately, to have some *closed-door* hearings. . . . But what it all adds up to is that many lawyers still don't appreciate that when a case gets down to a *public* courthouse, it is no longer a private matter.<sup>100</sup>

The question was put at issue in cases where it did not seem that closure was essential to the fairness of the trial, or where reasonable alternatives had not been attempted. In those cases the news media became concerned that they were being closed out of the proceedings for no good reason. In such cases,<sup>101</sup> the media contended that they had a first amendment right to attend the proceedings; this position led to the Court's decision in *Gannett Co. v. DePasquale*.<sup>102</sup>

The defendant in *Gannett* questioned whether the public has a "constitutional right to . . . access to a pretrial judicial proceeding, even though the accused, the prosecutor and the trial judge all have agreed to the closure of that proceeding in order to assure a fair trial."<sup>103</sup> The police in a suburb of Rochester, New York, investigated the disappearance of a man who seemed to have met a violent death. Two Rochester

of Watergate . . . . Pretrial publicity may make it more expensive to select a jury, more time-consuming perhaps; those are the tradeoffs we make in a free society to keep the workings of our courts open.

Stern, *Free Press/Fair Trial The Role of the News Media in Developing and Advancing Constitutional Processes*, 29 OKLA. L. REV. 349, 358 (1976).

[A] change of venue, in some cases, will work. . . . But in some cases it won't . . . . I know of no persuasive evidence that voir dire will solve the problems of reporting criminal records or illegally seized evidence. . . . There were three people, I believe, who, in the Watergate voir dire said they had never heard of Watergate. That is all very well, but it seems to me that just as we want an unprejudiced jury, we want a jury that has no imbeciles. . . .

So, this really is a problem, and it is not a problem where we can say, "Well, there is a first amendment," because we happen to have a fifth amendment with a due process clause, and we also have a sixth amendment which talks about impartial juries. There is a flat conflict, and there is just simply no way to get around it.

Kaplan, *supra* note 96, at 362.

<sup>100</sup> Stern, *supra* note 99, at 356. In a concurring opinion in *Westchester Rockland Newspapers, Inc. v. Leggett*, 48 N.Y.2d 430, 446, 399 N.E.2d 518, 527, 423 N.Y.S.2d 630, 640 (1979), Chief Judge Cooke responded to a request for closure:

[M]erely because a pending prosecution has aroused public interest does not lead inexorably to the conclusion that the fair trial rights of the defendant would be irrevocably prejudiced, or even jeopardized, by reports of what has transpired in pretrial proceedings. Such a conclusion would result in an unfortunate paradox: the greater the interest in a particular prosecution, the more apt the defendant to claim the possibility of prejudice and, concomitantly, the more likely that the proceeding will be isolated from public scrutiny.

<sup>101</sup> See, e.g., Stern, *supra* note 99, at 357; see generally Comment, *Richmond Case Widens Access, Spawns Doubts*, 66 A.B.A.J. 946, 947 (1980).

<sup>102</sup> 443 U.S. 368 (1979). For a good discussion of the case, see BeVier, *An Informed Public, An Informing Press: The Search for a Constitutional Principle*, 68 CAL. L. REV. 482 (1980).

<sup>103</sup> 443 U.S. at 370-71. While the Court first pointed out that the district attorney simply "did not oppose the motion," *id.* at 375, the opinion later went on to state that in the case "the defendants, the prosecutor, and the judge all agreed that closure of the pretrial suppression hearing was necessary to protect the defendants' right to a fair trial." *Id.* at 382 n.11.

newspapers gave considerable coverage to the disappearance and the later tracking down of the suspects in Michigan. Articles provided background information on the victim's life and the manner in which it was thought the victim had been killed. Coverage included the arraignment of the defendants on murder charges, the indictment, and the defendants' pleas of not guilty. The defendants moved to suppress statements on the ground that they had been given involuntarily; they also attempted to suppress evidence seized as fruits of the confessions. A hearing was scheduled by the trial judge on the motions.<sup>104</sup> At the hearing defense attorneys argued that the adverse publicity in the newspaper stories had affected the ability of the defendants to receive a fair trial. They requested that the public and press be excluded from the hearings on the motions to suppress. The district attorney did not oppose this request, and it was granted by the trial judge.<sup>105</sup> The trial judge stated, however, that in his view the press had a constitutional right of access to the hearing, but that this right "had to be balanced against the constitutional right of the defendants to a fair trial."<sup>106</sup> Finding that an open hearing would pose a "reasonable probability of prejudice to these defendants,"<sup>107</sup> the judge ruled that "the interest of the press and the public was outweighed in this case by the defendants' right to a fair trial."<sup>108</sup>

Writing for the Court,<sup>109</sup> Justice Stewart initially stressed the important role of the trial judge in determining that the defendants' due process rights were protected: "[A] trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity."<sup>110</sup> He described why the trial judge's obligation was particularly important in cases involving pretrial motions to suppress:

Publicity concerning pretrial suppression hearings such as the one involved in the present case poses special risks of unfairness. The whole purpose of such hearings is to screen out unreliable or illegally obtained evidence and insure that this evidence does not become known to the jury. Publicity concerning the proceedings at a pretrial hearing, however, could influence public opinion against a defendant and inform potential jurors of inculpatory information wholly inadmissible at the actual trial.

The danger of publicity concerning pretrial suppression hearings is particularly acute, because it may be difficult to measure with any degree of certainty the effects of such publicity on the fairness of

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<sup>104</sup> *Id.* at 371-75. At least seven stories appeared in each of the two newspapers before the pretrial motions were made. *Id.*

<sup>105</sup> *Id.* at 375.

<sup>106</sup> *Id.* at 376.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> Justice Stewart began his discussion by finding, as in *Nebraska Press*, that the dispute was not moot, as it was one which was "'capable of repetition, yet evading review.'" *Id.* at 377 (quoting *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911)).

<sup>110</sup> *Id.* at 378 (citation omitted).

the trial. After the commencement of the trial itself, inadmissible prejudicial information about a defendant can be kept from a jury by a variety of means. When such information is publicized during a pretrial proceeding, however, it may never be altogether kept from potential jurors. Closure of pretrial proceedings is often one of the most effective methods that a trial judge can employ to attempt to insure that the fairness of a trial will not be jeopardized by the dissemination of such information throughout the community before the trial itself has even begun.<sup>111</sup>

The opinion recognized "a strong societal interest in public trials,"<sup>112</sup> but remarked that such an interest "is a far cry . . . from the creation of a constitutional right on the part of the public."<sup>113</sup> Concluding that the sixth amendment guarantee of a public trial was for the benefit of the defendant,<sup>114</sup> the Court rejected the media's claim that "members of the general public have a constitutional right to attend a criminal trial," stating that "the history of the public-trial guarantee . . . ultimately demonstrates no more than the existence of a common-law rule of open civil and criminal proceedings."<sup>115</sup>

The opinion in *Gannett* raised more questions than it answered. While the basic question was whether the press had a constitutional right to attend the pretrial hearing, there was considerable discussion in the case as to the right of the public to attend *trials* as opposed to pretrial hearings.<sup>116</sup> While the media petitioners also argued that members of the press and the public had a right of access to pretrial hearings by reason of the first and fourteenth amendments, the Court reserved this question. Assuming *arguendo* that the media did have such a right, as the trial judge had held, the trial judge himself had found "under the circumstances of this case, that this right was outweighed by the defendants' right to a fair trial."<sup>117</sup> These difficult questions were left to be

<sup>111</sup> *Id.* at 378-79 (citation and footnote omitted).

<sup>112</sup> *Id.* at 383. The opinion continued: "Openness in court proceedings may improve the quality of testimony, induce unknown witnesses to come forward with relevant testimony, cause all trial participants to perform their duties more conscientiously, and generally give the public an opportunity to observe the judicial system." *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 380. The Court also stated:

All of this does not mean, of course, that failure to close a pretrial hearing, or take other protective measures to minimize the impact of prejudicial publicity, will warrant the extreme remedy of reversal of a conviction. But it is precisely because reversal is such an extreme remedy, and is employed in only the rarest cases, that our criminal justice system permits, and even encourages, trial judges to be overcautious in ensuring that a defendant will receive a fair trial.

*Id.* at 379 n.6.

<sup>115</sup> *Id.* at 384.

<sup>116</sup> Several times the opinion referred to the alleged sixth amendment right "to a public trial," and the right to "attend criminal trials." See *id.* at 382-84, 387.

<sup>117</sup> *Id.* at 393.

partially answered by other opinions in the case, and by *Richmond Newspapers, Inc. v. Virginia*.<sup>118</sup>

The Chief Justice, concurring in *Gannett*, argued that the holding in the case was limited to pretrial proceedings rather than trials and that different considerations were involved in the two.<sup>119</sup> Justice Powell, also concurring, agreed with the Chief Justice; however, he would have held explicitly that the reporters had an interest "protected by the First and Fourteenth Amendments in being present at the pretrial suppression hearing."<sup>120</sup> While finding such a first amendment right, he concluded that there might be situations in which the "unrestrained exercise of First Amendment rights poses a serious danger to the fairness of a defendant's trial."<sup>121</sup> Consequently, the defendant's sixth amendment trial interest would have to be weighed against the first amendment right of the media to report the court proceedings. Distinguishing *Nebraska Press*,<sup>122</sup> he concluded that with a proper test, the judge could order closure in spite of the strong public interest in the case.<sup>123</sup>

Like Justice Powell, Justice Rehnquist reached the first amendment issue raised by the media. However, he rejected the "proposition . . . that the First Amendment is some sort of constitutional 'sunshine law' that requires notice, an opportunity to be heard, and substantial reasons before a government proceeding may be closed to the public and press."<sup>124</sup>

The four dissenters,<sup>125</sup> in an opinion written by Justice Blackmun, rejected the view that "if the defense and the prosecution merely agree to have the public excluded from a suppression hearing, and the trial judge does not resist—as trial judges may be prone not to do, since nonresistance

<sup>118</sup> 448 U.S. 555 (1980).

<sup>119</sup> See 443 U.S. at 394-97 (Burger, C.J., concurring).

<sup>120</sup> *Id.* at 397 (Powell, J., concurring) (footnote omitted).

<sup>121</sup> *Id.* at 399.

<sup>122</sup> *Id.* ("[T]he gag order at issue in *Nebraska Press* . . . involved a classic prior restraint . . . . In the present case . . . we are confronted with a trial court's order that in effect denies access only to one . . . source.")

<sup>123</sup> *Id.* at 401. (Powell, J., concurring). Justice Powell stated the following test:

[I]t is the defendant's responsibility as the moving party to make some showing that the fairness of his trial likely will be prejudiced by public access to the proceedings. Similarly, if the State joins in the closure request, it should be given the opportunity to show that public access would interfere with its interests in fair proceedings or preserving the confidentiality of sensitive information. On the other hand, members of the press and public who object to closure have the responsibility of showing to the court's satisfaction that alternative procedures are available that would eliminate the dangers shown by the defendant and the State.

*Id.*

<sup>124</sup> *Id.* at 405 (Rehnquist, J., concurring). He relied on the Court's rulings, in a series of cases, indicating that there was no special right of access in the press to investigate prisons or to speak with prisoners. See *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974).

<sup>125</sup> Justices Brennan, White, and Marshall joined the dissent. 443 U.S. at 406.

is easier than resistance—closure shall take place . . .<sup>126</sup> They concluded that the sixth amendment to the Constitution “prohibits the States from excluding the public from a proceeding within the ambit of the Sixth Amendment’s guarantee without affording full and fair consideration to the public’s interests in maintaining an open proceeding.”<sup>127</sup> The dissenters stressed the significance of many pretrial proceedings and the need for the media to report them:

[T]he suppression hearing resembles and relates to the full trial in almost every particular. . . . Each side has incentive to prevail, with the result that the role of publicity as a testimonial safeguard, as a mechanism to encourage the parties, the witnesses, and the court to a strict conscientiousness in the performance of their duties, and in providing a means whereby unknown witnesses may become known, are just as important for the suppression hearing as they are for the full trial.

Moreover, the pretrial suppression hearing often is critical, and it may be decisive, in the prosecution of a criminal case. If the defendant prevails, he will have dealt the prosecution’s case a serious, perhaps fatal, blow; the proceeding often then will be dismissed or negotiated on terms favorable to the defense. If the prosecution successfully resists the motion to suppress, the defendant may have little hope of success at trial (especially where a confession is in issue), with the result that the likelihood of a guilty plea is substantially increased.<sup>128</sup>

Justice Blackmun recognized, however, that occasions could arise in which the needs of the media would conflict with the needs of the defendant. He stated that the public might be excluded from “portions of the proceeding at which the prejudicial information would be disclosed,”<sup>129</sup> but that a record of the *in camera* proceedings should be available to the public “as soon as the threat to the defendant’s fair-trial right has passed.”<sup>130</sup> The dissenters gave a short answer to the question raised by

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<sup>126</sup> *Id.* at 406 (Blackmun, J., concurring & dissenting in part). The opinion also stated:

The sixth amendment speaks in terms of the right of the accused to a public trial, but this right does not belong solely to the accused to assert or forego as he or she desires. . . . The defendant’s interest, primarily is to ensure fair treatment in his or her particular case. While the public’s more generalized interest in open trials includes a concern for justice to individual defendants, it goes beyond that. The transcendent reason for public trials is to ensure efficiency, competence, and integrity in the overall operation of the judicial system. Thus, the defendant’s willingness to waive the right to a public trial in a criminal case cannot be the deciding factor. . . . It is just as important to the public to guard against undue favoritism or leniency as to guard against undue harshness or discrimination.

*Id.* at 433 n.13 (quoting ABA STANDARDS FOR CRIMINAL JUSTICE, FAIR TRIAL AND FREE PRESS, Standard 8-3.2 at 15 (Approved Draft 1978)).

<sup>127</sup> 443 U.S. at 433 (Blackmun, J., concurring & dissenting in part). The dissenters emphasized that they did not reach the first amendment issue in the case. *Id.* at 447.

<sup>128</sup> *Id.* at 434.

<sup>129</sup> *Id.* at 445.

<sup>130</sup> *Id.*

Justice Stewart at the start of the majority opinion: There is an independent constitutional right to insist upon access unless there is a substantial probability that an open hearing would result in harm to the defendant's right to a fair trial. The dissenters, however, could find no such substantial probability in this case: "The coverage in petitioner's newspapers . . . was circumspect. . . . All coverage ceased on August 6 and did not resume until after the suppression hearing three months later. The stories that appeared were largely factual in nature. . . . And petitioner's newspapers had only a small circulation in [the county]."<sup>131</sup>

The conclusions to be drawn from *Gannett* are varied, to say the least. One could argue effectively that the media was the big loser in the Supreme Court. All nine Justices assumed without question that the media had no absolute right to demand that pretrial proceedings be kept open. Utilizing the balancing test of weighing the fair trial interest against the open access interest, five members of the Court<sup>132</sup> found that the petitioner in this case could not expect an open proceeding. This conclusion is particularly unfortunate for two reasons: first, as indicated in the dissenting opinion, the conduct of the media representatives was hardly egregious.<sup>133</sup> It is not clear that alternatives would have failed or that closure was necessary in light of the relatively calm and responsible reporting concerning the case. Second, the majority refused to confront the fact that in the vast majority of criminal proceedings there is no trial, making the reporting of important pretrial proceedings crucial. The Chief Justice remarked that "[s]omething in the neighborhood of 85 percent of all criminal charges are resolved by guilty pleas,"<sup>134</sup> a figure which has been consistently supported by research in the area.<sup>135</sup> Even in those cases which are not resolved by guilty pleas, pretrial proceedings are often dispositive. As Justice Powell observed in his concurring opinion, because suppression hearings may determine the outcome of the case, "the public's interest in this proceeding often is comparable to its interest in the trial itself."<sup>136</sup>

Most distressing to some journalists was the reluctance of the Justices

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<sup>131</sup> *Id.* at 446-48.

<sup>132</sup> The Chief Justice and Justices Stewart, Powell, Rehnquist, and Stevens. *See id.* at 378-91, 394, 397-98, 403.

<sup>133</sup> *See* note 131 & accompanying text *supra*.

<sup>134</sup> 443 U.S. at 397 (Burger, C.J., concurring).

<sup>135</sup> In the county in which the trial took place, every felony prosecution for the year 1976 was terminated without a trial on the merits. *Id.* at 435 (Blackmun, J., concurring & dissenting in part). The statistics cited by Justice Blackmun are particularly striking: In the year 1976 in the Supreme Court for the City of New York, almost 90% of all criminal cases were terminated by dismissal or by a plea of guilty. In the trial courts outside New York City the percentage was even higher. *Id.* at 435 n.14. *See generally* NATIONAL INSTITUTE OF LAW ENFORCEMENT AND CRIMINAL JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, PLEA BARGAINING IN THE UNITED STATES, app. A (1978).

<sup>136</sup> 443 U.S. at 397 n.1 (Powell, J., concurring).

to consider seriously the first amendment claim for access to pretrial proceedings. Only Justices Powell and Rehnquist discussed the issue at length, and only Justice Powell thought that there was some merit to the first amendment assertion.

The result in *Gannett*, then, is hardly cause for media celebration. There is, however, another side to the analysis. There is some indication that if a proper constitutional claim had been made, five Justices might have agreed with the media access contention in this particular case. Justice Powell pointed out that "although I disagree with my four dissenting Brethren concerning the origin and the scope of the constitutional limitations on the closing of pretrial proceedings, I agree with their conclusion that there are limitations and that they require the careful attention of trial courts before closure can be ordered."<sup>137</sup>

In spite of the serious claims of harm made in *Gannett*, in the vast majority of cases the pretrial publicity issue is not troublesome.<sup>138</sup> Even in those unusual cases where the question is at issue, it appears that judges are likely to be cautious before imposing closure orders. The American Bar Association position is that closure should only be ordered upon findings that "[1] the dissemination of information from the hearing would pose a clear and present danger to the fairness of the trial, and [2] the prejudicial effect of such information on the jurors cannot be avoided by any reasonable alternative means."<sup>139</sup> Even the lesser standard suggested in the proposed Federal Rules of Criminal Procedure would allow closure only if "[1] there is a reasonable likelihood that dissemination of information from the proceeding would interfere with defendant's right to a fair trial by an impartial jury; and [2] the prejudicial effect of such information on trial fairness cannot be avoided by any reasonable alternative means."<sup>140</sup>

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<sup>137</sup> *Id.* at 398 n.2 (Powell, J., concurring). *But see* Justice Rehnquist's opinion: I do not so lightly as my Brother Powell impute to the four dissenters in this case a willingness to ignore the doctrine of *stare decisis* and to join with him in some later decision to form what might fairly be called an 'odd quintuplet,' agreeing that the authority of trial courts to close judicial proceedings to the public is subject to limitations stemming from two different sources in the Constitution.

*Id.* at 405-06 n.2 (Rehnquist, J., concurring).

<sup>138</sup> *But see* Franklin, *Untested Assumptions and Unanswered Questions*, 29 STAN. L. REV. 387, 391 (1977).

<sup>139</sup> 2 ABA STANDARDS FOR CRIMINAL JUSTICE, FAIR TRIAL AND FREE PRESS, *supra* note 94, at Standard 8-3.6(d).

<sup>140</sup> *Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure*, 91 F.R.D. 289, 365-67 (1982) (proposed rule 43.1). *See also* *Revised Report of the Judicial Conference Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue*, 87 F.R.D. 519 (1980). The more stringent ABA Standard is the same substantive test as used in *Nebraska Press*. The test was considered and rejected by the Federal Rules Advisory Committee because "there is a crucial difference between imposing prior restraints against the press on the one hand and the denial of access to news sources on the other," and because a 'clear and present danger' test would be impractical in this setting and un-

The situation immediately after the Court's decision in *Gannett* was unsettled and unsettling.<sup>141</sup> The Court had allowed a closure order in that pretrial proceeding, thus giving support to the defense position that closures were generally proper.<sup>142</sup> *Gannett*, though, had involved a very specific fact situation, a closure order in a narrow pretrial proceeding. What about closure orders in other proceedings<sup>143</sup> or in the trial itself?<sup>144</sup> The Supreme Court, just one year to the day after *Gannett* was decided, shed light on this last question in *Richmond Newspapers, Inc. v. Virginia*.<sup>145</sup>

The criminal defendant in *Richmond Newspapers* was tried for murder four times over a two-year period.<sup>146</sup> At the fourth trial, counsel for the defendant moved that the trial be closed to the public due to a fear that testimony would be recounted to witnesses during the course of the proceedings. The district attorney made no objection to the motion. Pursuant to statute,<sup>147</sup> the judge ordered the trial closed after accepting the defense counsel's argument and finding that "having people in the Courtroom is distracting to the jury."<sup>148</sup> Chief Justice Burger, along with Justices White and Stevens, began the plurality opinion by noting that the issue in the instant case had never been decided by the Court, thereby distinguishing *Gannett*.<sup>149</sup> When the question was framed by the Chief Justice, its answer was clearly suggested:

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necessary where the only consequence is deferral of public knowledge of the matters occurring during closure." *Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure*, 91 F.R.D. 289, 372 (1982) (quoting 2 ABA STANDARDS FOR CRIMINAL JUSTICE, FAIR TRIAL AND FREE PRESS, at Standard 8-3.2 note (2d ed. 1980)).

<sup>141</sup> Within a year after the decision, over 150 proceedings were ordered closed, including 34 trials. Comment, *The Public's Right to Access Versus the Right to a Fair Trial: A Balancing Compromise*, 33 BAYLOR L. REV. 191, 193 n.22 (1981).

<sup>142</sup> See generally *Westchester Rockland Newspapers, Inc. v. Leggett*, 48 N.Y.2d 430, 448-49, 399 N.E.2d 518, 528-29, 423 N.Y.S.2d 630, 641-42 (1979) (Fuchsberg, J., concurring).

<sup>143</sup> For consideration of other hearings, see *In re Antitrust Grand Jury Investigation*, 508 F. Supp. 397 (E.D. Va. 1980) (immunity hearings), and *Rapid City Journal Co. v. Circuit Court*, 283 N.W.2d 563 (S.D. 1979) (voir dire hearings). With respect to post-trial proceedings, see *United States v. Winner*, 641 F.2d 825 (10th Cir. 1981). The Proposed Federal Rules contend that "there is no justification for extending the rule to [post-trial] proceedings." *Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure*, supra note 140, at 369.

<sup>144</sup> "[T]he Court [in *Gannett*] spoke no less than twelve times of a general public right of access to criminal trials." Boyd & Lehrman, *When, If Ever, Should Trials be Held Behind Closed Doors?*, 5 NOVA L.J. 1, 1 (1980).

<sup>145</sup> 448 U.S. 555 (1980).

<sup>146</sup> In the first trial evidence was improperly obtained; the second and third trials ended in mistrials. *Id.* at 559.

<sup>147</sup> In the trial of all criminal cases, whether the same be felony or misdemeanor cases, the court may, in its discretion, exclude from the trial any persons whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated.

VA. CODE § 19.2-266 (Supp. 1981).

<sup>148</sup> 448 U.S. at 561 (plurality opinion).

<sup>149</sup> *Id.* at 563-64. "In [*Gannett*], the Court was not required to decide whether a right of access to trials, as distinguished from hearings on pretrial motions, was constitutionally guaranteed." *Id.* at 564 (emphasis in original).

But here for the first time the Court is asked to decide whether a criminal trial itself may be closed to the public upon the unopposed request of a defendant, without any demonstration that closure is required to protect the defendant's superior right to a fair trial, or that some other overriding consideration requires closure.<sup>150</sup>

After tracing the origins of the criminal trial, the Chief Justice noted that "[w]hat is significant for present purposes is that throughout its evolution, the trial has been open to all who cared to observe."<sup>151</sup> The opinion emphasized that open access to criminal trials serves the public interest because "the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion,"<sup>152</sup> and because awareness that society is responding to crime reduces the probability that the public will take the law into its own hands.<sup>153</sup> The difficulty here, as in *Gannett*, was that neither the Constitution nor the Bill of Rights contains any provision which expressly guarantees the public or the media the right to attend criminal trials. Nevertheless, in construing the first amendment, the Chief Justice wrote that it could be read as "protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees. . . . The explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily."<sup>154</sup> For the three Justices, "without the freedom to attend [criminal] trials, which people have exercised for centuries, important aspects of freedom of speech and 'of the press could be eviscerated.'"<sup>155</sup>

The Justices pointed out that the first amendment interest was not absolute,<sup>156</sup> and that the trial must remain open to the public and the press "[a]bsent an overriding interest articulated in findings . . . ."<sup>157</sup> Here,

<sup>150</sup> *Id.*; see Sack, *Principle and Nebraska Press Association v. Stuart*, 29 STAN. L. REV. 411 (1977).

<sup>151</sup> 448 U.S. at 564 (plurality opinion).

<sup>152</sup> *Id.* at 571.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 575-77. The plurality noted other rights implicit in the Constitution, such as "the rights of association and of privacy, the right to be presumed innocent, and the right to be judged by a standard of proof beyond a reasonable doubt in a criminal trial. . . ." *Id.* at 579-80.

<sup>155</sup> *Id.* at 580. See also *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 920 (1950) (Frankfurter, J., dissenting from denial of certiorari) ("One of the demands of a democratic society is that the public should know what goes on in courts by being told by the press what happens there, to the end that the public may judge whether our system of criminal justice is fair and right.").

<sup>156</sup> Just as a government may impose reasonable time, place, and manner restrictions upon the use of its streets in the interest of such objectives as the free flow of traffic . . . , so may a trial judge, in the interest of the fair administration of justice, impose reasonable limitations on access to a trial.

448 U.S. at 581 n.18 (plurality opinion) (citation omitted).

<sup>157</sup> *Id.* at 581.

"the trial judge made no findings to support closure; no inquiry was made as to whether alternative solutions would have met the need to ensure fairness; there was no recognition of any right under the Constitution for the public or press to attend the trial."<sup>158</sup>

Justice Stevens concurred, primarily to explain the importance of the case:<sup>159</sup>

This is a watershed case. Until today the Court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever. . . . Today, however, for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment.<sup>160</sup>

In a lengthy concurring opinion, Justices Brennan and Marshall explored the rationale for the Court's ruling requiring open access. They particularly stressed the unique role of the media to carry forth such policies: "[T]he institutional press is the likely, and fitting, chief beneficiary of a right of access because it serves as the 'agent' of interested citizens, and funnels information about trials to a large number of individuals."<sup>161</sup> Justice Stewart wrote separately to emphasize that while a first amendment right existed in the press and the public with respect to access to criminal trials, such a right had to be weighed against the interests of the criminal defendant. In this case, he found that the trial judge had "given no recognition" to the rights of the press and the public to be present at trial.<sup>162</sup> In other cases, he would grant considerable discretion to the trial judge. Denying that the right of access was absolute, Justice Stewart said that "a trial judge [may] impose reasonable limitations upon the unrestricted occupation of a courtroom by representatives of the press and members of the public."<sup>163</sup> Justice Blackmun, concurring in the result, would have relied primarily on the sixth amendment right to a public trial.<sup>164</sup>

Only Justice Rehnquist dissented. Analyzing the language and origins of the first, sixth, fourteenth, and ninth amendments, he was unable to find any provision of the Constitution which prohibited the closure of a

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<sup>158</sup> *Id.* at 580-81.

<sup>159</sup> Justice Stevens also explained his view, as originally set forth in *Houchins v. KQED, Inc.*, 438 U.S. 1, 19-40 (1978) (Stevens, J., dissenting), as to why access to information should be given considerable leeway in a nontrial setting, 448 U.S. at 583-84 (Stevens, J., concurring).

<sup>160</sup> 448 U.S. at 582-83 (Stevens, J., concurring).

<sup>161</sup> *Id.* at 586 n.2 (Brennan, J., concurring). Justice White also concurred to reiterate his view in *Gannett* that the sixth amendment should be construed to forbid the general closing of criminal proceedings. *Id.* at 581-82 (White, J., concurring).

<sup>162</sup> *Id.* at 599-601 (Stewart, J., concurring).

<sup>163</sup> *Id.* at 600 (Stewart, J., concurring).

<sup>164</sup> *Id.* at 603 (Blackmun, J., concurring).

trial.<sup>165</sup> He also attacked the Court's general willingness to concentrate in itself so much power over the control of the criminal justice system. Justice Rehnquist objected to the Court's assuming "ultimate decision-making power over how justice shall be administered, not merely in the federal system but in each of the 50 States."<sup>166</sup> Nine persons should not exercise such authority over 220 million people.<sup>167</sup>

What is one to make of *Richmond Newspapers* with its seven separate opinions, none commanding more than three members of the Court? While questions concerning the legal bounds of the holding may be legitimately raised, the case is a major victory for the media. Eight members of the Court have explicitly recognized a first amendment right of access for the public and the press in connection with the criminal trial.<sup>168</sup> The broad language in the various opinions shows a judiciary most sympathetic to media claims.<sup>169</sup> All members of the Court who supported the first amendment argument concluded that the first amendment right of the press and public was not absolute, but had to be balanced on a case-by-case basis against the defendant's interest in a trial free from bias. Nevertheless, in order to satisfy the Supreme Court, a judge who orders closure of a trial will have to demonstrate, at a minimum, the existence of a genuine potential for prejudice, the effectiveness of a closure order in eliminating that threat, and the unavailability of alternatives in doing so.<sup>170</sup>

While the media were big winners in the Supreme Court in connection with the open access to the trial itself, it is less clear what impact, if any, *Richmond Newspapers* will have beyond the trial. Most of the Justices

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<sup>165</sup> *Id.* at 605-06 (Rehnquist, J., dissenting). See also *Gannett Co. v. DePasquale*, 443 U.S. at 403-06 (Rehnquist, J., concurring).

<sup>166</sup> 448 U.S. at 606 (Rehnquist, J., dissenting).

<sup>167</sup> *Id.*

<sup>168</sup> Justice Powell did not participate in *Richmond Newspapers*. *Id.* at 581. However, his opinion in *Gannett* leaves little doubt as to his position concerning the first amendment argument. See note 120 & accompanying text *supra*.

<sup>169</sup> The various discussions call to mind the argument made by journalist Carl Stern in response to a claim that a controversial trial should not be kept open.

I remember another case recently in suburban Washington where a judge closed a courtroom in which three men were being tried for sex offenses against two girls on the grounds that the men were modestly high government employees whose work for the government would be embarrassed and their performance for the taxpayers made more difficult if there was extensive publicity about the case. Well, that's too bad. I can't think of a better deterrent to that type of conduct . . . .

Stern, *supra* note 99, at 357. For an opinion echoing the sentiments expressed in the *Richmond Newspapers* opinions, see *Westchester Rockland Newspapers, Inc. v. Leggett*, 48 N.Y.2d 430, 445, 399 N.E.2d 518, 526, 423 N.Y.S.2d 630, 639 (1979) (Cooke, C.J., concurring).

<sup>170</sup> Comment *supra* note 141, at 202; Comment, *First Amendment—Constitutional Right of Access to Criminal Trials*, 71 J. CRIM. L. & CRIMINOLOGY 547, 557 (1980). See generally Hale, *Attitudes of Media Attorneys Concerning Criminal Proceedings*, 3 Com. & L. 3 (1981).

The Supreme Court reaffirmed its decision in *Richmond Newspapers* by striking down the state statute in *Globe Newspapers Co. v. Superior Court*, 102 S. Ct. 2613 (1982). Massachusetts law is unique in the country; by statute judges are required to close the

in their separate opinions stated that this case was to be distinguished from *Gannett* because *Richmond Newspapers* involved a trial while *Gannett* did not.<sup>171</sup> Nevertheless, the broad language throughout the opinions has made some commentators wonder whether *Richmond Newspapers* was decided by the Court in order to "reconsider *Gannett*,"<sup>172</sup> whether the Court took the case "in order to clarify the earlier decision,"<sup>173</sup> or whether it was intended to have "any impact at all on the *Gannett* decision."<sup>174</sup> However, there has already been considerable impact in the nontrial setting. Some courts have gone beyond *Richmond Newspapers* in holding first amendment considerations applicable to aspects of proceedings which could

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courtroom to the press and the public when a sex crime victim under the age of 18 is testifying. In other states, judges may exercise their discretion in such cases. In the trial at issue, neither the prosecution nor the government requested closure. The Massachusetts Supreme Judicial Court upheld this portion of the statute, as well as a provision giving the judge discretion to close the entire trial:

The plaintiff says that a balancing of State interests against First Amendment rights is permissible only if undertaken on a case-by-case basis. We do not agree. We perceive no such holding in *Richmond Newspapers*. . . . [B]y their very nature, these substantial State interests would be defeated if a case-by-case determination were used. Ascertaining the susceptibility of an individual victim might require expert testimony and would be a cumbersome process at best. . . . To the extent that such a hearing is effective, requiring various psychological examinations in some depth, the victim will be forced to relive the experience.

—Mass. at \_\_\_, 423 N.E.2d at 779-80. The media argument on appeal was that "no portion of the trial should be closed without a hearing at which the judge must ascertain that the reasons for the closing are 'tangible and substantial' and that the young victim's interest cannot otherwise be adequately protected." Greenhouse, *Law Closing Testimony in Sex Case Faces Test*, N.Y. Times, Nov. 17, 1981, § A, at 11, col. 1.

While there is considerable force behind the statutory policy, and while a closure order will be proper in many such cases, the Court in a 6-3 decision (the Chief Justice and Justices Rehnquist and Stevens dissenting) found that the statute conflicted irreconcilably with the holding in *Richmond Newspapers*. 102 S. Ct. at 2622-23, 2627. The Court in *Richmond Newspapers* stressed the first amendment interests in keeping important criminal trials open. It required "an overriding interest articulated in findings" before closure would be proper. A blanket closure rule in all cases in which minor victims testify conflicts with this principle. *Id.* at 2620-22. As stated by Justice Brennan for the *Globe Newspapers* majority, "[The state's interest] could be served just as well by requiring the trial court to determine on a case-by-case basis whether the State's legitimate concern for the well-being of the minor victim necessitates closure." *Id.* at 2621.

<sup>171</sup> See, e.g., 448 U.S. at 563-64 (plurality opinion). Justice Stevens found that "[t]he absence of any articulated reason for the closure order" distinguished *Richmond Newspapers* from *Gannett*. *Id.* at 584 n.2 (Stevens, J., concurring).

<sup>172</sup> Boyd & Lehrman, *supra* note 144, at 2.

<sup>173</sup> Comment, *supra* note 141, at 194.

<sup>174</sup> *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 77, 156 n.42 (1980). The commentator stated:

It is much less certain whether *Richmond Newspapers* extends a first amendment right of access to the pretrial context. In *Gannett*, the Court rejected the analogical argument that the sixth amendment policies justifying open trials should justify access to pretrial proceedings; the impact of *Richmond Newspapers*' first amendment ruling upon pretrial closures thus remains undetermined.

*Id.*

be termed nontrial.<sup>175</sup> The tone of the opinions in *Richmond Newspapers* has influenced trial judges who apply a much closer scrutiny to closure requests than ever before.<sup>176</sup>

The *Richmond Newspapers* case, for all its uncertainty, for all the questions concerning its potential impact, can properly be labeled as the Supreme Court's "most ringing endorsement of the press and public's right of access to government under the First Amendment."<sup>177</sup> Indeed, as counsel for the newspapers stated, "[t]he fact is the Court has taken as large a leap in the First Amendment area as it has in the last quarter century."<sup>178</sup> This leap was significant and entirely justified, for the closure

<sup>175</sup> Consider, for example, the attempt by one district judge to close portions of voir dire examination of jurors and to examine veniremen individually in chambers. The court of appeals frowned upon this type of closed activity in *In re United States ex rel. Pulitzer Publishing Co.*, 635 F.2d 676, 678 (8th Cir. 1980). The court explained:

Our sole reason for granting the writ in this case is based on the failure of the district judge to announce his reasons for the decision to close the voir dire proceedings and for his failure to balance the right of the public to attend the trial against the right of the defendant to a fair trial in accordance with the principles announced in [*Richmond Newspapers*].

*Id.* See also a decision to label a juvenile delinquency proceeding a "criminal trial" under *Richmond Newspapers*, holding that the press had a first amendment right to attend such sessions absent unusual circumstances. *In re certain Juvenile Delinquency Proceedings*, [1981] 29 CRIM. L. REP. (BNA) 2248.

<sup>176</sup> In *Palm Beach Newspapers, Inc. v. Florida*, 378 So. 2d 862, 864-65 (Dist. Ct. App. 1980), *rev'd*, 395 So. 2d 544, 548 (Fla. 1981), the court found that two witnesses' fear of retaliation for testifying was insufficient cause to exclude the press without specific supporting information. *But see* *Globe Newspaper Co. v. Superior Court*, \_\_\_ Mass. \_\_\_, 423 N.E.2d 773 (1981) (statute requiring closure during testimony of minor complainants in sexual assault cases constitutional). As indicated previously, *see* note 170 *supra*, the United States Supreme Court reversed in *Globe Newspaper*.

<sup>177</sup> Comment, *supra* note 101. This is especially clear when *Richmond Newspapers* is contrasted with the prison access cases, *see* note 124 *supra*.

<sup>178</sup> Comment, *supra* note 177, at 947. Harvard Law Professor Lawrence Tribe argued the case. *Id.* Professor Tribe's enthusiasm ought not to be unrestrained, however. Under the Supreme Court's ruling, trials still may be closed in special cases, *see* *Sacramento Bee v. United States Dist. Court*, 656 F.2d 477 (9th Cir. 1981); and, of course, the case does not overrule *Gannett*, thus allowing closures quite readily in pretrial matters, *see* *Federated Publications, Inc. v. Swedberg*, 96 Wash. 2d 13, 633 P.2d 74 (1981) (reporters could be excluded from suppression hearings in "Hillside Strangler" case if they refused to sign agreement to abide by state's bar/bench/press guidelines). As indicated in note 175 & accompanying text *supra*, however, it cannot be doubted that *Richmond Newspapers* has had considerable impact, even on the pretrial situation ostensibly covered by *Gannett*. This point was well made in *Miami Herald Publishing Co. v. Chappell*, 403 So. 2d 1342, 1344 (Dist. Ct. App. 1981), where the court refused to close a pretrial competency hearing. On appeal the judges adopted a three-part test to review closure orders:

[T]he public may be denied access . . . only if the movant proves that: (1) closure is necessary to prevent a serious and imminent threat to the administration of justice, (2) no less restrictive alternative measure is available, and (3) closure will in fact achieve the court's purpose . . . . The first prong of the test protects a defendant's right to a fair trial; the second prong employs traditional First Amendment techniques, and the third prong employs practical considerations. Because the test protects competing societal interests in providing fair trials while permitting free access to courts, we adopt its criteria.

*Id.* at 1345 (citations omitted).

order poses a great threat to the free dissemination of information about unquestionably newsworthy events. In that sense, it parallels the prior restraint conflict in *Nebraska Press*. In both cases the press would not be allowed to report newsworthy events, in the former case, by a court order of prohibition, and in the latter case, by a court order cutting off the source of information. The only real question to be raised as a matter of policy in *Richmond Newspapers* is why the Court did not take the opportunity to overrule or at least seriously cut back the shortsighted holding in *Gannett*.

### B. *The Privacy and Rehabilitation Interests*

To this point this article has examined cases in which the reporting of criminal trials has arguably conflicted with only one interest, that of the defendant under the sixth amendment to receive a fair trial before an unbiased jury. Apart from the trial and pretrial publicity conflicts, other interests may surface when there is media coverage of a criminal trial. Of great concern in this area are questions involving the privacy and rehabilitation of offenders.<sup>179</sup> One of the most famous cases in the area, *Melvin v. Reid*,<sup>180</sup> illustrates these interests. The plaintiff was a former prostitute who had been tried for murder. The murder trial was widely reported, but she was acquitted. After the trial, she married and became, according to the court, "entirely rehabilitated."<sup>181</sup> Seven years after the trial, the movie "The Red Kimono" was made; in the film the plaintiff's former life was set out in some detail. Included in the film were the facts of the murder charge and trial as well as the plaintiff's name.<sup>182</sup> The California court recognized the press and public interest generally in access to such information:

[T]he use of the incidents from the life of appellant in the moving picture is in itself not actionable. These incidents appeared in the records of her trial for murder, which is a public record, open to the perusal of all. The very fact that they were contained in a public record is sufficient to negative the idea that their publication was a violation of a right of privacy. When the incidents of a life are so public as to be spread upon a public record, they come within the knowledge and into the possession of the public and cease to be private.<sup>183</sup>

The public interest, however, did not include the need to know the plaintiff's name because it was not newsworthy. In addition, the use of the

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<sup>179</sup> The problem of televising criminal proceedings raises all three issues: privacy concerns, questions of rehabilitation, and issues surrounding the unbiased jury. See notes 243-96 & accompanying text *infra*.

<sup>180</sup> 112 Cal. App. 285, 297 P. 91 (1931).

<sup>181</sup> *Id.* at 286, 297 P. at 91.

<sup>182</sup> *Id.* at 287, 297 P. at 91.

<sup>183</sup> *Id.* at 290, 297 P. at 93.

name tended to jeopardize society's efforts to rehabilitate convicted criminals.<sup>184</sup>

One of the major objectives of society as it is now constituted, and of the administration of our penal system, is the rehabilitation of the fallen and the reformation of the criminal. Under these theories of sociology, it is our object to lift up and sustain the unfortunate rather than tear him down. Where a person has by his own efforts rehabilitated himself, we, as right-thinking members of society, should permit him to continue in the path of rectitude rather than throw him back into a life of shame or crime. Even the thief on the cross was permitted to repent during the hours of his final agony.<sup>185</sup>

The court allowed a civil action by the plaintiff against the producers.<sup>186</sup>

The "Red Kimono" case was relied on in *Briscoe v. Reader's Digest Association*,<sup>187</sup> a thoughtful opinion written by the California Supreme Court forty years later. The plaintiff had been convicted in 1956 of truck hijacking. Immediately thereafter he became rehabilitated. The defendant published an article discussing truck hijacking. The article referred to the plaintiff and the conviction, but not to the fact that the hijacking had occurred eleven years earlier. The court found that as a "result of the defendant's publication, plaintiff's 11-year-old daughter, as well as his friends, for the first time learned of this incident. They thereafter scorned and abandoned him."<sup>188</sup>

The facts in *Briscoe* put the question at issue. In a situation in which the basic story was newsworthy,<sup>189</sup> how would the interest in the dissemination of information balance against the objective of rehabilitating felons and the interest in the felon's privacy after he had been rehabilitated? The court acknowledged the important interest in reporting crimes and judicial proceedings and even in identifying persons currently charged with crimes.<sup>190</sup> The reports of *past* crimes and the identification of *past* defendants were different matters.

[I]dentification of the *actor* in reports of long past crimes usually serves little independent public purpose. Once legal proceedings have terminated, and a suspect or offender has been released, identification

<sup>184</sup> See *id.* at 290-91, 297 P. at 93.

<sup>185</sup> *Id.* at 292, 297 P. at 93.

<sup>186</sup> Though at the time it was not clear that there was a cause of action denominated privacy, the court was willing to allow the claim to go forward no matter what the label given to it. *Id.* at 292, 297 P. at 93-94.

<sup>187</sup> 4 Cal. 3d 529, 483 P.2d 34, 93 Cal. Rptr. 866 (1971).

<sup>188</sup> *Id.* at 533, 483 P.2d at 36, 93 Cal. Rptr. at 868.

<sup>189</sup> There was little question raised by the court that this was a legitimate newsworthy story involving substantial public issues. The plaintiff himself conceded that the basic subject of the article "may have been 'newsworthy.'" *Id.*

<sup>190</sup> There can be no doubt that reports of current criminal activities are the legitimate province of a free press. The circumstances under which crimes occur, the techniques used by those outside the law, the tragedy that may befall the victims—these are vital bits of information for people coping with

of the individual will not usually aid the administration of justice. Identification will no longer serve to bring forth witnesses or obtain succor for victims. Unless the individual has reattracted the public eye to himself in some independent fashion, the only public "interest" that would usually be served is that of curiosity.<sup>191</sup>

The court went on to state that "the state has a compelling interest in the efficacy of penal systems in rehabilitating criminals . . . . A jury might well find that a continuing threat that the rehabilitated offender's old identity will be resurrected by the media is counter-productive to the goals of this correctional process."<sup>192</sup>

A wide-ranging balancing test was adopted in *Briscoe* to determine whether the plaintiff's privacy action would lie. He would have to show that the publication was not newsworthy and that it revealed facts so offensive as to shock the community's notions of decency.<sup>193</sup> The case was remanded to the trial court to decide

(1) whether plaintiff had become a rehabilitated member of society, (2) whether identifying him as a former criminal would be highly offensive and injurious to the reasonable man, (3) whether defendant published this information with a reckless disregard for its offensiveness, and (4) whether any independent justification for printing plaintiff's identity existed.<sup>194</sup>

*Melvin* and *Briscoe*, taken together, represent an important line of cases because they demonstrate an awareness by the judiciary of the balance involved in the privacy and rehabilitation cases. On the one hand, many

the exigencies of modern life. Reports of these events may also promote the values served by the constitutional guarantee of a public trial. Although a case is not to be "tried in the papers," reports regarding a crime or criminal proceedings may encourage unknown witnesses to come forward with useful testimony and friends or relatives to come to the aid of the victim.

It is also generally in the social interest to identify adults currently charged with the commission of a crime. While such an identification may not presume guilt, it may legitimately put others on notice that the named individual is suspected of having committed a crime. Naming the suspect may also persuade eye witnesses and character witnesses to testify. For these reasons, while the suspect or offender obviously does not consent to public exposure, his right to privacy must give way to the overriding social interest.

*Id.* at 536, 483 P.2d at 39, 93 Cal. Rptr. at 871 (footnote omitted).

<sup>191</sup> *Id.* at 537, 483 P.2d at 40, 93 Cal. Rptr. at 872 (emphasis in original).

<sup>192</sup> *Id.* at 542, 483 P.2d at 43, 93 Cal. Rptr. at 875.

<sup>193</sup> *Id.* at 541, 483 P.2d at 42-43, 93 Cal. Rptr. at 874-75.

<sup>194</sup> *Id.* at 543, 483 P.2d at 44, 93 Cal. Rptr. at 876. Commentators generally applauded *Briscoe*. See Comment, *First Amendment Limitations on Public Disclosure Actions*, 45 U. CHI. L. REV. 180, 199 (1977); Comment, *An Accommodation of Privacy Interests and First Amendment Rights in Public Disclosure Cases*, 124 U. PA. L. REV. 1385, 1392, 1399 (1976). But see *Forsher v. Bugliosi*, 26 Cal. 3d 792, 608 P.2d 716, 163 Cal. Rptr. 628 (1980), where the California Supreme Court noted that the courts in California have refrained from extending the *Briscoe* rule to other cases: "Our decision in *Briscoe* was an exception to the more general rule that 'once a man has become a public figure, or news, he remains a matter of legitimate recall to the public mind to the end of his days.'" *Id.* at 811, 608 P.2d at 726, 163 Cal. Rptr. at 638 (quoting Prosser, *Privacy*, 48 CAL. L. REV. 383, 418 (1960)).

of these cases, particularly cases dealing with reporting of recent events, involve especially newsworthy activities and should be given considerable deference under the first amendment.<sup>195</sup> On the other hand, questions must be raised as to whether such deference should be given when the event is not current or identification of an individual adds little to the newsworthiness of the story but could adversely affect important privacy and rehabilitation interests.<sup>196</sup> The California courts seem to have struck the correct balance in dealing with these important concerns. These cases contrast with several cases recently decided by the Supreme Court in which the Court spent little time analyzing the rehabilitation and privacy interests and instead focused almost exclusively on first amendment objectives.

In *Cox Broadcasting Corp. v. Cohn*,<sup>197</sup> the privacy interest was paramount. The plaintiff's teenaged daughter was the victim of a rape who died during the incident. Six teenagers were indicted for both the murder and the rape. There was substantial media coverage of the incident and the trial, but the identity of the victim was not disclosed prior to trial. At the time the trial court accepted the guilty pleas, the defendant broadcasting company named the victim in a news report describing the court proceedings. Claiming an invasion of privacy, the father of the victim sued the defendants for money damages.<sup>198</sup> During the course of the civil proceedings, all parties conceded that the defendants had learned the name of the victim from an examination of the indictments which were available for inspection by the public in the courtroom.<sup>199</sup> The state trial court found that the defendant's broadcasting was in violation of a state statute which made it a misdemeanor to publish or broadcast the name or identity of a rape victim.<sup>200</sup>

The Georgia Supreme Court rejected the defendant's claim that the first amendment, as a matter of constitutional law, required judgment for the defendant. The court agreed that the criminal proceedings were matters of public concern. The court disagreed with the broader media argument, concluding instead that there was "no public interest or general concern about the identity of the victim of such a crime as will make

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<sup>195</sup> 4 Cal. 3d at 537, 483 P.2d at 39, 93 Cal. Rptr. at 871.

<sup>196</sup> It is quite difficult to articulate the strong first amendment interest involved in publishing the plaintiff's name in *Briscoe*, rather than merely describing the events.

<sup>197</sup> 420 U.S. 469 (1975).

<sup>198</sup> *Id.* at 471-75. Considerable question was raised as to whether, apart from constitutional claims, there existed a right of privacy in the plaintiff for disclosure of the name of the deceased daughter. The trial judge held that the Georgia statute gave a civil remedy to the plaintiff. The Georgia Supreme Court held that the trial court's ruling was in error but found that the common law tort of public disclosure allowed for an invasion of privacy claim. *Cox Broadcasting Corp. v. Cohn*, 231 Ga. 60, 61-62, 200 S.E.2d 127, 129-30 (1973), *rev'd*, 420 U.S. 469 (1975).

<sup>199</sup> 420 U.S. 469, 472-73 (1975).

<sup>200</sup> *Id.* at 471 n.1 (citing GA. CODE ANN. § 26-9901 (1972)).

the right to disclose the identity of the victim rise to the level of First Amendment protection."<sup>201</sup>

Looking to the injury involved in the case, public disclosure of private facts, the United States Supreme Court chose to construe the issue narrowly: "whether the State may impose sanctions on the accurate publication of the name of a rape victim obtained from public records—more specifically, from judicial records which are maintained in connection with a public prosecution and which themselves are open to public inspection."<sup>202</sup> The Court relied heavily on the media defendant's role in reporting the criminal trial proceedings. The Court reasoned that individuals have limited opportunities to see the government at work and that the media's reporting of governmental proceedings is a service without which many citizens and their representatives "would be unable to vote intelligently or to register opinions on the administration of government generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials . . ."<sup>203</sup> Justice White, writing for the majority, rejected plaintiff's claim "that the efforts of the press have infringed his right to privacy by broadcasting to the world the fact that his daughter was a rape victim."<sup>204</sup> He explained: "The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . are without question events of legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government."<sup>205</sup> In reversing the Georgia courts, the Court placed considerable emphasis on the fact that the information in this case had been placed in the public domain as official court records.<sup>206</sup> The Court gave virtually no consideration to the privacy interests claimed by the family of the rape and murder victim: "Once true information is disclosed in public court documents open to public inspec-

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<sup>201</sup> *Cox Broadcasting Corp. v. Cohn*, 231 Ga. 60, 68, 200 S.E.2d 127, 134 (1973), *rev'd*, 420 U.S. 469 (1975). The court relied heavily on the *Briscoe* case. Interestingly enough, in *Briscoe* the California Supreme Court said that the disclosure of the names of suspects in connection with recent crimes would generally be protected by the first amendment. 4 Cal. 3d at 537, 483 P.2d at 39, 93 Cal. Rptr. at 871. However, the court pointed out that the media would not necessarily have an "unmitigated right" to publish the identity of offenders or victims, relying on numerous statutes which prohibited the disclosure of the name of the rape victims in news reports, including the Georgia statute at issue in the *Cox Broadcasting* case. *Id.* at 537 n.10, 483 P.2d at 39 n.10, 93 Cal. Rptr. at 871 n.10.

<sup>202</sup> 420 U.S. at 491.

<sup>203</sup> *Id.* at 492.

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 495. The Court was almost unanimous in its holding. Chief Justice Burger concurred in the judgment and Justices Powell and Douglas wrote concurring opinions focusing more generally on the first amendment issues with respect to public figures and public affairs. Only Justice Rehnquist dissented; his dissent was limited to the question of whether the decision which was the subject of the appeal was a final judgment or decree under 28 U.S.C. § 1257 (Supp. IV 1974). *Id.* at 501.

tion, the press cannot be sanctioned for publishing it. In this instance as in others reliance must rest upon the judgment of those who decide what to publish or broadcast."<sup>207</sup>

The Supreme Court chose not to deal with the issues raised in *Briscoe* as well as in the Georgia courts' disposition in *Cox Broadcasting*. Although in many instances society needs to rely upon the judgment of those who decide what to publish or broadcast, it is not clear that the rape victim's disclosure case is such an instance. As the court in *Briscoe* pointed out, there is necessarily a delicate balance between the interests of free dissemination of information on the one side and preservation of privacy and rehabilitation interests on the other. Even more to the point is the conclusion reached by the Georgia Supreme Court in *Cox Broadcasting*: There is "no public interest or general concern about the identity of the victim of such a crime as will make the right to disclose the identity of the victim rise to the level of First Amendment protection."<sup>208</sup> No doubt the *incident* is newsworthy and the *trial* is newsworthy, but what is the public interest in the *identity* of the victim or the victim's family? Unfortunately, the Court did little to respond to this question.<sup>209</sup> The Justices simply concluded that publication of truthful information contained in official court records open to public inspection cannot be the subject of criminal sanction under the first and fourteenth amendments.<sup>210</sup>

<sup>207</sup> *Id.* at 496.

<sup>208</sup> 231 Ga. 60, 68, 200 S.E.2d 127, 134 (1973), *rev'd*, 420 U.S. 469 (1975).

<sup>209</sup> A number of the cases following *Cox Broadcasting* also chose to ignore the question. In *McCormack v. Oklahoma Publishing Co.*, 613 P.2d 737 (Okla. 1980), the court, acknowledging the holding in *Melvin v. Reid*, rejected it: "There is no liability for giving publicity to facts about the plaintiff's life which [*sic*] are matters of public record." *Id.* at 742 (quoting RESTATEMENT (SECOND) OF TORTS § 652 D, Comment b (1977)). See also *Moloney v. Tribune Publishing Co.*, 26 Wash. App. 357, 363, 613 P.2d 1179, 1183 (1980) ("If the report of an official public action or proceeding is accurate or a fair abridgement, an action cannot constitutionally be maintained, either for defamation or for invasion of the right to privacy."). As broadly stated in *WXYZ, Inc. v. Hand*, 658 F.2d 420, 427 (6th Cir. 1981): "[The statute] represents a legislative determination that in every case involving certain sex offenses, there exists a sufficiently serious and imminent threat to the privacy interests of the persons involved to justify a suppression order. Deference to such legislative judgments is impossible when First Amendment rights are at stake."

<sup>210</sup> The holding was strongly criticized:

Buttressing the result dictated by its first two grounds of decision, the Court argued that, as recognized by the common law public records defense to a privacy action, there is no substantial privacy interest in information already on the public record. Although the Court was less than explicit, the argument seems to be that because no legitimate privacy interests are infringed by giving publicity to public information, it is unconstitutional to impose sanctions on the press for printing such information regardless of its importance.

This argument rests on a false premise. Although it is true that a public disclosure action lies only if the facts disclosed are not widely known, it is disingenuous to suggest that all facts on the public record are public facts, in the sense that they are known to a substantial number of people. Giving publicity to little-known facts in the public record may appreciably affect individual privacy.

Comment, *First Amendment Limitations on Public Disclosure Actions*, *supra* note 194, at 189-90 (footnotes omitted).

By emphasizing the public nature of the trial and the public access to the court records in *Cox Broadcasting*, the Court left important questions open. The question was soon raised as to the result in cases in which there were state policies not allowing access by either the public or the press to various kinds of official records. Soon, too, the Court was confronted with cases involving proceedings which had traditionally been closed to the public, such as juvenile delinquency matters. Moreover, journalists asked what the impact of *Cox Broadcasting* would be when facts were found due to the independent investigation of the journalists rather than the availability of public records. The Court quickly answered these questions in a way which did little to displease the media defendants.

In *Oklahoma Publishing Co. v. District Court*,<sup>211</sup> the Supreme Court, in a short per curiam opinion, relied heavily upon the decisions in *Cox Publishing* and *Nebraska Press*. The state trial judge had enjoined members of the news media from "publishing, broadcasting, or disseminating, in any manner, the name or picture of [a] minor child' in connection with a juvenile proceeding involving that child then pending . . ." <sup>212</sup> The reporters for the defendant's newspapers had been in the courtroom during an open hearing on a detention petition in connection with a murder case. The newspaper obtained the eleven-year-old delinquent's name and picture. Thereafter, the trial judge entered the order, and the media petitioners moved to quash.<sup>213</sup> The Court held that under the first amendment the state judge could not "prohibit the publication of widely disseminated information obtained at court proceedings which were in fact open to the public."<sup>214</sup>

The Oklahoma case was an easy one. While the state statute provided for closed juvenile hearings, members of the press were present at the hearing with the full knowledge of the judge, the prosecutor, and the juvenile's lawyer. The media representatives had thus obtained the information lawfully and with the state's implicit approval.<sup>215</sup> Consequently, the Court quickly found that *Cox Broadcasting* required the result, without having to focus on the purposes which could be served by closed proceedings. Just one year later, however, the Court had before it a case in which the proceedings *could* be closed under state statute and *were* closed during the reporting of the incident.

The Virginia State Constitution<sup>216</sup> and statutes<sup>217</sup> prohibited the

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<sup>211</sup> 430 U.S. 308 (1977) (per curiam).

<sup>212</sup> *Id.* at 308 (quoting pretrial order entered by Dist. Court, Okla. County).

<sup>213</sup> *Id.* at 309.

<sup>214</sup> *Id.* at 310.

<sup>215</sup> *Id.* at 311.

<sup>216</sup> VA. CONST. art. VI, § 10, *quoted in* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 830 n.1 (1978).

<sup>217</sup> VA. CODE § 2.1-37.13 (1973), *quoted in* Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 830 n.1 (1978); *see* Judicial Inquiry & Rev. Comm'n R. 10, *quoted in* 435 U.S. at 830 n.1.

dissemination of information respecting the investigations of the confidential judicial review commission. The media defendant in *Landmark Communications, Inc. v. Virginia*<sup>218</sup> was found guilty of violating these provisions by publishing an article which accurately reported on a pending inquiry by the commission, and which identified the state judge whose conduct was the subject of the investigation.<sup>219</sup> The Supreme Court acknowledged that a large number of states had statutes requiring confidentiality with respect to judicial inquiry commissions.<sup>220</sup> It listed three functions served by the requirement of confidentiality in commission proceedings: first, protection against harm to a judge's reputation which might unfairly result from frivolous complaints; second, maintenance of confidence in the judicial system in preventing early disclosure of an otherwise unfounded charge; and third, protection of complainants and witnesses from possible recrimination.<sup>221</sup> The Court decided that the first amendment interest involved outweighed these functions after determining "that the publication Virginia seeks to punish under its statute lies near the core of the First Amendment . . ."<sup>222</sup> Chief Justice Burger stressed that the state courts had not demonstrated in the case at hand that the facts were such as to justify criminal sanction:

It is true that some risk of injury to the judge under inquiry, to the system of justice, or to the operation of the Judicial Inquiry and Review Commission may be posed by premature disclosure, but the test requires that the danger be "clear and present" and in our view the risk here falls far short of that requirement.<sup>223</sup>

The interest in confidentiality may be significant and the dissemination of information during the pendency of the proceedings may jeopardize that interest, yet the Court concluded without question that the first amendment interest must prevail.

Once again, the Court's decision in a case involving a balance of the first amendment against other interests is not difficult to understand. The state had *not* made an effective case for demonstrating the need for criminal prosecution.<sup>224</sup> Still, the result is troublesome. While in *Cox Broad-*

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<sup>218</sup> 435 U.S. 829 (1978).

<sup>219</sup> *Id.* at 831-32.

<sup>220</sup> *Id.* at 834.

<sup>221</sup> *Id.* at 833.

<sup>222</sup> *Id.* at 838.

<sup>223</sup> *Id.* at 845. The Court relied on the fact that in more than 40 states having similar commissions, criminal sanctions were not used to enforce the confidentiality against non-participants. *Id.* at 841.

<sup>224</sup> The Court did discuss alternatives which could be used, such as contempt proceedings against the breach of the confidentiality requirement by commission members or staff, the ability to require witnesses and members to take an oath of secrecy, and so forth. *Id.* at 841 n.12. It is not clear to this writer why such alternatives are so obviously superior to the approach taken by Virginia. In each of these alternative cases, the ultimate sanction (for violating the oath, for being held in contempt) would be a criminal or quasi-criminal penalty. But see Justice Stewart's concurring opinion, where he argued that confidentiality

casting the Court had before it a specific case involving fairly compelling facts, it refused to look to the facts in support of a privacy claim and focused exclusively on the first amendment issue. In *Landmark Communications* no specific facts were presented by the defendant, yet broad policies were enunciated in support of the result. Still, the Court had little trouble rejecting the privacy claim.

Some of the questions which remained open after *Cox Broadcasting* and *Landmark Communications* were considered in *Smith v. Daily Mail Publishing Co.*<sup>225</sup> The proceedings were directed to be closed by the state statute and were actually closed.<sup>226</sup> A strong argument was made as to a countervailing interest which would be served by the confidentiality of the proceedings.

The West Virginia Code provided: "[N]or shall the name of any child, in connection with any proceedings under this chapter, be published in any newspaper without a written order of the court"; and "[a] person who violates . . . a provision of this chapter for which punishment has not been specifically provided, shall be guilty of a misdemeanor. . . ."<sup>227</sup> In 1978 a junior high school student was shot and killed at school by a fourteen-year-old classmate. The classmate was identified by numerous eyewitnesses and was arrested by police soon after the incident. The media defendant learned of the shooting by monitoring the police band radio. Reporters and photographers were dispatched to the school. They obtained the name of the assailant by asking various witnesses. The following day the newspaper published a story about the shooting including the juvenile's name and picture.<sup>228</sup>

"The predominant philosophy of the juvenile justice system in the twentieth century has been one of positivism and rehabilitation. Protecting confidentiality in the juvenile process has been a central but controversial tenet of this philosophy."<sup>229</sup> In *Daily Mail* the state effectively argued the need for confidentiality by linking it to this goal of rehabilitating

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was a high government interest. He decided, however, that the state could not punish the newspaper:

If the constitutional protection of a free press means anything, it means that government cannot take it upon itself to decide what a newspaper may and may not publish. Though government may deny access to information and punish its theft, government may not prohibit or punish the publication of that information once it falls into the hands of the press, unless the need for secrecy is manifestly overwhelming.

*Id.* at 849 (Stewart, J., concurring) (footnote omitted).

<sup>225</sup> 443 U.S. 97 (1979).

<sup>226</sup> *Id.* at 98-100.

<sup>227</sup> W. VA CODE §§ 49-7-3 to -7-20 (1976).

<sup>228</sup> 443 U.S. at 99-100.

<sup>229</sup> Comment, *Freedom of the Press vs. Juvenile Anonymity: A Conflict Between Constitutional Priorities and Rehabilitation*, 65 IOWA L. REV. 1471, 1471 (1980) (footnotes omitted).

<sup>230</sup> Brief of Petitioners at 9-17, *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979).

juvenile delinquents,<sup>230</sup> "the primary goal of the juvenile justice system."<sup>231</sup> Justice Rehnquist, in his concurring opinion, stressed that "publicity may have a harmful impact on the rehabilitation of a juvenile offender."<sup>232</sup> In support of his proposition, Justice Rehnquist referred to an empirical psychological study on the effects of publicity on a juvenile.<sup>233</sup> For Justice Rehnquist, a prohibition against publication of the names of youthful offenders was a small price to pay to promote the state policy. "[A] State's interest in preserving the anonymity of its juvenile offenders—an interest that I consider to be, in the words of the Court, of the 'highest order'—far outweighs any minimal interference with freedom of the press that a ban on publication of the youths' names entails."<sup>234</sup>

The remainder of the Court<sup>235</sup> disagreed with Justice Rehnquist. For the majority, the focal point was "simply the power of a state to punish the truthful publication of an alleged juvenile delinquent's name lawfully obtained by a newspaper."<sup>236</sup> The Court noted that the only interest advanced to justify the statute was the protection of the anonymity of the juvenile offender. "It is asserted that confidentiality will further his

<sup>231</sup> Comment, *supra* note 229, at 1483. As noted in *S.A.S. v. Dis. Court*, \_\_\_\_ Colo. \_\_\_\_, 623 P.2d 58, 60 (1981) (citation omitted):

In order to protect the young from the stigma frequently associated with criminal proceedings, a petition in delinquency is classified as civil in character. The state's role in such a proceeding is not that of a prosecutor in a criminal case, but rather the role of *parens patriae* to protect the welfare of the child.

<sup>232</sup> 443 U.S. at 108 n.1 (Rehnquist, J., concurring).

<sup>233</sup> Recently, two clinical psychologists conducted an investigation into the effects of publicity on a juvenile. They concluded that publicity "placed additional stress on [the juvenile] during a difficult period of adjustment in the community, and it interfered with his adjustment at various points when he was otherwise proceeding adequately." Publication of the youth's name and picture also led to confrontations between the juvenile and his peers while he was in detention. While this study obviously is not controlling, it does indicate that the concerns that prompted enactment of state laws prohibiting publication of the names of juvenile offenders are not without empirical support.

*Id.* (quoting Howard, Grisso & Neems, *Publicity and Juvenile Court Proceedings*, 11 CLEARINGHOUSE REV. 203, 210 (1977)). The subject of this study was the eleven-year-old boy accused of the shooting in *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977). *Id.*

<sup>234</sup> 443 U.S. at 107. Justice Rehnquist concurred because the statute did not accomplish its stated purpose. Only newspapers were prohibited from printing the names of the youths, with the statute excluding electronic media and other forms of publication. *Id.* at 110. The majority of the Court agreed. *Id.* at 104-05. It disagreed, however, with his conclusion that "a generally effective ban on publication that applied to all forms of mass communication, electronic and print media alike, would be constitutional," *id.* at 110 (Rehnquist, J., concurring); see *id.* at 102-03 (majority opinion).

<sup>235</sup> Justice Powell did not participate in the decision. 443 U.S. at 106.

<sup>236</sup> *Id.* at 105-06. The Court relied heavily on *Davis v. Alaska*, 415 U.S. 308 (1974), where the state had not permitted a criminal defendant to impeach a prosecution witness on the basis of his juvenile record. The Court had struck down the state's ruling, finding that the state's policy had to be subordinated to the defendant's sixth amendment right of confrontation. *But see* Justice Rehnquist's response to this point:

In *Davis*, where the defendant's liberty was at stake, the Court stated that '[s]erious damage to the strength of the State's case would have been a real

rehabilitation because publication of the name may encourage further antisocial conduct and also may cause the juvenile to lose future employment or suffer other consequences for this single offense."<sup>237</sup> The majority opinion of the Chief Justice did not substantively analyze this claim, but merely stated that "[t]he magnitude of the State's interest in this statute is not sufficient to justify application of a criminal penalty to respondents."<sup>238</sup> Because forty-five other states had similar confidentiality statutes without criminal penalties, the State of West Virginia had not demonstrated that its action was "necessary to further the state interests asserted."<sup>239</sup>

The *Daily Mail* case represents a resounding triumph for the media. The state presented a very strong case: This was a proceeding which had traditionally been found to be confidential, empirical evidence was offered in support of the need for confidentiality, and the media's information was received outside of the closed official proceedings. Indeed, the Court chose not to dispute Justice Rehnquist's point that "[p]ublication of the names of juvenile offenders may seriously impair the rehabilitative goals of the juvenile justice system and handicap the youths' prospects for adjustment in society and acceptance by the public."<sup>240</sup> Even granting such an interference, the Court found that the first amendment interest in the dissemination of information concerning the proceedings prevailed.<sup>241</sup> One can seriously challenge this conclusion. No doubt the reporting of the basic incident and the proceedings was newsworthy and deserved protection under the first amendment. It is not clear, however, what the interest of the public is in finding out the name of the delinquent. Nor is it clear what the adverse impact of a contrary Court ruling would be on the media and the public. Was not Justice Rehnquist's point well taken? Is this not a trivial interference with the media's function of keeping the public well informed about newsworthy events? The Court

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possibility had petitioner been allowed to pursue this line of inquiry [related to the juvenile offender's record]. The State also could have protected the youth from exposure by not using him to make out its case. By contrast, in this case the State took every step that was in its power to protect the juvenile's name, and the minimal interference with the freedom of the press caused by the ban on publication of the youth's name can hardly be compared with the possible deprivation of liberty involved in *Davis*. Because in each case we must carefully balance the interest of the State in pursuing its policy against the magnitude of the encroachment on the liberty of speech and of the press that the policy represents, it will not do simply to say, as the Court does, that the 'important rights created by the First Amendment must be considered along with the rights of defendants guaranteed by the Sixth Amendment.'

443 U.S. at 109 n.2 (Rehnquist, J., concurring) (citations omitted).

<sup>237</sup> *Id.* at 104.

<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 102, 105.

<sup>240</sup> *Id.* at 107-08 (Rehnquist, J., concurring).

<sup>241</sup> See note 238 & accompanying text *supra*.

refused to address these questions, deferring as before to the first amendment contentions, which lacked considerable strength in this particular case.<sup>242</sup> As in *Cox Broadcasting* and *Landmark Communications*, one must question the Court's lack of consideration of interests other than the first amendment.

### C. Televising Trials

The televising of trials is an area quite apart from the previous discussions. The media are not closed out of proceedings. They are not forbidden to disseminate information and are not restricted as to the content of the information they publish. There is no punishment, civil or criminal, for the act of publishing. The question here is whether the electronic media shall have access to the criminal trial so that the trial process may be photographed or televised.

Throughout recent history, lawyers have been both skeptical about the media need for photographic coverage of criminal trials (whether still cameras or television) and apprehensive about the potential for disruption. Nowhere was this fear realized more clearly than in the spectacular trial of Bruno Hauptmann for the Lindbergh kidnaping.<sup>243</sup> The American

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<sup>242</sup> The majority could have decided the case on the equal protection ground that only newspapers were covered under the statute. See note 234 & accompanying text *supra*. Instead, this point became somewhat of an afterthought. See 443 U.S. at 104-05.

<sup>243</sup> *State v. Hauptmann*, 115 N.J.L. 412, 180 A. 809 (1935), *cert. denied*, 296 U.S. 649 (1935). The scene was well described in Seidman, *supra* note 7, at 13-14 (footnotes omitted):

Guilty or innocent, Bruno Richard Hauptmann certainly did not receive a trial calculated to determine the truth in a reliable fashion. The jury's verdict served only to formalize a verdict reached months earlier by the press. From the moment the Lindbergh child was seized, press coverage was intense and unremitting. Although the hysteria abated somewhat during the long search for the kidnapper, it began anew upon Hauptmann's arrest. Reams of copy were published examining every scrap of evidence tending to implicate Hauptmann. By the time of the trial, most major papers had established small bureaus in Flemington and had conducted massive advertising campaigns boasting of their coverage.

Flemington, a peaceful town of 2500 with a one-man police force, was simply not prepared to deal with the 64,000 sightseers and 16,000 automobiles that descended on it. Predictably, complete bedlam reigned outside the courthouse. The situation was only slightly less chaotic in the courtroom itself. The media and the spectators constantly disrupted court proceedings. Elaborate telegraph equipment was installed inside the courthouse, and although the trial judge prohibited the taking of pictures inside the courtroom itself, his order was openly flouted. Indeed, sound and motion picture equipment was plainly visible in the balcony of the courtroom throughout the trial.

Despite sequestration during the trial, the jury obviously was exposed to massive pretrial publicity. Moreover, each day as the jurors walked up the courthouse steps, they passed through a gauntlet of reporters, newsboys, and ordinary citizens making bets on the case, shouting "Burn Hauptmann," and selling souvenir reproductions of the kidnap ladder. The jurors ate in a public

Bar Association formally adopted a rule in direct response to the adverse impact of massive media coverage in that world famous case:

Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the court room, during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted.<sup>244</sup>

In 1952 a special committee of the ABA produced a report which caused the House of Delegates to amend this canon to proscribe televising court proceedings as well.<sup>245</sup> A majority of states adopted the substance of this rule.<sup>246</sup> The Federal Rules of Criminal Procedure also prohibits camera coverage of trials: "The taking of photographs in the court room during the progress of judicial proceedings or radio broadcasting of judicial proceedings from the court room shall not be permitted by the court."<sup>247</sup>

A recent poll of practicing lawyers reflected once again the overwhelming sentiment against allowing proceedings to be televised:

dining room, separated only by a cloth screen from reporters discussing the case over lunch. Even during deliberations, the jury could hear the mob that had gathered outside the courthouse screaming "Kill Hauptmann! Kill Hauptmann!"

<sup>244</sup> ABA CANONS OF JUDICIAL ETHICS No. 35, reprinted in 62 ABA REP. 1123, 1134-35 (1937).

<sup>245</sup> 77 ABA REP. 110, 257 (1952). The Canon was recodified as 3A(7) of the Code of Judicial Conduct which provides:

A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recesses between sessions, except that a judge may authorize:

(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;

(b) the broadcasting, televising, recording or photographing of investitive, ceremonial, or naturalization proceedings;

(c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:

(i) the means of recording will not distract participants or impair the dignity of the proceedings;

(ii) the parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;

(iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and

(iv) the reproduction will be exhibited only for instructional purposes in educational institutions.

ABA CODE OF JUDICIAL CONDUCT No. 3A(7) (1980).

<sup>246</sup> Pequignot, *From Estes to Chandler: Shifting the Constitutional Burden of Courtroom Cameras to the States*, 9 FLA. ST. U.L. REV. 315, 319 (1981); *Petition of Post-Newsweek Stations, Florida, Inc.*, 370 So. 2d 764 (Fla. 1979).

<sup>247</sup> FED. R. CRIM. P. 53.

Lawyers' attitudes toward statements regarding televised courtroom proceedings, United States, 1979

[NOTE: this table presents the findings of a survey done by Kane, Parsons and Associates for the American Bar Association Journal. Telephone interviews were conducted with a random sample of 601 lawyers who are members of the American Bar Association.]<sup>248</sup>

[percentages]

	Agree strongly	Agree with reser- vations	Dis- agree with reser- vations	Disagree strongly	Not sure
Television cameras in the courtroom would tend to distract witnesses	55	20	15	8	2
TV cameras in the courtroom should be discouraged as they will be used to show the more sensational aspects of a trial only	47	23	20	8	2
The use of televised proceedings should not be allowed as they will encourage lawyers and judges to grandstand for the TV audience	39	25	20	14	2
Televised courtroom proceedings would enhance the public concept of our system of justice	16	21	26	34	3
Televised courtroom proceedings should be encouraged because citizens are entitled to see our courts in operation	15	18	26	40	1
Barring television from courtrooms discriminates against that news source	9	11	19	59	2

Indeed, as recently as September 1980, the Judicial Conference of the United States adopted a rule prohibiting the taking of photographs and the use of radio or television broadcasting in the courtroom:

The taking of photographs and operation of tape recorders in the

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<sup>248</sup> *Lawyers Aren't Convinced that TV Belongs in Courtrooms*, 65 A.B.A.J. 1306, 1308 (1979).

courtroom or its environs during the progress of or in connection with judicial proceedings . . . is prohibited. A judge may, however, permit (1) the use of electronic or photographic means for the presentation of evidence or the perpetuation of a record, and (2) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings.<sup>249</sup>

Several arguments have been made respecting the adverse impact of cameras in the courtroom. The major points were succinctly set out by columnist James Reston:

They would be a distracting influence and make it more difficult to get the truth out of witnesses, whose powers of observation, recollection and communication are already limited in the emotional stresses of a courtroom.

They would encourage jurors to think about themselves on camera rather than concentrating on the evidence, and tempt lawyers to play to the cameras rather than to the jury.

While they would extend the process of justice to a much wider audience, they would in many if not most cases give that audience a distorted picture of the proceedings.<sup>250</sup>

A case illustrating the potential for disruption by cameras in the courtroom is that of Billie Sol Estes, a well-known financier and friend of Presidents who was convicted of swindling numerous farmers.<sup>251</sup> The Texas Judicial Canons allowed the trial judge, in his discretion, to direct the televising and photographing of court proceedings.<sup>252</sup> The difficulty in *Estes* was that the proceedings looked very much like a circus.<sup>253</sup> "Massive pretrial publicity total[ed] 11 volumes of press clippings . . . ."<sup>254</sup>

[At pretrial proceedings when the case was first called for trial,] all available seats in the courtroom were taken and some 30 persons stood in the aisles. . . . [A]t least 12 cameramen were engaged in the courtroom throughout the hearing . . . . Cables and wires were snaked across the courtroom floor, three microphones were on the judge's bench and others were beamed at the jury box and the counsel table. [All parties] conceded that the activities . . . led to considerable disruption of the hearings.<sup>255</sup>

<sup>249</sup> Revised Report of the Judicial Conference Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue, *supra* note 140, at 535-36.

<sup>250</sup> Reston, *Television And The Courts*, N.Y. Times, Jan. 23, 1981, § A, at 23, col. 5. See also Tongue and Lintott, *The Case Against Television in the Courtroom*, 16 WILLAMETTE L. REV. 777 (1980). (Justice Tongue sits on the Oregon Supreme Court.)

<sup>251</sup> *Estes v. Texas*, 381 U.S. 532 (1965). *Estes* continues to have difficulties with the criminal justice system. See *Horton v. United States*, 646 F.2d 181 (5th Cir. 1981) (affirming conviction for defrauding United States).

<sup>252</sup> *Estes v. Texas*, 381 U.S. 532, 535 (1965).

<sup>253</sup> See *id.* at 536. See also *Murphy v. Florida*, 421 U.S. 794, 799 (1975). The issue also arose in the Sam Sheppard case, though the disposition there primarily rested on the adverse pretrial publicity. See text accompanying notes 51-61 *supra*.

<sup>254</sup> 381 U.S. 532, 535 (1965).

<sup>255</sup> *Id.* at 535-36.

Though this extreme situation was altered somewhat at trial,<sup>256</sup> a good deal of television coverage occurred, and this coverage was broadcast the same day it was taken.<sup>257</sup> According to the Court, on one occasion the video tapes were rebroadcast in place of the "late movie".<sup>258</sup>

When the case came before the Supreme Court, the defendant claimed that his due process rights had been violated by the televising and broadcasting of the pretrial proceedings and the trial. Six separate opinions were written. Justice Clark's opinion for the Court established what appeared to be a per se rule that the televising of proceedings, over the objection of the defendant, denied due process rights. In response to the state's contention that no prejudice had been shown by the petitioner as resulting from the televising, Justice Clark stated: "Television in its present state and by its very nature, reaches into a variety of areas in which it may cause prejudice to an accused. Still one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced."<sup>259</sup> Chief Justice Warren, joined by Justices Douglas and Goldberg, made the point even more directly, stating

[t]hat the televising of criminal trials is inherently a denial of due process. . . . The record in this case presents a vivid illustration of the inherent prejudice of televised criminal trials and supports our conclusion that this is the appropriate time to make a definitive appraisal of television in the courtroom.<sup>260</sup>

This view of a per se rule commanded the four votes indicated above.<sup>261</sup>

Four Justices dissented,<sup>262</sup> finding that there was no per se constitutional rule against the introduction of television into a courtroom. They also found that there had been no showing that under the circumstances of the particular trial the petitioner was denied his constitutional rights.<sup>263</sup> The real issue, therefore, centered on the position of the ninth Justice,

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<sup>256</sup> Ultimately, the televising of the trial itself was restrained compared to the pretrial proceedings.

A booth had been constructed at the back of the courtroom which was painted to blend with the permanent structure of the room. It had an aperture to allow the lens of the cameras an unrestricted view of the courtroom. All television cameras and newsreel photographers were restricted to the area of the booth when shooting film or telecasting.

[L]ive telecasting was prohibited during a great portion of the actual trial.

*Id.* at 537.

<sup>257</sup> *See id.*

<sup>258</sup> *Id.* at 538.

<sup>259</sup> *Id.* at 544.

<sup>260</sup> *Id.* at 552 (Warren, C. J., concurring).

<sup>261</sup> While Justice Harlan concurred, he did not subscribe to the Court's per se analysis. *Id.* at 588-90 (Harlan, J., concurring).

<sup>262</sup> *Id.* at 601.

<sup>263</sup> *Id.* at 602 (Stewart, J., dissenting, joined by Black, Brennan and White, JJ.). Even the dissenters recognized that "the introduction of television into a courtroom is, at least in the present state of the art, an extremely unwise policy. It invites many constitutional risks, and it detracts from the inherent dignity of the courtroom." *Id.* at 601.

Justice Harlan. He concurred in the Court's judgment, but in his separate opinion he left some doubt as to how much of Justice Clark's opinion he supported. In Justice Harlan's view, although television in the courtroom could have negative effects, prohibiting it could preclude states' "procedural experimentation."<sup>264</sup> Justice Harlan concluded:

[T]here is no constitutional requirement that television be allowed in the courtroom, and, at least as to a notorious criminal trial such as this one, the considerations against allowing television in the courtroom so far outweigh the countervailing factors advanced in its support as to require a holding that what was done in this case infringed the fundamental right to a fair trial assured by the Due Process Clause of the Fourteenth Amendment.<sup>265</sup>

The confusion as to the *Estes* holding was fueled, to a large extent, by the egregious facts presented there. One federal court characterized Justice Harlan's opinion as favoring the per se rule "in a 'notorious' case which is 'heavily publicized' and 'highly sensational.' Thus, *Estes* can be construed as standing for the proposition that television coverage of a 'notorious' criminal case absent the defendant's validly obtained consent is a per se violation of due process."<sup>266</sup> Other judges viewed *Estes* as being limited to the situation in which the presence of cameras in the courtroom actually was shown to have prevented a fair trial,<sup>267</sup> while still others took a very broad view of *Estes*.<sup>268</sup>

With this shaky constitutional precedent in mind, the states proceeded cautiously. Many states, following the lead of the American Bar Association, refused to allow any electronic coverage. Others limited such coverage to particular kinds of proceedings, such as appellate arguments.

<sup>264</sup> *Id.* at 587 (Harlan, J., concurring).

<sup>265</sup> *Id.* at 587, 591 (emphasis added). Justice Harlan added:

In the context of a trial of intense public interest, there is certainly a strong possibility that the timid or reluctant witness, for whom a court appearance even at its traditional best is a harrowing affair, will become more timid or reluctant when he finds that he will also be appearing before a 'hidden audience' of unknown but large dimensions. There is certainly a strong possibility that the 'cocky' witness having a thirst for the limelight will become more 'cocky' under the influence of television. And who can say that the juror who is gratified by having been chosen for a front-line case, an ambitious prosecutor, a publicity-minded defense attorney, and even a conscientious judge will not stray, albeit unconsciously, from doing what 'comes naturally' into pluming themselves for a satisfactory television 'performance'?

*Id.* at 591.

<sup>266</sup> *Zaehring v. Brewer*, 635 F.2d 734, 738 (8th Cir. 1980). Enormous problems would be created, however, if trial judges actually had to determine which cases were sufficiently "notorious."

<sup>267</sup> *State v. Newsome*, 177 N.J. Super. 221, 226-28, 426 A.2d 68, 71-72 (1980).

<sup>268</sup> See *Bradley v. Texas*, 470 F.2d 785, 787 (5th Cir. 1972) ("Television coverage of a trial is considered inherently prejudicial . . ."). But see Merola, *Who'd Beat on a Suspect While the Camera's Running?*, TV GUIDE, July 25, 1981, at 17 (Mr. Merola is the district attorney of Bronx County in New York City).

A few began to allow television coverage of criminal trials.<sup>269</sup> In *Chandler v. Florida*,<sup>270</sup> which ultimately came before the Supreme Court, the state had chosen to go farther than any other by allowing television coverage of criminal trials, even over the specific objection of the defendant.

The state of Florida embarked on an ambitious pilot program in 1975 for televising one civil and one criminal trial under specific guidelines requiring the consent of all parties.<sup>271</sup> After this program ended in 1978, the state supreme court reviewed briefs, reports, and studies, including its own survey of interested parties, and concluded that "on balance there [was] more to be gained than lost by permitting electronic media coverage of judicial proceedings subject to standards for such coverage."<sup>272</sup> The Florida Supreme Court then promulgated a permanent canon allowing for such coverage.<sup>273</sup>

The implementing guidelines required by the Florida canon specified in detail the type of equipment to be used and the manner of its use.<sup>274</sup> As noted by Chief Justice Burger, the restrictions are designed to eliminate any adverse impact which might otherwise be present:

[N]o more than one television camera and only one camera technician are allowed. Existing recording systems used by court reporters are used by broadcasters for audio pickup. Where more than one broadcast news organization seeks to cover a trial, the media must pool coverage. No artificial lighting is allowed. The equipment is positioned in a fixed location, and it may not be moved during trial. Videotaping equipment must be remote from the courtroom. Film, videotape, and lenses may not be changed while the court is in session. No audio recording of conferences between lawyers, between parties and counsel, or at the bench is permitted. The judge has sole and plenary discretion to exclude coverage of certain witnesses, and the jury may not be filmed. The judge has discretionary power to forbid coverage whenever satisfied that coverage may have a deleterious effect on the paramount right of the defendant to a fair trial. The Florida

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<sup>269</sup> See *Chandler v. Florida*, 449 U.S. 560, 565 n.6 (1981); see also *In re* Petition of Post-Newsweek Stations, Fla., Inc., 370 So. 2d 764, 786-91 app. 2 (Fla. 1979) (reprinting National Center for State Courts, *Television in the Courtroom: Recent Developments*, Feb. 7, 1979); see also Carter, *Television in the Courtrooms*, 5 STATE CT. J. 6 (1981).

<sup>270</sup> 449 U.S. 560 (1981).

<sup>271</sup> Petition of Post-Newsweek Stations, Fla., Inc., 327 So. 2d 1, 2 (Fla. 1976).

<sup>272</sup> Petition of Post-Newsweek Stations, Fla., Inc., 370 So. 2d 764, 780 (Fla. 1979). This opinion contains an excellent discussion of the various arguments to be made as to the desirability of televising criminal trials. See *id.* at 779-81.

<sup>273</sup> FLA. CANON 3A(7). This canon provides:

Subject at all times to the authority of the presiding judge to (i) control the conduct of proceedings before the court, (ii) ensure decorum and prevent distractions, and (iii) ensure the fair administration of justice in the pending cause, electronic media and still photography coverage of public judicial proceedings in the appellate and trial courts of this state shall be allowed in accordance with standards of conduct and technology promulgated by the Supreme Court of Florida.

<sup>274</sup> 370 So. 2d at 783-85 app. 1, A.

Supreme Court has the right to revise these rules as experience dictates, or indeed to bar all broadcast coverage of photography in courtrooms.<sup>275</sup>

The defendants in *Chandler* had been charged with the relatively routine offenses of conspiracy to commit burglary, grand larceny, and possession of burglary tools. While the case was hardly notorious along the lines of *Estes*, it was not ordinary either. At the time of their arrest, the defendants were Miami Beach police officers. A television camera was in place for one afternoon during which the state presented the trial testimony of its chief witness. No coverage occurred in connection with the defendants' case. The defendants argued that the Florida rule was unconstitutional on its face and as applied, but the arguments were rejected at the state court level.<sup>276</sup> The defendants in argument before the United States Supreme Court read the *Estes* case as announcing a per se constitutional rule that televising of any portion of a criminal trial without the defendant's consent is a denial of due process.<sup>277</sup>

Chief Justice Burger, focusing on Justice Harlan's swing vote in *Estes*,<sup>278</sup> concluded:

[*E*stes is not to be read as announcing a constitutional rule barring still photographic, radio and television coverage in all cases and under all circumstances. It does not stand as an absolute ban on state experimentation with an evolving technology, which, in terms of modes of mass communication, was in its relative infancy in 1964, and is, even now, in a state of continuing change.<sup>279</sup>

While at least two members of the Court, Justices Stewart and White, thought that *Estes* did announce a per se rule and should be overruled,<sup>280</sup> no member of the Court<sup>281</sup> was willing in 1981 to accept such a per se rule. As stated by the Chief Justice: "The risk of juror prejudice is present in any publication of a trial, but the appropriate safeguard against such prejudice is the defendant's right to demonstrate that the media's

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<sup>275</sup> 449 U.S. at 566.

<sup>276</sup> *Id.* at 567-68. See *Chandler v. State*, 366 So. 2d 64, 69 (Dist. Ct. App. 1979) (per curiam), cert. denied, 376 So. 2d 1157 (Fla. 1979) (per curiam), *aff'd*, 449 U.S. 560 (1981).

<sup>277</sup> *Id.* at 570.

<sup>278</sup> See notes 264-68 & accompanying text *supra*.

<sup>279</sup> 449 U.S. at 573-74. The Chief Justice emphasized the limitations imposed by Justice Harlan in his opinion: "At the present juncture, I can only conclude that televised trials, at least in cases like this one, possess such capabilities for interfering with the even course of the judicial process that they are constitutionally banned." *Id.* at 573 (quoting 381 U.S. at 595-96 (Harlan, J., concurring)) (emphasis added by Chief Justice Burger).

<sup>280</sup> 449 U.S. at 583 (Stewart, J., concurring) ("Although concurring in the judgment, I cannot join the opinion of the Court because I do not think the convictions in this case can be affirmed without overruling *Estes v. Texas*."); *id.* at 587 (White, J., concurring) ("I think *Estes* is fairly read as establishing a per se constitutional rule against televising any criminal trial if the defendant objects. So understood, *Estes* must be overruled to affirm the judgment below.')

<sup>281</sup> Justice Stevens did not participate in the case. *Id.* at 583.

coverage of his case . . . compromised the ability of the particular jury that heard the case to adjudicate fairly."<sup>282</sup>

The Court acknowledged that since *Estes* had been decided, many states had allowed experimentation and many of the negative factors found in *Estes*—cumbersome equipment, cables, poor lighting, and the number of camera technicians—were no longer of great concern.<sup>283</sup> The Court thus decided that “no one has been able to present empirical data sufficient to establish the mere presence of the broadcast media inherently has an adverse effect . . . .”<sup>284</sup> Because the defendants were not able to offer any evidence of particular prejudice,<sup>285</sup> the Court held that, unlike the situation in *Estes*, there was no showing that the trial was in any way affected by television coverage.<sup>286</sup>

The difficulty with the approach of the Court is that few defendants will ever be able to show prejudice resulting from the television cameras, apart from the spectacular case such as *Estes*.<sup>287</sup> More importantly, it is not clear to this writer why such a showing should have to be made by the defendant. This is not a case where severe first amendment restrictions are being imposed on the media. The sources of information are not being limited or cut off. No punishment of any sort is being meted out for the content of the reporting. Can anyone doubt that—at least in some cases—the televising of proceedings will have some serious impact on the trial participants,<sup>288</sup> an impact which will not be tangible and will not likely lead to appealable issues?

If the central thesis is that televising of criminal proceedings will educate the public far better than other forms of coverage, does not this assertion prove too much? If it is educational in the context in which a defendant stands to be deprived of his or her liberty, is it not also educational for the public to understand how the United States Supreme Court operates? The Court does not, however, allow electronic media coverage

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<sup>282</sup> *Id.* at 575.

<sup>283</sup> *Id.* at 576-77.

<sup>284</sup> *Id.* at 578-79. The Chief Justice recognized that the “data thus far assembled” were “limited” and “non-scientific.” *Id.* at 576 n.11.

<sup>285</sup> *Id.* at 568. The only evidence was to the contrary because at voir dire the jurors were asked if the presence of the camera would in any way compromise their ability to consider the case. *Id.* at 567.

<sup>286</sup> *Id.* at 582. See Platte, *TV in the Courtroom: Right of Access?*, 3 *COM. & L.* 11 (1981).

<sup>287</sup> Of course, even after *Chandler*, restrictions on television may be legitimately imposed so as to control prejudicial publicity and protect the defendant's right to a fair trial. The obvious example is the notorious Atlanta child murder trial which, the trial judge ruled, could not be televised. The court there held that under the Georgia rules consent of all parties was a prerequisite, but in any case, televising of the proceedings would not be in the public interest in view of the potential harm “to those children and families who were adversely affected by the ordeal” in the city of Atlanta. *State v. Williams*, [1981] 29 *CRIM. L. REP. (BNA)* 2516.

<sup>288</sup> As Justice White noted in *Chandler*, “the majority does not underestimate or minimize the risks of televising criminal trials over a defendant's objections. I agree that those risks are real and should not be permitted to develop into the reality of an unfair trial.” 449

of appellate arguments before it.<sup>289</sup> The Court in *Chandler* did not respond to these issues, but again stressed the importance of media coverage of criminal trials. Despite the importance of such coverage, the Court's focus on it seems to miss the mark.

In fairness to the Court, it did make clear that there was no *constitutional right* of media access with respect to electronic coverage of trials. Instead, relying on the Florida rules, it wrote that trial judges would have to be vigilant to make sure no prejudice was suffered by defendants in these televised cases.<sup>290</sup>

In many respects, *Chandler* is a seminal case. Reversing the traditional legal view of electronic coverage of trials, the Court refused to adopt a per se rule against such coverage.<sup>291</sup> It is true that the Court also did not establish any constitutional right of access regarding electronic coverage, but made explicit that the key was a showing of specific prejudice to the defendant. This showing will be a difficult one to make absent a circuslike atmosphere.<sup>292</sup> The ruling in *Chandler* is, thus, a very

U.S. at 588-89 (White, J., concurring). See also the comments of Justice Stewart in 14 THIRD BRANCH 3 (1982):

I think a good argument can be made against televising the proceedings in a trial court, the argument being that the televising of such proceedings would distort the administration of justice, would distort the actions of the witnesses and the members of the jury and even the judge, conscious as they would be that they were not just in a courtroom but in everybody's living room.

For an interesting exchange on this point by two practicing lawyers, see Allied Educational Foundation, *Television in the Courtroom—Limited Benefits, Vital Risks?*, 3 COM. & L. 30 (1981) (educational conference).

<sup>289</sup> Even at the swearing-in ceremony of Justice Sandra Day O'Connor, only reporters and artists were allowed to record the event in accordance with the Supreme Court's policy banning television, tape-recording, and picture-taking of proceedings. *Washington Post*, Sept. 25, 1981, § A, at 3, col. 1 (reprinted in the *Bloomington Herald-Telephone*, Sept. 26, 1981, § 1, at 3, col. 1). At this time an intense controversy exists in the California Supreme Court. Despite strenuous objections from two Justices, the California court has now agreed to allow cameras to film oral arguments for the first time in the Court's history. Chief Justice Byrd noted that the court wished to treat litigants fairly while "mak[ing] court proceedings more open and understandable to the public." Hager, *Cameras Allowed to Enter Supreme Court*, *Los Angeles Times*, Sept. 4, 1981, § 1, at 3, col. 5. The dissenting Justices, however, stated that "it is regrettable that a majority of the members of this court have yielded to the persistence of an entertainment media. . . . 'As a result, this temple of justice is being transformed into a theater, and lawyers and justices are to be the actors.'" *Id.* at 3-21, col. 5.

<sup>290</sup> 449 U.S. at 574.

"The Florida guidelines place on trial judges positive obligations to be on guard to protect the fundamental right of the accused to a fair trial. . . . [I]t is significant that Florida requires that objections of the accused to coverage be heard and considered on the record by the trial court." *Id.* at 577.

<sup>291</sup> Tornquist & Grifall, *Television in the Courtroom: Devil or Saint?* 17 WILLAMETTE L. REV. 345 (1981); Zimmerman, *Overcoming Future Shock: Estes Revisited, or A Modest Proposal for the Constitutional Protection of the News-Gathering Process*, 1980 DUKE L.J. 641.

<sup>292</sup> See Zimmerman, *supra* note 291. One reporter reviewed the evidence and received these quotes from judges and lawyers: "I've yet to see how they detract from the administration of justice"; "it's worked better than we anticipated"; "after two or three minutes, everybody in the courtroom forgets the cameras and the mikes are there." Lind-

broad victory for the media.<sup>293</sup> Without any showing by the media of a great need to broadcast the proceedings or a showing that such proceedings would not be inherently prejudicial, the Court recognized the importance of open access absent a compelling showing of prejudice by the defendant.<sup>294</sup> The impact of *Chandler* has already been widespread. Numerous states have adopted rules paralleling the Florida experiment,<sup>295</sup> and as the technology improves one expects further experimentation.<sup>296</sup>

### CONCLUSION

There has always been and will continue to be a great public interest in criminal trials. These events are newsworthy and central to the democratic process and need to be fully and freely reported by the various news media. Within the last decade the Supreme Court has strongly accepted this view, moving away from an occupation with the sixth amendment and fourteenth amendment rights of the accused on trial and toward the legitimate interest of the media to open access to criminal trials. Instead of merely deferring to a claim of potential prejudice to the trial rights of the defendant, the Court has become greatly concerned with the impact of restrictions on the dissemination of information under the first amendment.

The position of the Court makes a good deal of sense in the first two areas discussed in this article. Prior restraint orders should be virtually impossible to obtain,<sup>297</sup> as these orders completely cut off the media from the news events. Similarly, closure orders should only be granted in the rarest of circumstances. In this sense *Richmond Newspapers* is right, but *Gannett* is wrong. If the press cannot be routinely shut out from trials,

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sey, *After 5 Years, Judges and Lawyers See Courts Adjusting to the Camera's Eye*, N.Y. Times, Feb. 7, 1981, at 6, col. 1.

<sup>293</sup> Cf. Pequignot, *supra* note 246.

<sup>294</sup> It is surprising and disappointing that the Court was not willing to evaluate the various interests involved; instead it deferred to the media's claims. One would have hoped for a test somewhat parallel to that used in *Mathews v. Eldridge*, 424 U.S. 319 (1976), a case in which the Court discussed the procedural safeguards required under the due process clause. There the Court looked to three factors (private interest, risk of erroneous deprivation, the government's interest) in reaching its determination of the due process mandate. *Id.* at 335. In *Chandler* the Court did not engage in such a weighing process.

<sup>295</sup> Tornquist & Grifall, *supra* note 291; Erickson, *COLORADO LAWYER*, Sept. 1981, at 2199, 2200, indicates that 31 states now permit television and camera coverage of trial or appellate proceedings. For a good discussion of the manner in which this evolution has occurred, see Carter, *supra* note 269. The proposed Illinois rules are typical of the new trend. Section 61(c)(24) of the Supreme Court Rules as passed by the Illinois State Bar Association would allow the taking of photographs and broadcasting or televising of court proceedings "subject to conditions imposed by authority of the presiding judge."

<sup>296</sup> For a good discussion of the great improvements in the technology in this area, see Loewen, *Cameras in the Courtroom: A Reconsideration*, 17 *WASHBURN L.J.* 504 (1978).

<sup>297</sup> They may now be impossible to obtain under any circumstances, in light of the various concurring opinions in *Nebraska Press*. See notes 86-93 & accompanying text *supra*.

it is difficult to understand why no strong showing need be made by the trial judge in the vital pretrial setting.

The other actions taken in this field by the Supreme Court are far less defensible. When the press is not being kept away from the proceedings, when they are free to report the important facts of the subject incident, as well as the pretrial hearings and the trial, the Court should be reluctant to disregard other state interests. The privacy of rape victims and the goal of the state in keeping juvenile and judicial inquiry matters confidential are significant. On the other hand, it is a subtle argument, indeed, to contend that first amendment interests are seriously affected by forbidding the reporting of the names of victims of crimes, juvenile delinquents, or judges not yet determined to have acted improperly. Of even greater concern is the Court's ruling in the televised trial case where the states were given much discretion, though questions regarding the limited educational value of such broadcasting and the adverse impact on the trial process were expressed.<sup>298</sup>

In spite of the fears stated by many journalists,<sup>299</sup> the media have fared quite well before the Supreme Court when the question involved the reporting of criminal trials. In many of these cases, the first amendment was quite properly given great weight. In others, however, the unwillingness of the Justices to evaluate other, conflicting interests is troubling.

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<sup>298</sup> As noted by the Chief Justice in *Chandler*, the Conference of State Chief Justices, by a vote of 44 to 1, recently approved a resolution allowing the highest court of each state to promulgate rules regulating radio, television, and other photographic coverage of court proceedings. 449 U.S. at 564 n.4.

<sup>299</sup> For the views of Carl Stern and Bob Woodward, see notes 20, 99 & 169 *supra*; see also note 100 & accompanying text *supra*.



1-1-1967

# Controlling Prejudicial Publicity by the Contempt Power: The British Practice and Its Prospect in American Law

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CONTROLLING PREJUDICIAL PUBLICITY BY THE CONTEMPT POWER:  
THE BRITISH PRACTICE AND ITS PROSPECT IN AMERICAN LAW

I. Introduction

Recent, sensational criminal cases have engendered publicity so adverse to a criminal defendant's constitutional right to a fair trial that judges have been importuned by members of the bar to restrain newspaper excesses by the use of the contempt power.<sup>1</sup> Whether American courts can constitutionally curb press coverage of pretrial or trial proceedings that may prejudice a defendant's right to a fair trial, and whether it would be desirable for them to do so, are still open questions. In Britain, no such doubt exists, under English law, as to the propriety of using this inherent judicial power to "safeguard the fair administration of criminal justice by jury trial from mutilation or distortion by extraneous influences."<sup>2</sup>

English courts have protected the integrity of their criminal process from direct interference by parties before the courts through the instrumentality of the contempt power since early common law.<sup>3</sup> Until the beginning of this century, it was thought that the exercise of this summary power against constructive contempts<sup>4</sup> rested on the "same immemorial usage as supports the whole fabric of the common law";<sup>5</sup> but in fact the practice developed only in the eighteenth century.<sup>6</sup> Lord Hardwicke, in the 1742 case of *Roach v. Garvan*,<sup>7</sup> laid the foundation for this practice in committing an editor to the Fleet for impugning the characters of witnesses. While disregarding an objection that these actions were proper matter for a libel suit rather than for the court's summary jurisdiction, he stated that courts must punish publications that result in "prejudicing

1 Though their recommendations for avoiding prejudicial publicity are aimed primarily at stopping dissemination of information by court officers, the ABA Advisory Committee has also recommended that judges make a limited use of the contempt power:

(a) Against a person who, knowing that a criminal trial by jury is in progress or that a jury is being selected for such a trial:

(i) disseminates by any means of public communication an extrajudicial statement relating to the defendant or to the issues in the case that goes beyond the public record of the court in the case, if the statement is reasonably calculated to affect the outcome of the trial and seriously threatens to have such an effect; or

(ii) makes such a statement with the expectation that it will be so disseminated. ABA ADVISORY COMMITTEE ON FAIR TRIAL AND FREE PRESS, STANDARDS

RELATING TO FAIR TRIAL AND FREE PRESS 150 (Tent. Draft 1966).

2 *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 920 (1950) (opinion of Justice Frankfurter respecting the denial of the petition for writ of certiorari).

3 For a discussion of the early history of the contempt power, see GOLDFARB, *THE CONTEMPT POWER* 9-25 (1963).

4 Constructive contempts are those criminal contempts committed out of the presence of the court which obstruct the administration of justice. See Goodhart, *Newspapers and Contempt of Court in English Law*, 48 HARV. L. REV. 385, 386 (1935).

5 Fox, *The King v. Almon*, 24 L.Q. REV. 184, 185 (1908). Until proven historically unsound by Sir John Fox in Fox, *supra* at 184 and 266, this statement from Lord Wilmot's unpublished opinion in *Rex v. Almon*, [1765] WILMOT'S NOTES 243 (1802), was authority in both England and the United States. See GOLDFARB, *op. cit. supra* note 3, at 19-20.

6 English courts had the power to punish interference by strangers out of the presence of the court before that time, but the usual procedure was by indictment, information, or action at law for libel. See Fox, *supra* note 3, at 270.

7 2 Atk. 469, 26 Eng. Rep. 683 (Ch. 1742).

mankind against persons before the case is heard . . . ,"<sup>8</sup> and that they must do so to "keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters."<sup>9</sup>

The power of constructive contempt has been used frequently by modern English courts to preserve the "stream of justice" from pollution by newspaper publications that tend to interfere with the administration of criminal justice.<sup>10</sup> In these cases, an offending newspaper is not punished, as it would first seem to an American familiar with defendant-centered remedies, because its publication has prejudiced the individual criminal defendant.<sup>11</sup> Rather, the contempt is that the paper has obstructed the administration of justice and injured the court by depriving it "of the power of doing that which is the end for which it exists — namely, to administer justice duly, impartially, and with reference solely to the facts judicially brought before it."<sup>12</sup>

## II. British Contempt Procedure

Although theoretically contempt is an offense against the process of criminal justice, English courts do not proceed against newspapers on their own motion.<sup>13</sup> The individual defendant in a pending criminal proceeding, who believes his right to a fair trial has been prejudiced by newspaper publicity, initiates prosecution against the offending paper.<sup>14</sup> The aggrieved party applies directly, or requests the Attorney General to apply on his behalf,<sup>15</sup> to a Queen's Bench Divisional Court<sup>16</sup> for a writ of attachment for contempt.<sup>17</sup> Then the court, by a judgment based on all the circumstances at the time of publication, determines whether the newspaper is guilty of contempt.<sup>18</sup> The form and content of the offending article, the circulation of the paper in which it appeared, and the state of the proceedings against the accused at the time of its publication are factors in this judgment.<sup>19</sup> The question of liability is judged by an objective

8 *Id.* at 471, 26 Eng. Rep. at 685.

9 *Ibid.*

10 Though many of the early uses of constructive contempt involved punishing personal attacks on judges, the rationale for punishment was the same: "to prevent undue interference with the administration of justice." *Rex v. Davies*, [1906] 1 K.B. 32, 40 (1905).

11 *E.g.*, *Regina v. Evening Standard Co.*, [1954] 1 Q.B. 578, 583-84; *Rex v. Parke*, [1903] 2 K.B. 432, 436-37; *Regina v. Balfour-Re Stead*, 11 T.L.R. 492, 493 (Q.B.D. 1895).

12 *Rex v. Parke*, *supra* note 11, at 437.

13 See Gillmor, *Free Press and Fair Trial in English Law*, 22 WASH. & LEE L. REV. 17, 18-20 (1965).

14 *Ibid.*

15 *Ibid.* This practice has, in recent cases, been preferred over application by private counsel, see Brief for Attorney General as Amicus Curiae, *Regina v. Duffy*, [1960] 2 Q.B. 188, 192. Proceeding by private counsel has the advantage, however, that as advisers to the defendant in the criminal proceeding, they would be best able to seek the application without prejudicing the defendant's eventual defense. See *Contempt of Court*, 207 L.T. 225, 227 (1949).

16 Gillmor, *supra* note 13, at 19. All branches of the High Court of England have the power to punish contempts against themselves. See Goodhart, *supra* note 4, at 909. Queen's Bench Division Courts, however, have exclusive jurisdiction over constructive contempts arising out of criminal proceedings before those courts and out of those committed during preliminary hearings.

17 An attachment is essentially a committal to prison. See Goodhart, *supra* note 4, at 908.

18 *Regina v. Duffy*, [1960] 2 Q.B. 188, 196-97.

19 *Ibid.*

standard. Therefore, that the publication did not, in fact, interfere with the fair administration of the criminal proceeding is irrelevant.<sup>20</sup> Under this rigidly objective standard a paper was held in contempt even though the accused had been acquitted.<sup>21</sup>

If the court finds that the article had a reasonable tendency to interfere with the impartial administration of justice, it will summarily order the editor, reporter, publisher, or any other person responsible for the publication to appear before the court. Unless cause can be shown why such persons or their paper should not be punished — by convincing the court that no contempt was committed — a prison sentence, fine, or both will be imposed. If the damage is slight, the court can nominally tax the paper the costs of the proceedings.<sup>22</sup> Thus, the severity of the sentence imposed is entirely within the discretion of the court. Although in early constructive contempt cases, those found guilty of contempt were imprisoned for terms as long as three years,<sup>23</sup> recently, prison sentences have been imposed only in cases of exceptional abuse.<sup>24</sup>

### III. Comment Found to Be Contempt

English law is settled that any newspaper comment calculated to prejudice pending criminal proceedings will be punished as contempt.<sup>25</sup> The courts, moreover, have given a broad definition to the type of newspaper "comment" that will be classified as contempt, and to when proceedings are "pending" for contempt purposes.

Reporting information not accepted into evidence at the trial<sup>26</sup> and commenting on the personal character and prior criminal record of an accused,<sup>27</sup> both recognized as having a dangerous tendency to "try" cases in the newspapers rather than in a court of law, have been punished as contempt. Similarly, expressing an opinion as to the results of a pending trial has been considered by English judges to be "comment" tending to prejudice an accused.<sup>28</sup>

An extreme example of prejudicial publicity, severely dealt with by an English court, concerned the murder trial of John Haigh in 1949.<sup>29</sup> Haigh, who had been charged with the acid-bath murder of an elderly woman, was described by a series of newspaper articles as a human vampire, with lurid reasons

20 See *Rex v. Daily Mirror*, [1927] 1 K.B. 845. In this case a newspaper was punished with contempt for printing a photograph of a person charged with a crime when it was "apparent to a reasonable man that a question of identity," *id.* at 850, might arise. None of the witnesses who identified the accused had, in fact, seen the photograph. Identity, moreover, was not in issue at the trial. *Rex v. Daily Mirror*, *supra*.

21 *Regina v. Evening Standard Co.*, [1954] 1 Q.B. 578.

22 See Goodhart, *supra* note 4, at 909.

23 See *Rex v. White*, 1 Campb. 359, 170 Eng. Rep. 985 (N.P. 1808).

24 See *Rex v. Bolam*, 93 Sol. J. 220 (1949). Until recently, the sentence imposed was final. Parliament now provides a statutory right of appeal in contempt cases. Administration of Justice Act, 1960, 8 & 9 Eliz. 2, c. 65, § 13.

25 Cowen, *Prejudicial Publicity and the Fair Trial: A Comparative Examination of American, English and Commonwealth Law*, 41 *INT. L.J.* 69, 76 (1965).

26 See *Rex v. Tibbits*, [1902] 1 K.B. 77 (1901).

27 See *Rex v. Davies*, [1906] 1 K.B. 32 (1905).

28 *Rex v. Balfour-Re Stead*, 11 T.L.R. 492 (Q.B.D. 1895).

29 *Rex v. Bolam*, 93 Sol. J. 220 (1949). A full account of the case appears in the appendix to Justice Frankfurter's opinion concerning the denial of certiorari in *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 930-32 (1950).

given for that description. Though Haigh had been charged with only one murder, the articles said he had been charged with several and went on to list the names of his other "victims." Lord Goddard, while denouncing the paper's conduct as pandering to sensationalism, sentenced the editor to three months in prison and fined the newspaper £10,000.<sup>30</sup> He concluded with an ominous warning.

If for the purpose of increasing the circulation of their paper they should again venture to publish such matter as this, the directors themselves might find that the arm of the Court was long enough to reach them and to deal with them individually.<sup>31</sup>

To an American press, restricted only by the recently liberalized law of libel<sup>32</sup> and by its own sense of responsibility,<sup>33</sup> the English decision of *Rex v. Astor*<sup>34</sup> would seem like "draconian control."<sup>35</sup> It illustrates how careful English newspapers must be to avoid contempt convictions for comment tending to prejudice a criminal trial. In this case, the court held that the mere arrangement of two news items next to each other was contempt. The first item gave an account of a civil proceeding concerning a share transaction, while the second covered a criminal prosecution relating to this same transaction. The jury in the criminal case, the court reasoned, upon reading the articles in question, might be unduly influenced against the accused.

#### IV. When a Proceeding Is Pending for Contempt Purposes

English courts have jurisdiction to punish such comments only when they are published during a pending criminal proceeding.<sup>36</sup> A proceeding is pending for contempt purposes even though trial has not yet begun. In *Rex v. Parke*,<sup>37</sup> Justice Wills, while punishing press comment published during preliminary hearings, reconciled earlier cases that seemed to require that a criminal case be at trial before a court could have jurisdiction to punish for contempt.

It is true that in very nearly all the cases which have arisen there has been a cause actually begun, so that the expression, [that a case is pending] quite

<sup>30</sup> *Rex v. Bolam*, *supra* note 29.

<sup>31</sup> *Id.* at 220. See also *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 932 (1950).

<sup>32</sup> *Cf. New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

<sup>33</sup> American news media representatives have deplored any direct or indirect restraint on news reporting, stating that any evil that might exist can be curbed by voluntary codes. See comment of CBS President, Dr. Frank Stanton, *Justice and the News Media*, Trial, Dec.-Jan., 1966, p. 40. For a discussion of voluntary codes which have proven unsuccessful, see Note, *Community Hostility and the Right to an Impartial Jury*, 60 *Colum. L. Rev.* 349, 372 n.138 (1960).

English newspapers, though already policed by the contempt power, have engaged in self-regulation through a voluntary press council. One practice, evidently beyond the attention or reach of the courts, which the council has condemned is "checkbook journalism," which is the practice of making story contracts with witnesses engaged in pending proceedings. See *N.Y. Times*, Nov. 27, 1966, p. 15, col. 1.

<sup>34</sup> 30 T.L.R. 10 (K.B.D. 1913).

<sup>35</sup> See Goldfarb, *Ensuring Fair Trial: The Impropriety of Publicity*, *The New Republic*, Feb. 29, 1964, p. 12.

<sup>36</sup> See Cowen, *supra* note 25, at 76

<sup>37</sup> [1903] 2 K.B. 432.

natural under the circumstances, accentuates the fact, not that the case has been begun, but that it is not at an end. That is the cardinal consideration. It is possible very effectually to poison the fountain of justice before it begins to flow.<sup>38</sup>

Later cases pushed the time during which a case is pending and thus the period during which a newspaper is subject to contempt back to the time of a suspect's arrest.<sup>39</sup> Whether a court can exercise jurisdiction before proceedings can be said to have been initiated by an arrest, as when the suspect's arrest is only imminent, has yet to be decided by an English court.<sup>40</sup>

A criminal case is still pending for contempt purposes until the time for bringing notice of appeal has expired, or until an appeal has been finally heard,<sup>41</sup> because the possibility exists that a new jury, susceptible to prejudicial comments, might be empaneled upon the granting of a new trial.<sup>42</sup>

On appeal, however, the question of an alleged contempt is only whether the publication tends to prejudice the proceeding *then* pending — the appeal.<sup>43</sup> A comment which might prejudice a jurymen likely would not have the same effect upon a judge. The language in a recent case<sup>44</sup> that refused an attachment for contempt on appeal, moreover, indicates that no comment, short of a "deliberate campaign to influence the decision of the appellate tribunal"<sup>45</sup> will be considered contempt.

## V. Intent Not Required

One of the severest aspects of English constructive contempt law is that a newspaper can be in contempt even though it had no intention to interfere with the administration of justice.<sup>46</sup> An early English case determined that intent is not a necessary element of the offense. In *Roach v. Garvan*,<sup>47</sup> Lord Hardwicke answered a defense that a publisher did not know the content of a contemptuous article:

38 *Id.* at 438.

39 *Rex v. Editor*, 40 T.L.R. 833 (K.B.D. 1924); *Rex v. Clarke*, 103 L.T.R. 636 (K.B.D. 1910).

40 Professor Goodhart wrote in 1935 that he thought it "almost certain that the courts would not hesitate to take this step if they felt that the administration of justice had been interfered with." Goodhart, *supra* note 4, at 890-91. The problem is rooted in the rationale for punishing contempts — whether the offense is against the administration of justice generally, or whether it is an interference with a particular proceeding. See Note, *Contempt of Court When Proceedings Imminent*, 80 L.Q. REV. 166 (1964). Commonwealth courts that have considered the problem are divided. See Cowen, *supra* note 25, at 77.

41 *Rex v. Davies*, [1945] 1 K.B. 435.

42 The awarding of a *de novo* trial on appeal in England is rare. *Regina v. Duffy*, [1960] 2 Q.B. 188, 198.

43 *Id.* at 197.

44 In a recent case Lord Parker questioned how vulnerable English judges might be to such comments. In refusing an attachment for contempt, he said: "A judge is in a very different position to a jurymen. Though in no sense superhuman, he has by his training no difficulty in putting out of his mind matters which are not evidence in the case." *Id.* at 198.

45 *Id.* at 197.

46 Goodhart, *supra* note 4, at 906-07; Note, *Contempt by Publication: The Limitation on Indirect Contempt of Court*, 48 VA. L. REV. 556, 567 (1962).

47 2 Atk. 469, 26 Eng. Rep. 683 (Ch. 1742).

But though it is true, this is a trade, yet they must take care to do it with prudence and caution; for if they print any thing that is libellous, it is no excuse, to say, that the printer had no knowledge of the contents, and was entirely ignorant of its being libellous . . . .<sup>48</sup>

Thus, newspapers are held strictly liable for the content of the articles appearing within their pages. As the scope of newspaper coverage expanded, it became impossible for those in charge to have personal knowledge of the circumstances of each news story.<sup>49</sup>

As a result of this increased coverage, the burden of strict responsibility for the possibly prejudicial nature of articles correspondingly increased, sometimes with harsh results.

In *Regina v. Evening Standard Co.*,<sup>50</sup> an otherwise reliable reporter left the courtroom to telephone an account of the trial to his paper. In the interim he missed part of a witness' testimony. In the court's judgment, the resulting distorted account tended to prejudice the accused's trial. Though the court accepted the good faith of the reporter and recognized the fact that his editor had no reason to suspect the inaccuracy, the newspaper was nonetheless fined £1,000 for the contempt.<sup>51</sup>

Some doubt existed, however, that a newspaper would be punished for contempt, if, without any negligence on its part, it was ignorant of the fact that criminal proceedings were pending.<sup>52</sup> But in 1956, the case of *Regina v. Odhams Press*<sup>53</sup> resolved this question by holding a newspaper liable for publishing articles that the court later found to be a contempt, regardless of what care the paper had exercised in reporting. The test to be applied in newspaper contempt cases, Lord Goddard said, is completely objective, weighing only the article's reasonable tendency to interfere with the administration of justice.<sup>54</sup> That a reporter and editor were subjectively ignorant of the fact that proceedings were pending, could, therefore, not be a defense.<sup>55</sup>

The following year this strict standard was applied to magazine distributors with even harsher results.<sup>56</sup> During an internationally sensational murder trial, copies of *Newsweek* magazine carrying comments improper by English standards were circulated in London. When charged with responsibility for the publication,<sup>57</sup> the distributors pleaded the defamation defense of innocent dissemination<sup>58</sup> — that they had no reason to suspect the propriety of the publication. The court rejected the analogy between defamation and constructive contempt. The distributors, like newspaper publishers, were held to be absolutely liable for contempt.<sup>59</sup>

48 *Id.* at 472, 26 Eng. Rep. at 685; *Ex parte Green*, 7 T.L.R. 411 (Q.B. 1891).

49 Note, *supra* note 46, at 567-68.

50 [1954] 1 Q.B. 578.

51 *Ibid.*

52 See Goodhart, *supra* note 4, at 907.

53 [1957] 1 Q.B. 73 (1956).

54 *Id.* at 80.

55 *Ibid.*

56 *Regina v. Griffiths*, [1957] 2 Q.B. 192.

57 *Newsweek's* only representative in England was its chief European correspondent, who, the court felt, could not be held responsible for the contempt. *Id.* at 202.

58 See generally PROSSER, *Torts* § 108, at 794 (3d ed. 1964).

59 *Regina v. Griffiths*, [1957] 2 Q.B. 192, 203-04.

Reaction to these extensions of contempt control over the news industry, from both the English press<sup>60</sup> and bar,<sup>61</sup> was vehement. Parliament responded to these protests by passing the Administration of Justice Act of 1960,<sup>62</sup> which eliminated strict liability as the standard in such contempt cases. The statute provides that it would be a defense if a newspaper's personnel, at the time of publication, "did not know and had no reason to suspect that the proceedings were pending."<sup>63</sup> Distributors were similarly relieved of responsibility, if, having exercised reasonable care, they were ignorant of a publication's tendency to prejudice a fair trial.<sup>64</sup> Although intent is still not a required element for constructive contempt, the new standard requires at least some negligence in not knowing that an action is pending. In that respect it has greatly decreased the newspaper's burden and has kept contempt from seriously inhibiting worthwhile reporting.

## VI. Reporting of Preliminary Hearings

Through the vigorous application of contempt, English judges have been successful in curbing the flagrantly prejudicial effects that newspaper comment can have on pending proceedings. The detailed reporting of preliminary hearings, however, a more subtle, but nonetheless damaging source of prejudice to criminal defendants, has remained out of the reach of the contempt power.

Though the legality of reporting the details of preliminary hearings before examining magistrates was doubtful at one time,<sup>65</sup> the Law of Libel Amendment Act of 1888<sup>66</sup> made a "fair and accurate" newspaper account privileged. As a result, newspapers can freely publish information under the guise of a report, which, had it been gratuitous comment, might well have supported an attachment for contempt. Since magistrate's courts are not considered "open"<sup>67</sup> under English law, the public, including the press, has no right to be present. Magistrates theoretically have the power to order hearings held *in camera* when to do so will best serve the ends of justice.<sup>68</sup> Although this procedure, by itself, would effectively curtail the reporting of preliminary hearings and its attendant abuses, magistrates have rarely exercised this discretion.<sup>69</sup>

The dangers of reporting preliminary hearings lie within the nature of

60 See Inglis, *Contempt of Court*, *The Spectator*, Jan. 17, 1958, pp. 68-69.

61 See Note, 73 L.Q. REV. 8 (1957); Note, *Innocent Distributors and Contempt of Court*, 73 L.Q. REV. 467 (1957); Note, *Unintentional Contempt of Court*, 20 MODERN L. REV. 275 (1957).

62 8 & 9 Eliz. 2, C. 65.

63 See Administration of Justice Act, 1960, 8 & 9 Eliz. 2, c. 65, § 11(1).

64 See Administration of Justice Act, 1960, 8 & 9 Eliz. 2, c. 65, § 11(2).

65 Until 1848 preliminary hearings in England were viewed as serving inquisitorial functions, rather than acting as protection for an accused. Publication of depositions taken at those hearings, at which the accused had no right to be present, was objected to because it gave the defendant knowledge of the prosecution's evidence. For an excellent discussion of the development of preliminary hearings in England, see Geis, *Preliminary Hearings and the Press*, 8 U.C.L.A.L. REV. 397, 399-401 (1961).

66 51 & 52 Vict., c. 64, §§ 3-4.

67 The Indictable Offenses Act, 1848, 11 & 12 Vict., c. 42, § 19.

68 Magistrate's Court Act, 1952, 15 & 16 Geo. 6 & 1 Eliz. 2, c. 55, § 4(2).

69 One English writer suggests that the reason for this reluctance is that the magistrates are generally active in local politics and are "reluctant to renounce the spotlight." Note, *The Aftermath of the Adams Case*, 20 MODERN L. REV. 387, 390 (1957).

the hearings themselves. Preliminary hearings,<sup>70</sup> theoretically designed to save persons from frivolous prosecution, have become, to the defense, a valuable means of discovering the prosecution's case.<sup>71</sup> While the prosecutor must introduce sufficient evidence to justify committal, the practice of English defense counsel is to reveal as little of its evidence as possible before trial.<sup>72</sup> Therefore, a detailed report of the hearing necessarily presents to the public a one-sided picture of the case that is slanted against the accused. These accounts, moreover, will often contain evidence that, though unsuccessfully objected to at the hearing, will later be ruled inadmissible by the trial judge.<sup>73</sup> Evidence of prior convictions or criminal associations, properly heard by a magistrate on the question of bail, would likewise be excluded under trial standards.

The result of this reporting in sensational cases is that the newspapers report every minute detail of these hearings, spread these details before potential jurors, and effectively prejudice the accused even before he is committed for trial.<sup>74</sup>

A recent controversial trial graphically demonstrates the dangers of prejudice inherent in this type of reporting. At the preliminary hearing in the murder trial of Dr. John Bodkin Adams in 1957,<sup>75</sup> the prosecution introduced evidence that several of the doctor's patients had died under mysterious circumstances. A defense request for a private hearing on this evidence was denied.<sup>76</sup> When the doctor was subsequently committed for only one murder, it became certain that evidence of the other deaths would not be admissible at his trial. The widespread detailed reporting of the preliminary hearing had created an atmosphere so grossly prejudicial to the defendant that a fair trial was made impossible.<sup>77</sup>

In response to the abuses exemplified by the *Adams* case, a parliamentary committee, headed by Lord Tucker, was appointed to consider possible remedies. The committee reported that an increased use of *in camera* proceedings would not be satisfactory.<sup>78</sup> Not only was there a "general distaste for the idea of justice being administered in a court of law behind locked doors,"<sup>79</sup> but it was also questioned whether the magistrates' demonstrated reluctance to sitting *in camera* could be overcome.<sup>80</sup> As a solution, the Committee proposed that press reporting of preliminary hearings be restricted in two ways: if an accused were

70 For a thorough discussion of the preliminary hearing in modern English criminal procedure, see DEVLIN, *THE CRIMINAL PROSECUTION IN ENGLAND* 106-19 (1958).

71 *Id.* at 112-13.

72 *Id.* at 110.

73 *Id.* at 118.

74 One English writer, in comparing the abuses of American newspaper trial reporting with the evils resulting from English reporting of preliminary hearings, commented: "There is little doubt that in both countries the interests of the individuals have been sacrificed to the public's thirst for sensation and that the freedom of the press has been confused with license." Gower & Price, *The Profession and Practice of the Law in England and America*, 20 *MODERN L. REV.* 317, 341 (1957).

75 Because Dr. Adams was eventually acquitted, his trial was not officially reported. For a full account of the case, see Palmer, *Dr. Adams' Trial for Murder*, 1957 *CRIM. L. REV.* 365.

76 Note, *supra* note 69.

77 See Geis, *supra* note 65, at 402.

78 Departmental Committee on Proceedings Before Examining Justices, CMD. No. 479, at 19 (1958).

79 *Id.* at 9.

80 *Id.* at 19.

discharged at the hearing, an account of the proceedings would remain privileged; if he were committed, only a description of the name, charge, and decision of the court would be permitted until the trial's conclusion.<sup>81</sup> Thus, press reporting of the hearing would not be completely prohibited, only delayed.

After a period of parliamentary inaction on the Tucker Committee's recommendations, new impetus for reform resulted from the prejudicial publicity caused by the reporting of the preliminary hearing in the trial of Dr. Stephen Ward<sup>82</sup> — an offshoot of the notorious Profumo scandal. A restriction similar to the Committee's recommendation recently was given preliminary approval by the House of Commons.<sup>83</sup> If enacted, this legislation would effectively eliminate the one source of prejudicial press publicity not policed by the contempt jurisdiction of English courts. This proposed reform, moreover, will make one criticism of the English approach to the problem of prejudicial publicity in criminal proceedings no longer completely valid. The author of this charge, Australian Zelman Cowen, recently criticized the fact that although English courts, unlike those in America, readily strike at the source of prejudicial publicity after it occurs, they do little to remedy its effects on the individual defendant whose right to a fair trial has been damaged.<sup>84</sup> In Cowen's words:

The English law is unsatisfactory because it apparently loses interest in the prejudicial effect of what is published by the media once the offending publisher has been punished for contempt. But, like John Brown's body, the prejudice goes marching on, and unlike the American law, the English law gives us no ground to believe that this may lead to the reversal of convictions.<sup>85</sup>

The argument, in American terminology, is that it is a hollow victory<sup>86</sup> for the criminal defendant that the "poisoner"<sup>87</sup> of the "stream of justice" is punished, when he is denied his constitutional right to a fair trial.

If the reporting of preliminary hearings is restricted, as appears likely, the only method of reporting, under English law, capable of generating prejudicial publicity that is widespread and comprehensive enough to seriously threaten the impartiality of a defendant's trial will be prohibited. Thus the lack of reversals in English criminal trials will no longer be a serious issue, since publicity that is prejudicial enough to bias a jury will not exist.

Conceivably, newspapers could flout the statutory restriction on the reporting of preliminary hearings, but this seems unlikely given the "elevated" sense of responsibility of the English press.<sup>88</sup> It is also admitted that individual in-

81 *Id.* at 24.

82 See generally, KENNEDY, *THE TRIAL OF STEPHEN WARD* (1964); Cowen, *Prejudicial Publicity and the Fair Trial: A Comparative Examination of American, English and Commonwealth Law*, 41 *IND. L.J.* 69, 81-82 (1965).

83 Letter from Mr. Anthony Lewis, Chief London Correspondent, *New York Times*, to the *NOTRE DAME LAWYER*, March 7, 1967, on file in the office of the *NOTRE DAME LAWYER*.

84 Cowen, *supra* note 82, at 83.

85 *Ibid.*

86 One American commentator has voiced a criticism similar to Cowen's. See GOLDFARB, *THE CONTEMPT POWER* 88 (1963).

87 See *Irvin v. Dowd*, 366 U.S. 717, 730 (1961) (concurring opinion).

88 See Goldfarb, *Public Information, Criminal Trials and the Cause Celebre*, 36 *N.Y.U.L. REV.* 810, 827 (1961).

stances of pretrial and trial comment "calculated to prejudice a fair trial"<sup>89</sup> may still occur. But these, if English contempt law continues to operate as it has, will be quickly punished. As a result, newspaper publicity will be unable to generate a sustained atmosphere of prejudice likely to influence jurors or potential jurors.

In cases where some prejudicial publicity appears, a *voir dire* can be used to eliminate the potential jurors who are exposed to this publicity. Though use of this procedural safeguard is as rare in England as it is commonplace in the United States,<sup>90</sup> its use has been strongly recommended by Justice Devlin.<sup>91</sup> By use of the *voir dire*, the comparatively slight risk of harm, from prejudicial publicity, which will be left remaining after the adoption of a restriction on the reporting of preliminary hearings can successfully be eliminated.

### VII. The Use of Contempt in the United States

With the exception of the abuses created by the reporting of preliminary hearings, English courts have been successful in combating the effects of prejudicial newspaper publicity upon their criminal process.<sup>92</sup> The dilemma in American law is to find a workable method of securing criminal trials from prejudicial publicity while at the same time preserving freedom of the press. In this context, one wonders if American courts can pattern their use of the contempt power after the English model to curb press publications that threaten the right of criminal defendants to an impartial trial.

Undoubtedly, the greatest obstacle in American law preventing the use of the contempt power, as employed by judges, is the first amendment. English law has had little difficulty in restricting newspaper coverage of criminal proceedings in the interest of the fair administration of justice.<sup>93</sup> The Constitution and the heritage of a completely free and uninhibited press, however, make the prospect of employing similar measures in this country doubtful.

Recent Supreme Court decisions have reaffirmed, more pointedly than ever, a commitment to the principle that the first amendment rights of freedom of speech<sup>94</sup> and freedom of the press<sup>95</sup> are "pre-eminent" in American constitutional law. It thus would be within a tenuous framework that *any* restriction upon the freedom of the American press would have to operate.

At the same time, recent gross interferences by the press in the administration of American criminal justice<sup>96</sup> have threatened to "try" defendants "by

89 *Rex v. Daily Mirror*, [1927] 1 K.B. 845, 850.

90 See DEVLIN, *TRIAL BY JURY* 30-32 (1956).

91 *Id.* at 31.

92 See Harvey, *Fair Trial v. Free Press — A British Lawyer's View*, 42 L.A.B. BULL. 109 (1967).

93 Judge Oliver's comments concluding *Rex v. Davies* [1945] 1 K.B. 435, 446, are blunt, but exemplary:

Much is said to-day about the freedom of the press, and I only wish to point out that our decision in this case comes to no more than this: that everything the public has a right to know about a trial of the kind with which we are here concerned, that is to say, everything that has taken place in open court, may be published, and beyond that there is no need or right to go.

94 See generally *Cox v. Louisiana*, 379 U.S. 536 (1965).

95 *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

96 See *Sheppard v. Maxwell*, 384 U.S. 333 (1966).

newspaper" rather than before an impartial jury. At least one writer has called the "preferred status" of the first amendment into question by challenging the press to prove itself of "significant social value"<sup>97</sup> in its reporting of criminal trials, or else be restricted in the interest of safeguarding rights "equally enshrined in the Constitution."<sup>98</sup>

American courts,<sup>99</sup> theoretically, can exercise the power of constructive contempt against newspapers in a manner consistent with the first amendment, but only if the conduct punished thereby presents a "clear and present danger" to the administration of justice. This test, laid down as a "minimum compulsion of the bill of rights" on the states by the Supreme Court in *Bridges v. California*,<sup>100</sup> has proven nebulous, defying definition.<sup>101</sup> Negatively, it can be said, with some certainty, that newspaper articles criticizing judges,<sup>102</sup> and letters to grand jurors to the same effect,<sup>103</sup> do not involve a "clear and present danger." The Supreme Court, however, has not, while reviewing state contempt convictions, decided whether prejudicial publicity surrounding a criminal trial presents such an imminent threat. In the one case which presented the question to them, the Court denied certiorari.<sup>104</sup> In this 1949 case, a Baltimore trial court held a local radio station in contempt for broadcasting reports of the capture, confessions, and prior criminal record of a Negro charged with the brutal murder of an eleven-year-old white girl. The broadcasts, which contained a grisly account of the discovery of the butcher-knife murder weapon and also reported the defendant's admission of a prior rape of a white woman, created an atmosphere so hostile to the defendant that his counsel felt compelled to waive a jury trial.<sup>105</sup>

Reversing the contempt conviction, the Maryland Court of Appeals held that the broadcasts did not present such a clear and present danger as to meet the first amendment test.<sup>106</sup> When the Supreme Court denied certiorari, Justice Frankfurter wrote an opinion carefully explaining that the denial implied neither approval nor disapproval of the court of appeals' judgment.<sup>107</sup> Thus, whether prejudicial publicity reaching a jury in a criminal trial is a clear and present danger to the administration of justice, which would allow a court to use the contempt power to deal with it, is still an open question.

Though the Court has recently demonstrated an increasing awareness of

97 Will, *Free Press vs. Fair Trial*, 12 DE PAUL L. REV. 197, 200 (1963).

98 *Ibid.*

99 The power to punish constructive contempts has been prohibited in federal courts by statute. 18 U.S.C. 401 (1958). For the early history of that law and its turbulent beginnings, see Nelles & King, *Contempt by Publication in the United States*, 28 COLUM. L. REV. 401, 525 (1928). For a concise treatment of its subsequent history, see Note, *Contempt by Publication: The Limitation on Indirect Contempt of Court*, 48 VA. L. REV. 556, 558-560 (1962).

100 314 U.S. 252, 263 (1941).

101 See Note, *supra* note 99, at 561.

102 *Craig v. Harney*, 331 U.S. 367 (1947); *Pennekamp v. Florida*, 328 U.S. 331 (1946).

103 *Wood v. Georgia*, 370 U.S. 375 (1962).

104 *Baltimore Radio Show, Inc. v. State*, 193 Md. 300, 67 A.2d 497, *cert. denied*, 338 U.S. 912, 920 (1950).

105 *Ibid.*

106 *Ibid.*

107 *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912 (1950).

the harmful effects of prejudicial publicity on the impartiality of criminal trials,<sup>108</sup> this should not be taken as an indication that a direct restraint on the press would now be favored. The most recent pronouncement of the Supreme Court on this subject, in *Sheppard v. Maxwell*,<sup>109</sup> if it is authority for any one principle, appears as a judgment that the traditional procedural safeguards, which stop short of direct restraints, can guarantee a fair trial.

### VIII. Conclusion

The quality of English newspaper reporting has not become "tepid"<sup>110</sup> under the restraints imposed by the use of the contempt power. English newspapers must, nevertheless, exercise caution in what they report. In a country noted for the efficiency of its civil servants, the honesty and professionalism of its police and judges,<sup>111</sup> and its comparative freedom from the evils of organized crime,<sup>112</sup> the caution thus imposed has not proven socially harmful.

In America, the idea of punishing newspapers for publications that a judge reflectively considers likely to prejudice a fair trial, would be, if not constitutionally invalid, fatally objectionable on grounds of social policy and tradition. The press, in the United States, plays an important public role as an instrument of social reform. Moreover, it serves a "watchdog" function on corruption in government, police, and the courts. If its reporting is inhibited by the threat of the contempt power imposed at the discretion of judges, newspapers will not properly fulfill this necessary function. Although the English use of contempt is appealing because of its success, it must be rejected in this country as a means guaranteeing the fair criminal trial demanded by the sixth amendment.

*John Scripp*

108 See *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Irvin v. Dowd*, 366 U.S. 717 (1961).

109 See *Sheppard v. Maxwell*, *supra* note 108.

110 See Lewis, *British Verdict on Trial-by-Press*, N.Y. Times, June 20, 1965, § 6 (Magazine), p. 15.

111 Jaffe, *Trial by Newspaper*, 40 N.Y.U.L. REV. 504, 512 (1965).

112 DEVLIN, *op. cit. supra* note 70, at 134. *But see* The South Bend Tribune, Mar. 5, 1967, p. 16, col. 4.



**International Standards and Comparative Approaches on  
Freedom of Expression and Blocking of Terrorist or  
Extremist Content Online**

**the OSCE Representative on Freedom of the Media  
on the request of the Russian Federation**

OSCE, Vienna, January 2018

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## I. INTRODUCTION

1. The Russian Federation has requested the Office of the Representative to provide “information on the OSCE groundwork and best practices in the sphere of countering the spread of extremist and terrorist propaganda through mass-media and on the Internet, including provisions to temporarily block the sources, which refuse to react on requests of the competent authorities to delete the relevant content as provided by national legislation.”
2. In offering this advice, the Representative emphasises his continued readiness to engage in further dialogue with the Russian Federation and other interested OSCE participating States on these issues.
3. This advice will focus on the legal aspects of the issue.
4. At the same time, the advice also builds upon the larger context of the comprehensive approach of the OSCE to security, in which the protection of human rights, including freedom of expression and freedom of the media, is seen as an integral part of the OSCE's participating States' contribution to peace and security. On several occasions, the OSCE Representative on Freedom of the Media highlighted - as his predecessors did before him - that this approach, acknowledging the intertwined character of peace and security efforts in the three dimensions of the OSCE (political and military, economic and environmental policies, and the human dimension), defines the unique character of the OSCE and has been confirmed many times. In 2015, in the Belgrade Ministerial Declaration on Reinforcing OSCE Efforts to Counter Terrorism in the Wake of Recent Terrorist Attacks, Ministers agreed “(...) that respect for human rights, fundamental freedoms and the rule of law are complementary and mutually reinforcing with effective counter-terrorism measures, and are an essential part of a successful counter-terrorism effort.”<sup>1</sup> The OSCE Representative on Freedom of the Media insisted on several occasions, including in his Report to the Permanent Council of the OSCE in November 2017, that there must be no opposition between protecting freedom of expression and freedom of the media on the one hand, and the fight against extremism and terrorism, on the other hand.

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<sup>1</sup> See: <http://www.osce.org/cio/207261?download=true>

5. These OSCE principles remain guiding in the context of a high level of terrorist threats and security challenges throughout the OSCE region. However, there are many cases where security concerns may lead to the temptation to subordinate, even temporarily, the respect for human rights to the fight against extremism and terrorism. .
6. The first risk of such a subordination is that, since security threats can last, the exception becomes the rule at the expense of fundamental freedoms. .
7. The second risk is the temptation to misuse the national security argument as a pretext to silence dissenting voices and to restrict freedom of expression at large. .
8. At the OSCE Internet Freedom Conference “The Role and Responsibilities of Internet Intermediaries”, on 13 October 2017 in Vienna, the Representative on Freedom of the Media noted that we have been confronted, in the past years, with a backlash against the extraordinary open space of Internet. “We have seen the dissemination of degrading and illegal content, of extremist and hate speech, of terrorist content and propaganda, of attacks and threats such as against female journalists. They can impact directly on democracy, peace and cohesion of societies. The Representative added that in response, there is an increasing pressure of states on intermediaries, to counter the circulation of such offensive material, through the adoption of new laws and policies which can meet legitimate goals, but can also affect the open and free Internet as we have known it so far. As a consequence, we are entering again in unknown territory”.<sup>2</sup>
9. This Advice is structured as follows: *first*, international law and standards on the permissibility of blocking measures against websites on the grounds that they disseminate extremist or terrorist content will be set out; and *second*, examples of comparative approaches on the issue of blocking, particularly amongst OSCE participating States, in that regard will be set out. It is intended to offer guidance on the scope of circumstances, if any, in which authorities may block websites according to international law and standards.
10. At the outset, it is noted that the issue of blocking of websites has attracted growing attention amongst international and regional human rights bodies, as well as the European Court of Human Rights (ECtHR) over a number of years. It is a live legal issue at the ECtHR, which is currently

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<sup>2</sup> See: <http://www.osce.org/fom/350386?download=true>

examining in two cases – namely, *OOO Flavus and others v Russia*<sup>3</sup> and *Kharitonov v Russia*<sup>4</sup> – which are the first opportunity for the court to examine Russian legislation on the blocking of websites and national legal proceedings resulting in websites being blocked by court orders.

11. This advice takes many sources into consideration, including treaty law, resolutions, declarations and legal reviews issued by the Office of the OSCE Representative on Freedom of the Media alongside other intergovernmental mandate-holders on freedom of expression, third-party submissions of leading NGOs in the field of freedom of expression and digital rights,<sup>5</sup> and the significant comparative study undertaken by the Council of Europe and published in June 2016, “Study on blocking, filtering and takedown of illegal content on the Internet”.<sup>6</sup>
  
12. This advice shows that blocking measures can only be compatible with international standards on freedom of expression in very exceptional circumstances, if they are provided by law and a court has determined that a particular measure is both necessary and proportionate to protect a legitimate aim, such as national security or public order.

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<sup>3</sup> Application Nos. 12468/15, 20159/15, 23489/15, 19074/16 & 61919/16.

<sup>4</sup> Application no. 10795/14.

<sup>5</sup> See the Third-Party Intervention Submissions by ARTICLE 19, The Electronic Frontier Foundation, Access Now and Reporters Without Borders in *OOO Flavus v Russia*, Application Nos. 12468/15, 20159/15, 23489/15, 19074/16 & 61919/16, 15 January 2018 and the Third Party Intervention Submissions by Access Now in *Kharitonov v Russia*, Application no. 10795/14, 17 October 2017.

<sup>6</sup> See Council of Europe, *Study on blocking, filtering and takedown of illegal content on the Internet*, June 2016 <https://www.coe.int/en/web/freedom-expression/study-filtering-blocking-and-take-down-of-illegal-content-on-the-internet>

## II. INTERNATIONAL LAW AND STANDARDS

### A. General Principles

#### 1. *Broad scope of freedom of expression*

13. Under international law, the right to freedom of expression is protected by Article 19 of the Universal Declaration of Human Rights and Article 19 of the International Covenant on Civil and Political Rights (“ICCPR”). Article 19 of the ICCPR, the key international treaty provision on freedom of expression, states:

**2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.**

**3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:**

**(a) For respect of the rights or reputations of others;**

**(b) For the protection of national security or of public order (ordre public), or of public health or morals.**

14. This provision is similar to provisions of regional human rights law, including notably Article 10 of the European Convention on Human Rights (“ECHR”).<sup>7</sup>

15. Article 20(2) of the ICCPR subsequently provides that “any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”<sup>8</sup>

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<sup>7</sup> This provision states: “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.”

16. At the outset, it is important to note that the right to freedom of expression is broad in its scope encompassing “even expression that may be regarded as deeply offensive”,<sup>9</sup> as stated by the Human Rights Committee, or ideas, information and opinions “that offend, shock or disturb the State or any part of the population”,<sup>10</sup> as stated by the ECtHR.

## ***2. Protection of online speech as offline speech***

17. International human rights bodies, as well as the ECtHR, have acknowledged that human rights, particularly the right to freedom of expression, extends and applies to the online sphere.<sup>11</sup> Human Rights Council resolution 32/13 of July 2016, for instance “[a]ffirms that the same rights that people have offline must also be protected online, in particular freedom of expression, which is applicable regardless of frontiers and through any media of one’s choice”.<sup>12</sup>

## ***3. Limitations on freedom of expression: three-part test***

18. Under international legal standards, limitations of the right to freedom of expression are permissible but “must not put in jeopardy the right itself” and meet certain conditions, namely they must be: (1) “provided by law” which is sufficiently clear and precise; (2) pursue a legitimate aim set out in Article 19 para 3 of the ICCPR (the “rights or reputations of others” or “the protection of national security or of public order (ordre public), or of public health or morals”); and (3) conform to the “strict tests of necessity and proportionality”.<sup>13</sup> As stated by the Human Rights Committee, any restrictions “must be appropriate to achieve their protective function; they must be the least intrusive instrument amongst those which might achieve their

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<sup>8</sup> “Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence”, Appendix in the Annual Report of the United Nations High Commissioner for Human Rights, A/HRC/22/17/Add.4, 11 January 2013.

<sup>9</sup> Human Rights Committee, General Comment No 34, CCPR/C/GC/34, 12 September 2011, para 11.

<sup>10</sup> *Handyside v UK*, Application No 5493/72, judgment of 7 December 1976 at para 49.

<sup>11</sup> Human Rights Council resolutions 26/13 of 26 June 2014 and 32/13 of 18 July 2016; General Assembly resolution 68/167 of 18 December 2013; Report of the Special Rapporteur on freedom of opinion and expression, 11 May 2016, A/HRC/32/38, para 6.

<sup>12</sup> *Ibid.*

<sup>13</sup> Human Rights Committee, General Comment No 34, CCPR/C/GC/34, 12 September 2011, para 22.

protective function”.<sup>14</sup> Hence, any broad measures invoking “terrorism” or “extremism” to justify online restrictions on freedom of expression, including through website blocking, must therefore be clearly defined and establish a “direct and immediate connection between the expression and the threat” to national security”.<sup>15</sup>

## **B. International standards on freedom of expression as applied to counter-terrorism and counter-extremism measures**

### *1. General*

19. According to international law, there are no universal definitions of either “extremism” or “terrorism”, even though these terms are regularly used in the texts produced by international and regional intergovernmental bodies, including UN General Assembly, Security Council and Human Rights Council resolutions and the OSCE’s own commitments, as well as states’ laws and policies.<sup>16</sup> In General Comment 34, the Human Rights Committee has emphasised that counter-terrorism and counter-extremism measures should be compatible with Article 19 of the ICCPR. It stated:

**States parties should ensure that counter-terrorism measures are compatible with paragraph 3 [of Article 19 of the ICCPR]. Such offences as “encouragement of terrorism” and “extremist activity” as well as offences of “praising”, “glorifying”, or “justifying” terrorism, should be clearly defined to ensure that they do not lead to unnecessary or disproportionate interference with freedom of expression. Excessive restrictions on access to information must also be avoided. The media plays a crucial role in informing the public about acts of terrorism and its capacity to operate should not be unduly restricted. In this regard, journalists should not be penalized for carrying out their legitimate activities.<sup>17</sup>**

20. In their Joint Declaration on Freedom of Expression and countering violent extremism of 2016, the four inter-governmental mandate-holders on freedom of expression – including the OSCE

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<sup>14</sup> Human Rights Committee, General Comment No 27, CCPR/C/21/Rev.1/Add.9, 9 November 1999, para 14.

<sup>15</sup> Human Rights Committee, General Comment No 34, CCPR/C/GC/34, 12 September 2011, para 35.

<sup>16</sup> See, for instance, Declaration on Strengthening OSCE Efforts to Prevent and Counter Terrorism, Document of the Twenty-Third Meeting of the Ministerial Council, 8-9 December 2016, Hamburg MC.DOC/1/16.

<sup>17</sup> Human Rights Committee, General Comment No 34, CCPR/C/GC/34, 12 September 2011, para 46.

Representative on Freedom of the Media – fleshed out the scope of the right to freedom of expression as it relates to “extremist” content.<sup>18</sup> They reiterated that:

**1. General Principles**

*(a) Everyone has the right to seek, receive and impart information and ideas of all kinds, especially on matters of public concern, including issues relating to violence and terrorism, as well as to comment on and criticise the manner in which States and politicians respond to these phenomena (...)*

**(c) Any restrictions on freedom of expression should comply with the standards for such restrictions recognised under international human rights law. In compliance with those standards, States must set out clearly in validly enacted law any restrictions on expression and demonstrate that such restrictions are necessary and proportionate to protect a legitimate interest. (...)**

21. They also emphasised that any limitations on freedom of expression, including on the grounds of countering extremism, must be subject to judicial review, stating that:

**(e) Restrictions on freedom of expression must be subject to independent judicial oversight.**

22. The UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has further elaborated on what ought *not* to be considered “extremism”:

**38. [S]imply holding or peacefully expressing views that are considered ‘extreme’ under any definition should never be criminalised, unless they are associated with violence or criminal activity. The peaceful pursuance of a political, or any other, agenda – even where that agenda is different from the objectives of the government and considered to be ‘extreme’– must be protected. Governments should counter ideas they disagree with, but should not seek to prevent non-violent ideas and opinions from being discussed.**

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<sup>18</sup> Joint Declaration on Freedom of Expression and countering violent extremism adopted by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, adopted on 4 May 2016.

23. Measures on counter-terrorism and counter-extremism are regularly justified on the grounds of protection of national security and/or public order, under Article 19 para 3 of the ICCPR. In this regard, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, has warned against vague and overbroad definitions.

## **2. Restrictions on online content, particularly blocking**

24. In 2011, in its General Comment 34 on Article 19 of the ICCPR, the UN Human Rights Committee stated that “generic bans on the operation of certain sites and systems are not compatible” with Article 19 of the ICCPR<sup>19</sup>.

25. In the 2016 Joint Declaration on Freedom of Expression and countering violent extremism, the international intergovernmental mandate-holders on freedom of expression, including the OSCE Representative on Freedom of the Media, recommended that:<sup>20</sup>

### **2. Specific Recommendations: (...)**

*(e) States should not subject Internet intermediaries to mandatory orders to remove or otherwise restrict content except where the content is lawfully restricted in accordance with the standards outlined above. States should refrain from pressuring, punishing or rewarding intermediaries with the aim of restricting lawful content (...)*

*(j) States should not adopt, or should revise, laws and policies which involve the following:*

**(i) Blanket prohibitions on encryption and anonymity, which are inherently unnecessary and disproportionate, and hence not legitimate as restrictions on freedom of expression, including as part of States’ responses to terrorism and other forms of violence.**

**(ii) Measures that weaken available digital security tools, such as backdoors and key escrows, since these disproportionately restrict freedom of expression**

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<sup>19</sup> Human Rights Committee, General Comment No 34, CCPR/C/GC/34, 12 September 2011.

<sup>20</sup> Joint Declaration on Freedom of Expression and countering violent extremism adopted by the UN Special Rapporteur on Freedom of Opinion and Expression, the OSCE Representative on Freedom of the Media, the OAS Special Rapporteur on Freedom of Expression and the ACHPR Special Rapporteur on Freedom of Expression and Access to Information, 4 May 2016.

**and privacy and render communications networks more vulnerable to attack. [emphasis added]**

26. International human rights mechanisms have long expressed particular concern about blocking measures as such. In their 2011 Joint Declaration on Freedom of Expression on the Internet, the four inter-governmental mandate-holders on freedom of expression stressed:

***Mandatory blocking of entire websites, IP addresses, ports, network protocols or types of uses (such as social networking) is an extreme measure – analogous to banning a newspaper or broadcaster – which can only be justified in accordance with international standards, for example where necessary to protect children against sexual abuse.***<sup>21</sup> [emphasis added]

### 3. Key cases

27. The jurisprudence of the ECtHR on access to the Internet has included important case-law concerning measures blocking access to the Internet. The cases highlight that the imposition of any blocking measure needs to have clear and actual legal basis, and in doing so meet the foreseeability requirement.

28. In the 2012 decision of *Ahmet Yildirim v Turkey*, the ECtHR held that there had been a violation of Article 10 of the ECHR on freedom of expression in a case concerning a Turkish court decision to block access to the service *Google Sites*, which hosted a site whose owner was facing criminal proceedings for insulting the memory of Atatürk.<sup>22</sup> The ECtHR decided that, even though the decision did not constitute a blanket ban, but rather a restriction on the Internet, the effects of the measure had been arbitrary and the judicial review of the blocking of access had been insufficient to prevent abuses. Specifically, there was no indication that the Turkish court had made any attempt to “weigh up the various interests at stake, in particular by assessing the need to block all access to *Google Sites*”, which was a consequence of shortcomings in the domestic law. The domestic judges ought to have “taken into consideration ... the fact that the

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<sup>21</sup> Joint Declaration on Freedom of Expression on the Internet, 1 June 2011, para 3 (a).

<sup>22</sup> *Ahmet Yildirim v Turkey*, Application No 3111/10, judgment of the European Court of Human Rights of 18 December 2012.

measure, by rendering large quantities of information inaccessible, substantially restricted the rights of Internet users and had a significant collateral effect”.<sup>23</sup>

29. In *Cengiz v Turkey*, decided in 2015, the ECtHR held that there also had been a violation of Article 10 of the ECHR in the case of the wholesale blocking of *YouTube* in Turkey.<sup>24</sup> The court found that, given that there was no statutory provision empowering the domestic court to block all access to *YouTube*, the interference with freedom of expression “did not meet the requirement of lawfulness under the Convention and did not afford the applicants the degree of protection to which they were entitled by the rule of law in a democratic society”.<sup>25</sup>
30. It is noted that the Turkish Constitutional Court has also on occasion found that blocking access to *YouTube* and *Twitter* is in violation of freedom of expression.<sup>26</sup>

#### ***4. OSCE Representative on Freedom of the Media***

31. Besides participating in the development and adoption of successive Joint Declarations on freedom of expression, including those addressing the issue of blocking as referenced above, the OSCE Representative on Freedom of the Media has expressed a position about the permissibility of restrictions on content and the blocking of websites in numerous contexts, many times over many years.
32. An early example of these expressed positions can be found in the Amsterdam Recommendations on Freedom of the Media and the Internet, launched at a conference in Amsterdam on 14 June 2003. These recommendations state that:

**Any means of censorship that are unacceptable within the ‘classic media’ must not be used for online media. New forms of censorship must not be developed.**

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<sup>23</sup> *Ibid*, para 66.

<sup>24</sup> *Cengiz and others v Turkey*, Application No 48226/10 et 14027/11, judgment of the European Court of Human Rights of 1 December 2015.

<sup>25</sup> *Ibid* para 65.

<sup>26</sup> TC Anayasa Mahkemesi, Başvuru Numarası, 2014/4705, Karar Tarihi, judgement of the Turkish Constitutional Court of 29 May 2014; T C Anayasa Mahkemesi, Başvuru Numarası, 2014/3986, Karar Tarihi, judgment of the Turkish Constitutional Court of 2 April 2014.

33. In May 2012, welcoming the adoption of a net neutrality law making the Netherlands the first OSCE country to do so, the Representative has highlighted this law in her presentation to the Permanent Council as an important step to protect Internet traffic from undue restrictions and prioritization, as the law requires operators to treat all Internet traffic equally, regardless of author, origin, destination or content. The OSCE Representative highlighted that the law also prohibits network operators from slowing or blocking third-party services that allow for Internet-based communications.<sup>27</sup>

34. The conclusions of a February 2013 conference on the Internet hosted by the OSCE Representative on Freedom of the Media emphasised:<sup>28</sup>

**In today's democratic societies, citizens shall be allowed to decide for themselves what they want to access on the Internet. As the right to disseminate and receive information is a basic human right, government-enforced mechanisms for filtering, labelling or blocking content shall not be acceptable.**

35. Communiqué No. 6/2016 of the OSCE Representative on Freedom of the Media of 1 September 2016 also indicates that states should only restrict content that is considered a threat to national security if it can be demonstrated that it is intended to incite imminent violence, likely to incite such violence and there is a direct and immediate connection between the expression and the likelihood of occurrence of such violence.<sup>29</sup> The communiqué also states that blanket prohibitions are disproportionate and therefore unacceptable.<sup>30</sup>

36. The publication “Media Freedom on the Internet: An OSCE Guidebook” (2016) makes the following recommendations to policy makers:

**• Do rely on blocking only within a strict legal framework with regards to content identified as illegal by the courts of law.**

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<sup>27</sup> “OSCE media freedom representative welcomes Dutch net neutrality law”, press release, 14 May 2012; Regular Report to the Permanent Council for the period from 12 June 2012, FOM.GAL/4/12/Rev.1, 21 June 2012.

<sup>28</sup> Recommendations of the OSCE Representative on Freedom of the Media following the conference “Internet 2013: Shaping policies to advance media freedom” held in Vienna on 14-15 February 2013 published in Regular Report to the Permanent Council for the period from 30 November 2012 to 13 June 2013, FOM.GAL/3/13/Rev.1, 13 June 2013.

<sup>29</sup> Communiqué No. 6/2016 of OSCE Representative on Freedom of the Media of 1 September 2016.

<sup>30</sup> *Ibid*, para (viii).

• Do recall that blocking is not an effective method to address problems associated with Internet content and could have serious side effects including over blocking.

• Don't allow Internet access providers to restrict users' right to receive and impart information by means of blocking, slowing down, degrading or discriminating Internet traffic associated with particular content, services, applications or devices.<sup>31</sup>

37. In his address at the Internet Freedom Conference “The Role and Responsibilities of Internet Intermediaries” in Vienna in 2017, the Representative stated that rules and decisions regulating Internet “should avoid negative impact on access to information, and should in particular avoid development of a variety of content and liability regimes that differ among different areas of the world, thus fragmenting the Internet and damaging its universality”. He added that “It has become a human right to have access to the Internet and its services, and to be free to use it. The defence of this online right is the extension of the defence of the universal right to freedom of expression and freedom of the media offline.”<sup>32</sup>

### III. COMPARATIVE APPROACHES

#### A. Approaches to blocking “extremist” online content

38. Over recent years, many States have adopted “a combination of repressive legislative measures to block, filter and ban specific content or entire websites” as the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism has noted.<sup>33</sup>

39. In June 2016, the Council of Europe published a comprehensive, comparative study on “Filtering, blocking and take-down of illegal content on the Internet”.<sup>34</sup> This recent report is

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<sup>31</sup> *Media Freedom on the Internet: An OSCE Guidebook*, March 2016 (Vienna: OSCE, 2016) pp 6 – 7.

<sup>32</sup> <http://www.osce.org/fom/350386?download=true>

<sup>33</sup> Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 22 February 2016, A/HRC/31/65 para 40.

<sup>34</sup> See Council of Europe, *Study on filtering, blocking and takedown of illegal content on the Internet*, June 2016 <https://www.coe.int/en/web/freedom-expression/study-filtering-blocking-and-take-down-of-illegal-content-on-the-internet>

See also *Ahmet Yıldırım v Turkey*, Application No 3111/10, judgment of the European Court of Human Rights, 18 December 2012, paras 31 – 37.

instructive for any comparative assessment of the regulatory frameworks with respect to blocking.

### *1. No legal framework or general legal framework*

40. The 2016 Council of Europe report indicates that:

**[There] are countries which do not have any specific legislation on the issue of blocking, filtering and takedown of illegal internet content: there is no legislative or other regulatory system put in place by the State with a view to defining the conditions and the procedures to be respected by those who engage in the blocking, filtering or takedown of online material. An argument often put forward in this context is the impossibility for the legislator to keep up with the pace of technological developments. The underlying reasons for a lack of legislative activity may also be found in a country's legal traditions.**

**In the absence of a specific or targeted legal framework, several countries rely on an existing “general” legal framework that is not specific to the internet to conduct what is, generally speaking - limited blocking or takedown of unlawful online material. This is witnessed in countries such as Germany, Austria, the Netherlands, the United Kingdom, Ireland, Poland, the Czech Republic and Switzerland. As such countries become increasingly confronted with the reality of internet content-related disputes, the absence of legislative intervention has presented a challenge. In recent years, diverse mechanisms have been relied on to fill the regulatory gap and to address particular issues. Some jurisdictions have even chosen to combine approaches, maintaining a largely unregulated framework, but with legislative or political intervention in specific areas. In some jurisdictions, such as the UK and Albania, self-regulation has been adopted by the private sector to supplement the void left by the legislator's choice not to intervene in the area at stake. Other countries, such as the Netherlands and Germany, rely on the domestic courts to ensure that the necessary balance between freedom of expression on the one hand and safety of the internet and the protection of other fundamental rights is preserved to the greatest extent possible.<sup>35</sup>**

41. Participating States such as the UK, Austria, the Netherlands, Ireland, Poland, the Czech Republic and Switzerland have relied upon existing legislation to address issues raised by illegal content on the Internet. In practice, this means that the courts in such states decide whether or not

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<sup>35</sup> Executive Summary, Council of Europe, *Study on blocking, filtering and takedown of illegal content on the Internet*, June 2016 <https://rm.coe.int/168068511c> at ii. In 2017, Germany adopted a law on social media, the “NetzDG”.

content is illegal and should be blocked.

42. In the UK, and in the absence of a specific legal framework, the High Court of Justice of England and Wales has offered guidance on the principles to be considered in making blocking orders. In *Cartier International AG v British Sky Broadcasting Ltd*, the judge (Mr Justice Arnold) emphasised the principle of proportionality in the following way:

**189. (...) I conclude that, in considering the proportionality of the orders sought (...), the following considerations are particularly important:**

- (i) The comparative importance of the rights that are engaged and the justifications for interfering with those rights;**
- (ii) The availability of alternative measures which are less onerous;**
- (iii) The efficacy of the measures which the orders require to be adopted by the Internet Service Providers (ISPs), and in particular whether they will seriously discourage the ISPs' subscribers from accessing the Target Websites;**
- (iv) The costs associated with those measures, and in particular the costs of implementing the measures;**
- (v) The dissuasiveness of those measures;**
- (vi) The impact of those measures on lawful users of the internet.**

**190. In addition, it is relevant to consider the substitutability of other websites for the Target Websites.<sup>36</sup>**

## **2. Specific legal framework**

Some participating States – including Germany, the Russian Federation, France, Turkey, Portugal, Hungary, Spain and Finland – have put in place, in some cases very recently, a specific legal framework allowing blocking and takedown of certain categories of illegal content, in particular content that endangers national security, including terrorist content, but also child abuse materials, content that threatens public health and morals, as well as content that constitutes a “hate crime”.

43. The 2016 Council of Europe report indicates that:

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<sup>36</sup> *Cartier International AG v British Sky Broadcasting Ltd* [2014] EWHC 3354 (Ch), judgment of 17 October 2014, para 189.

[I]n many jurisdictions, the legislator has intervened in order to set up a legal framework specifically aimed at regulation of the internet and other digital media, including the blocking, filtering and removal of internet content. Finland, France, Hungary, Portugal, the Russian Federation, Spain and Turkey are examples of jurisdictions that have opted for this regulatory approach. Such legislation typically provides for the legal grounds on which blocking or removal may be warranted, the administrative or judicial authority which has competence to take appropriate action and the procedures to be followed.

Whereas the more common grounds for the adoption of blocking, filtering and takedown measures are exhaustive and expressly defined in the legislation of most countries which subscribe to such a regulatory model, certain jurisdictions have, in effect, extended the grounds on which blocking or removal may legitimately be taken - often by amendments to legislation or through creative judicial interpretation.<sup>37</sup>

### *3. Procedure*

44. According to the Council of Europe report, in relation to material concerning terrorism and national security and also child abuse and criminality, especially hate crimes:

many of the States with legal rules targeted at the removal of internet content provide for the urgent blocking of such material without the need for a court order in at least some of the areas mentioned. Greece, France, Portugal, the Russian Federation, Serbia and Turkey are examples.

45. The report continues as such on aspects of procedure:

Administrative authorities, police authorities or public prosecutors are given specific powers to order internet access providers to block access without advance judicial authority. It is common to see such orders requiring action on the part of the internet access provider within 24 hours, and without any notice being given to the content provider or host themselves. In other countries, such as Finland, where a court order is otherwise needed, hosting providers who have knowledge of such material may be expected to remove it voluntarily without judicial authority and to provide the content provider with due notice, which permits them to challenge the action through the courts.

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<sup>37</sup> *Ibid.*

**A number of national systems (such as Turkey, in some cases) require the relevant administrative authority to obtain subsequent judicial approval of their order, while others place a splash page at the location of the blocked material explaining why the material is blocked and how it may be challenged. In most countries, interested parties are given the opportunity to challenge blocking actions through usual criminal (or, where appropriate, civil) procedure laws. The Portuguese regulation explicitly states so.**

**Particularly in relation to material concerning child abuse and other serious crimes or in relation to online gambling, many countries, such as France, Greece, Italy, Romania, the Russian Federation, Turkey and the UK, adopt a “list” system, whereby a central list of blocked URLs or domain names are maintained and updated by the relevant administrative authority. This is notified to the relevant internet access providers, who are required to ensure that blocking is enforced.**

**In many States, the takedown and blocking of material which infringes intellectual property and privacy or defamation rights is effected or authorised pursuant to court order only. Some countries have introduced alternative notice and takedown procedures designed to avoid the need for court action. In Finland, for example, there is evidence of a procedure for rights holders to obtain removal of allegedly unlawful material, subject to content providers being afforded a due process to challenge removal. Particularly in relation to defamatory material or content which otherwise infringes privacy rights enforcement will usually depend on the initiative being taken by the person or organisation harmed, and so many countries offer some form of ‘notice and take-down’ procedure. These may require the person or organisation affected to notify the relevant website operator directly before procedures for taking down the material can be initiated. Where the website operator refuses to remove material determined to be unlawful, the relevant domestic authority may provide a deadline to the host to remove the material, and/or may leave itself exposed to third party liability for the content. Internet access providers can even be ordered to block access to the URL, or even the entire website.**

46. Several of these examples show that a number of participating States through different approaches have introduced laws and policies with the objective to respect international obligations regarding freedom of expression while countering illegal content. Additionally, they have put in place mechanisms of appeal and judicial oversight to ensure the right balance between the two objectives. This legislation will have to be regularly evaluated and if necessary amended. Independent judicial oversight is an essential element in the implementation of such legislation.

#### IV. COMPATIBILITY OF BLOCKING MEASURES WITH INTERNATIONAL STANDARDS ON FREEDOM OF EXPRESSION

47. On the basis of the international law and standards indicated above (in Part II), website blocking measures can only be compatible with international standards on freedom of expression where they are provided by law and a court has determined that a particular measure is necessary and proportionate to protect legitimate aims as specified by international law.
48. Leading NGOs in the field – namely ARTICLE 19, the Electronic Frontier Foundation, Access Now and Reporters Without Borders – have argued this position in their third-party intervention submissions in the case of *OOO Flavus and others v Russia* of 15 January 2018. The framework presented in the submissions supports the conditions indicated in the international standards upon which the Office of the OSCE Representative on Freedom of the Media relies, indicated above, in fleshing out the very exceptional circumstances in which blocking orders may be permissible. A number of the arguments made in the submissions are particularly relevant for the purpose of this advice.
49. The third-party intervention of the above-mentioned NGOs states that in order to meet the requirement that any blocking measure, as a restriction on freedom of expression, is provided by law, there should be a number of “procedural safeguards” in place. The intervention sets out the following conditions for blocking orders:
- **Blocking should only be ordered by a court or other independent and impartial adjudicatory body. Regulatory models whereby government agencies directly issue blocking orders are inherently problematic as executive agencies are, by nature, more likely to call for measures that protect the particular state interests they are tasked to protect, such as national security or child safety, rather than freedom of expression;**
  - **When a public authority or third party applies for a blocking order, the operators of the website, authors of the offending content, ISPs and/or other relevant internet intermediaries should be given the opportunity to be heard in order to contest the application;**

- Similarly, procedures should be in place allowing other interested parties, such as free expression advocates or digital rights organizations, to intervene in proceedings in which a blocking order is sought;
- Users should be given a right to challenge, after the fact, the decision of a court or other independent and impartial adjudicatory body to block access to content. A fortiori, this must include a right for victims of collateral blocking to challenge the wrongful blocking of their website or webpage; (...)

The third-party intervention adds that :

**In countries where blocking decisions are made by public authorities, the law should guarantee that those authorities are independent of government and that their decisions can be readily challenged before a court or tribunal. Moreover, the law should lay down the criteria to be applied by these authorities to determine whether any blocking order can be issued.**

It also recommends, with respect to the blocking of certain sites containing information about technologies, that :

**The blocking of websites which contain information about VPNs or other similar technologies can never be justified. Such technologies are content-neutral and blocking such websites thus amounts to a restriction on access to all content which might be obtained using those technologies. Accordingly, the blocking of such technologies (or information about them) is inherently incapable of being adequately specified with reference to categories of legitimately proscribed content.**

## V. CONCLUSION

50. In conclusion, the Representative on Freedom of the Media emphasizes that in accordance with international law, website blocking, as a very serious interference with freedom of expression, would only be permissible in a very limited and well-defined range of circumstances.

51. According to the law and standards highlighted in this advice, the blocking of websites must be subject to the strictest safeguards.

52. As indicated above, if mandatory blocking measures are permissible at all, they should: (i) have a basis in law, (ii) be ordered by a court or other independent body and (iii) be strictly necessary and proportionate to the legitimate aim pursued. In considering whether to grant a website blocking order, the court or other independent body tasked with making the order must take into account the impact of the order on lawful content and what technology may be used to prevent over-blocking. All those affected by blocking orders, including journalists and other authors, as well as publishers of content, and those who seek to access the content, should be given an opportunity to challenge such orders and must therefore be notified of their existence.
53. Given the permanent evolution of the Internet, existing regulatory practices should be reviewed regularly regarding their respect of the above-mentioned principles, with evaluation mechanisms of implementation established by law, in order to ensure that the authorities, the legislator and civil society will be able to verify regularly that the legislation in place doesn't go beyond defined legitimate aims such as the fight against extremism and terrorist propaganda, and that human rights, particularly freedom of expression and freedom of the media, are properly protected.

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## FAIR TRIAL OR FREE PRESS: LEGAL RESPONSES TO MEDIA REPORTS OF CRIMINAL TRIALS

BRONWYN NAYLOR\*

IN June 1993 in *R. v. Taylor*<sup>1</sup> the Court of Appeal quashed the murder convictions of two young women on grounds (inter alia) of prejudicial press coverage of the original trial. In October 1993 three police officers charged with conspiring to pervert the course of justice following the release of the Birmingham Six had their prosecution stayed. The court accepted the argument that adverse publicity made a fair trial impossible.<sup>2</sup>

Are more checks on the press needed to ensure fair trial? Is media sensationalism forcing the courts to provide new protections? Or are recent developments unnecessarily endangering free speech and a free press?

Debate about the freedom of the press has had a high profile in Britain in recent years. The press defends its corner energetically, aligning its interests with the "public interest" and claiming that restraint of the press allows corruption and abuse to flourish. In the context of criminal trials the press points to the fundamental principle of open decision making. These are persuasive arguments. All too often, however, the commercial character of the industry dominates, with "news values" which favour conflict and sensationalism, with potentially serious consequences for their subjects.

This article reviews *Taylor* and other recent cases and discusses their implications for the free press/fair trial debate.

### R. v. TAYLOR

Michelle Taylor and her sister Lisa were prosecuted for the murder of Alison Shaughnessy, who was stabbed to death late one afternoon after coming home from work. Michelle Taylor had been having an affair with the victim's husband. The trial took place in July 1992.

The sisters denied being anywhere in the vicinity. The evidence was

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<sup>1</sup> *R. v. Taylor* [1993] *The Times*, 15 June.

<sup>2</sup> *R. v. Reade* [1993] *The Independent*, 19 October.

extremely circumstantial and the timing was very tight. There were around 23 minutes in which time the Taylor sisters were to have entered the flat, stabbed the victim 54 times, destroyed all scientific evidence and disposed of their blood-stained clothes, and driven four miles in peak traffic back to Michelle's workplace. The prosecution case focused on the relationship between Michelle and the husband of the murdered woman. So did the newspaper coverage. Many papers had her convicted of the murder from the start.

Several newspapers published a still from a video of the victim's wedding, showing Michelle Taylor kissing the groom (her lover), a peck on the cheek turned into a passionate kiss by creative editing. Headlines proclaimed "CHEAT'S KISS" and "JUDAS KISS". The video was of no relevance to the killing itself, and it was never actually put in evidence at the trial.

The jury convicted the two women. An appeal was lodged, initially based on the prejudicial press coverage. When preparing their appeal defence lawyers obtained police documents which had not previously been made available. One document was a police record of a message from a crucial witness. This witness said at the trial that he had seen two blonde girls leaving the victim's house and jogging away down the road. His first statement to the police, however, had been that one of the women whom he saw might have been black. The accused women are both white. He also originally said that they were walking away from the house, rather than jogging.

In addition, the defence discovered, a short time before the appeal, that the witness had claimed a reward being offered by the victim's employer for help in solving the murder. This had been known to the police, but not to any counsel in the case, nor to the Crown Prosecution Service.

The appeal went ahead in June 1993 on two grounds:

1. That the prosecution failed to make available their witness's contradictory statements. He was an extremely impressive witness for the prosecution, an impression which would have been different had the defence been able to cross-examine him on his contradictory statements and the possible motive for changing his evidence.

2. That the press coverage was extremely prejudicial.

The Court of Appeal quashed the convictions as unsafe and unsatisfactory. It concluded (and the prosecution conceded) that failure to disclose the inconsistent witness statement was a significant irregularity.

The court also took the view that the coverage had been "unremitting, extensive, sensational, inaccurate and misleading". Despite warnings by the judge to the jury, it was impossible to say that the jury were not influenced in their decision by what they had read, and the

court was satisfied that "the press coverage of the trial did create a real risk of prejudice". On the basis of its findings on the press coverage, the court did not order a retrial.

#### NARRATIVES OF VIOLENCE

Violent events challenge fundamental social structures and expectations. People seek explanations to reduce the contradictions they introduce. Explanations take the form of "stories" or "narratives". In the context of the criminal justice system, explanatory narratives are constructed as police and lawyers compile facts, follow up particular lines of enquiry, select witnesses and call experts, as they put a case together for a trial. Addresses to the jury and pleas in mitigation of sentence also offer narratives about the event and the offender. These (and alternative) narratives are then reported and developed in the news media. There may of course be competing narratives; those of defence and prosecution counsel, of the judge when sentencing, and those of rival newspapers.

The process of preparing a case for trial inevitably involves selection and construction of a case.<sup>3</sup> In a sense this is not peculiar to lawyers or police (though it has specific consequences of particular interest here). It is simply a corollary of the widely accepted observation that all experience is mediated by the human subject, and that *everyone* is therefore engaged in the ongoing process of constructing their own reality.<sup>4</sup>

In a case such as this, where there is no direct evidence as to who actually killed the victim, a prosecution depends on persuading a jury that the prosecution scenario is believable, that the circumstantial material adds up to proof of guilt, that the projected events and motivations are predictable. In this case, the witness who saw two young women leaving the victim's house at the relevant time may originally have thought one was black, but as he now thought they were both blonde (as were Michelle Taylor and her sister Lisa) his earlier statement could be ignored by the police and not disclosed. It could even, on the most generous analysis, genuinely be regarded as irrelevant.<sup>5</sup>

The press adopted the prosecution story with gusto. It provided a scenario—the jealous woman killer—well known in myth although

<sup>3</sup> See Mike McConville, Andrew Sanders and Roger Leng, *The Case for the Prosecution: Police Suspects and the Construction of Criminality* (London, 1991).

<sup>4</sup> See for example P. Berger and T. Luckmann, *The Social Construction of Reality* (London, 1967).

<sup>5</sup> The Court of Appeal commented, however, "We can only conclude that [the Detective Superintendent] did not disclose it to the prosecution legal team, because he knew that if he did, in accordance with the Bar's high tradition, they would in turn disclose it to the Defence." (Transcript, 12–13).

statistically rare, and popularised in films such as *Fatal Attraction*. The story had all the features tabloid (and other) newspapers regard as most newsworthy. They gave the trial enormous coverage, with headlines such as "THE 'KILLER' MISTRESS WHO WAS AT LOVER'S WEDDING" and "LOVE CRAZY MISTRESS BUTCHERED RIVAL WIFE COURT TOLD". It is not suggested that this was a conspiracy against the Taylor sisters themselves. But it provided a "script", and excluded other scripts, in a way which the Court of Appeal concluded was powerfully prejudicial.

### THE POWER OF THE PRESS

The media give a lot of space to death and violence, as is widely recognised. The main national UK papers devote 64.5 per cent. of their crime reporting to stories of personal violence, although official figures suggest that only 6 per cent. of crime actually involves personal violence.<sup>6</sup> Violence incorporates the drama, the human emotion, the shattering of "normal" expectations, which are required for a story to be newsworthy.<sup>7</sup>

Crime coverage promotes a perception that violent crime is increasing particularly rapidly (contrary to the official statistics), that disorderly youth is running rampant and that the social order is under threat, a message which is then reflected in calls for tougher sanctions and increased policing.

News reporting is effective ideologically because it presents explanations as self-evident and unchallengeable.<sup>8</sup>

. . . the power of newspaper interpretations lies in their ability to make events intelligible at a mundane, "commonsense" level, to provide a guide for practical activity and to alleviate the need for further investigation and consideration . . . This commonsense mode of understanding trades off myths and stereotypes which provide simple, comfortable, ready-made pictures and explanations of things.<sup>9</sup>

Britain has a large newspaper-reading public. Around 11.5 million people buy a tabloid newspaper each day and 2.5 million buy a

<sup>6</sup> Williams, Paul and Julie Dickinson, "Fear of Crime: Read All About It? The Relationship between Newspaper Crime Reporting and Fear of Crime" (1993) 33 *British Journal of Criminology* 33.

<sup>7</sup> See Richard Ericson, Patricia Baranek and Janet Chan, *Visualizing Deviance: A Study of News Organization* (Milton Keynes, 1987).

<sup>8</sup> See for example Stuart Hall, Chas Critcher, Tony Jefferson, John Clarke and Brian Roberts, *Policing the Crisis: Mugging, the State, and Law and Order* (Basingstoke, 1978); Colin Sumner and Simon Sandberg, "Press censure of 'dissident minorities'" in Colin (ed.), *Censure, Politics and Criminal Justice* (Milton Keynes, 1990).

<sup>9</sup> Steve Chibnall, *Law-and-Order News: An Analysis of Crime Reporting in the British Press* (London 1977), p. 44.

broadsheet.<sup>10</sup> The popular tabloid newspapers are written in simple language, requiring only basic reading skills, and are therefore likely to be particularly effective vehicles for the dissemination of written information—and the values inextricably embedded.

The power of the media image is illustrated in the case of Myra Hindley, convicted of several murders in the early 1960s. She has become an “evil icon”, her story regularly retold in the tabloids and the famous picture routinely republished.<sup>11</sup> Arguably the campaigning stance taken by some papers has made it difficult, or impossible, for her parole to be considered.<sup>12</sup>

The press tends to claim that it is in a legal straitjacket. It points to the Calcutt inquiries into privacy (1990) and press self-regulation (1993), increasing powers of the Press Complaints Commission, contempt legislation and so on.<sup>13</sup> Kelvin McKenzie (then editor of the *Sun*) complained, when criticised by the Court of Appeal for the *Sun*'s coverage of the *Taylor* case, that the court did not understand how popular newspapers worked, and “Justice would be better served if there were fewer judges from Brasenose College, Oxford, and more *Sun* readers from the University of Life on the bench”.<sup>14</sup>

In fact much press activity still falls outside legal regulation. And judges in some cases take a fairly robust view of jurors' vulnerability. Lawton J. might have found himself in agreement with the editor of the *Sun*, commenting in *R. v. Kray*,<sup>15</sup> “I have enough confidence in my fellow-countrymen to think that they have got newspapers sized up”.

Robertson and Nicol, in their text *Media Law*, argue that juries are “remarkably resilient” to newspaper comments, citing the acquittals of Jeremy Thorpe, the Kray twins and Janie Jones.<sup>16</sup> Lawton J. in the *Kray* case relied on short memories and the concentration required in a trial to limit the impact of press coverage:

It is, however, a matter of human experience, and certainly a matter of experience of those who practice in the Criminal Courts, first, that the public's recollection is short, and, secondly, that the drama, if I may use that term, of a trial almost always has the effect of excluding from recollection that which went before.<sup>17</sup>

The passage of time was found to reduce the impact of some forms

<sup>10</sup> December 93–May 94 averages: *Media Guardian* 20 June 1994. During this period 4 million people bought the *Sun* each day, and 2.5 million bought the *Daily Mirror*, the two top-selling national newspapers.

<sup>11</sup> Mike Nellis, “Myra Hindley: The Hated Icon” (1985) 20 *The Abolitionist*, p. 9.

<sup>12</sup> David Astor, “A witch-hunt that demeans us all”, *The Observer*, 25 April 1993.

<sup>13</sup> See for example Association of British Editors, *An Alternative White Paper: Media Freedom and Media Regulation* (February 1994).

<sup>14</sup> Quoted in the *Guardian* 12 June 1993, p. 1. Was this an admission that people do not believe what they read in the tabloid press?

<sup>15</sup> (1969) 53 Cr.App.Rep. 412, 414.

<sup>16</sup> Geoffrey Robertson and Andrew Nicol, *Media Law* (3rd ed.) (London, 1992), p. 263.

<sup>17</sup> (1969) 53 Cr.App.Rep. 412, 415.

of media coverage in a recent American experimental study.<sup>18</sup> Lapse of time eliminated the effect of prejudicial "factual" publicity (a report of previous convictions) on jurors' deliberations. "Emotional" material (such as the graphic description of a victim's injuries) however was not so readily excluded from memory and continued to produce hostile jury decisions. Interestingly, the most common protective device used in this country, the judicial instruction to the jury, was found to be quite ineffective as a cure for prejudicial press reporting.

#### LEGAL REMEDIES FOR PREJUDICIAL PUBLICITY

The legal system recognises in various ways the proposition that decision makers may be adversely affected, or influenced, by information which may be presented in the press. It has long taken account of such concerns, for example in evidentiary rules excluding (at least *prima facie*) what is recognised to be highly prejudicial information, for instance: exclusion of previous convictions at trial; the similar fact rule; recent developments in the restriction of prior sexual history evidence in rape trials; provision for severance of indictments.

Three substantive areas of direct statutory or judicial intervention are pre-emptive restrictions on reporting, action for contempt, and appeals based on prejudicial press coverage.

##### *1. Pre-emptive restrictions on reporting*

Journalists can be prevented from publishing what they have heard in court, either for all time or temporarily, under various rules.<sup>19</sup> For example, reporting of committal proceedings is limited essentially to the names of parties, the charges and the decision to commit, restrictions which apply until the trial has been completed.<sup>20</sup> The identity of children involved in court proceedings is generally protected,<sup>21</sup> and since 1976 a complainant in a rape case must in general remain anonymous.<sup>22</sup>

Section 11 of the Contempt of Court Act 1981 embodies the power to prohibit the publication of names of parties or witnesses, or other matters.<sup>23</sup> There must, however, be a strong case for suppression in the interests of the administration of justice—and not simply individual

<sup>18</sup> Geoffrey P. Kramer *et al.*, "Pretrial Publicity, Judicial Remedies, and Jury Bias" (1990) 14 *Law and Human Behaviour*, p. 409.

<sup>19</sup> See Robertson and Nicol, pp. 323ff; C.J. Miller, *Contempt of Court* (2nd ed.) (Oxford, 1990), ch. 10.

<sup>20</sup> Magistrates Courts Act 1980, s. 8. A defendant has a right to have the restriction lifted.

<sup>21</sup> Children and Young Persons Act 1933 (as amended), ss. 39(1) and 49(1).

<sup>22</sup> Sexual Offences (Amendment) Act 1976, s. 4; since extended to victims of other sexual offences by the Sexual Offences (Amendment) Act 1992.

<sup>23</sup> Miller, pp. 315ff.

interests—before any reviewing court will endorse overriding the central principle of open justice.<sup>24</sup>

In general a fair and accurate report of matters in open court cannot be contempt of court.<sup>25</sup> A court can however order the postponement of publication of certain matters to avoid “a substantial risk of prejudice to the administration of justice”.<sup>26</sup> The Court of Appeal has, however, been critical of too sweeping a use of these gagging orders by trial courts, and emphasised the need to show a *substantial* risk of serious prejudice, which could not be otherwise reduced.<sup>27</sup>

## 2. Proceedings for contempt

The law of contempt is meant to deter: it is concerned with the *potential* effect of publication.<sup>28</sup> A publication is in contempt if it “creates a substantial risk that the course of justice in particular proceedings will be seriously impeded or prejudiced”.<sup>29</sup>

In a recent case involving a trial for murder of a police officer, it was accepted that media reports of the defendant’s previous conviction for murder would be seriously prejudicial if jurors were aware of it at the trial.<sup>30</sup> However the court held that the Attorney-General had not shown that there was a “substantial risk” of the prejudice occurring, because of the lapse of a likely nine months or more before the trial, during which potential jurors would have forgotten the story, and because of the limited circulation of the offending newspapers.

Contempt is a strict-liability offence if committed in relation to an “active” case, one presently before the courts.<sup>31</sup> Intent is therefore irrelevant, unless the public interest or other defence applies.<sup>32</sup> A prosecution can only be brought by the Attorney-General or with the Attorney-General’s consent.

Contempt of court is the only serious criminal offence triable without a jury; it carries a maximum penalty of two years’ imprisonment and unlimited fine. Imprisonment is rare, though sometimes threatened by a court; fines are more likely to be imposed. More commonly however a judge may warn members of the press about certain evidence, or require the editor of an offending publication or broadcaster to attend the court.

<sup>24</sup> See *R. v. Evesham Justices, ex parte McDonagh* [1988] Q.B. 553. See generally Robertson and Nicol, pp. 339–340.

<sup>25</sup> Contempt of Court Act 1981, s. 4(1).

<sup>26</sup> Contempt of Court Act 1981, s. 4(2).

<sup>27</sup> See for example *Re Central Television plc.* [1991] 1 W.L.R. 4.

<sup>28</sup> *Attorney-General v. English* [1983] 1 A.C. 116, 141.

<sup>29</sup> Contempt of Court Act 1981, s. 2(1). See generally, Miller, *Contempt of Court*, Robertson and Nicol, *Media Law*, ch. 6.

<sup>30</sup> *Attorney-General v. Independent TV News Ltd.* [1994] *The Times*, 12 May.

<sup>31</sup> See Miller, ch. 6, Robertson and Nicol, pp. 278–8 on when a case is *sub judice* or “active.”

<sup>32</sup> Contempt of Court Act 1981, s. 5.

In the *Taylor* case, the trial judge gave several warnings to the jury to decide the case on the evidence alone, but complained at one point that "I do not want to preface every day's hearing with a little homily to the jury [about] not looking at the press."<sup>33</sup>

On appeal, the Court of Appeal expressed concern that the defence had not asked for the jury to be discharged. However it accepted that in this case counsel would be reluctant to ask for a retrial as it would entail holding the two young women in custody for a further considerable period to allow the publicity to be dispelled.

More recently, in the trial of Beverley Allitt, a nurse charged with the murders of several young children in her care, the judge castigated several media representatives at the end of the trial. The judge had ruled early in the trial that evidence that the defendant apparently suffered from the personality disorder Munchausen's Syndrome should not be admitted at the trial. It would obviously have been highly prejudicial. The press had therefore been able to prepare material on the disorder but could not publish it while the trial was in progress. Apologies were accepted from local TV and newspaper representatives for using background material before all verdicts were given, and from the *Guardian* for a leader published while the jury was still out, referring to the defendant as a psychopath.

Counsel for the *Observer*, however, argued that its article on Munchausen's Syndrome, published whilst the jury was still out, did not pose a serious risk of substantial prejudice. The judge disagreed. He referred the alleged contempt to the Attorney-General, stating "If the jury had in fact seen the page it would have caused the most appalling problem."<sup>34</sup>

### 3. Prejudice as a ground of appeal

Media publicity is adverted to in the course of many trials, with a view to having the judge caution the press, warn the jury, or, more drastically, to having the jury dismissed. Contempt proceedings against the offending media may follow. But it is extremely rare for press coverage itself to provide the grounds, after conviction, for a successful appeal. This is so—perhaps surprisingly—even when the publisher of the article has been held to be in contempt.<sup>35</sup> Two recent cases have, however, seen convictions quashed due to prejudicial publicity.

In *R. v. McCann, Cullen and Shanahan*<sup>36</sup> convictions were overturned following highly prejudicial press coverage of a related issue.

<sup>33</sup> Transcript, p. 10; 10 July 1992.

<sup>34</sup> Quoted in *The Times* 29 May 1993.

<sup>35</sup> See Miller, *op. cit.*, p. 191. The author cites *Dyson* (1943) 29 Cr.App.Rep. 104 as the "only modern recorded instance" where a conviction was quashed at p. 192.

<sup>36</sup> (1991) 92 Cr.App.Rep. 239.

Three Irish defendants were tried in 1988 for conspiracy to murder the (then) Secretary of State for Northern Ireland, Tom King. The day after the defendants exercised their right to silence during the trial, the Home Secretary announced in Parliament the government's intention to change the law on the right to silence. There was much press coverage. Tom King (and Lord Denning, whose views the Court of Appeal noted "were bound to be influential") were widely quoted as claiming in strong terms "that in terrorist cases a failure to answer questions or to give evidence was tantamount to guilt".<sup>37</sup>

The trial judge refused to discharge the jury, but warned jurors to disregard any press coverage of this issue. The defendants were convicted, and appealed. The Court of Appeal considered the likely impact of the statements (and the "coincidence" of their timing) such that the jury should have been discharged.

*R. v. Taylor*, discussed above, appears to be the only other such case in recent times, and the first where media reporting of a trial itself has been held to be so prejudicial as to lead (at least in part) to the quashing of the convictions obtained. The Court of Appeal in *Taylor* endorsed the opinion of the judge giving leave to appeal that the coverage had been extensive, sensational and misleading. The court was particularly critical of the publication of the stills from the wedding video, which had never been in evidence at the trial, and the accompanying headlines. The Court of Appeal concluded that the press had gone far beyond the matters raised at the trial, presenting comment rather than reports, and assuming guilt on the part of the young women in the dock, with apparently no appreciation of the fact that this was the matter at issue in the trial: "the Press is no more entitled to assume guilt in what it writes during the course of a trial, than a police officer is entitled to convince himself that a defendant is guilty and suppress evidence . . .".<sup>38</sup>

The court adopted the principle enunciated in *McCann* that if the media coverage at a trial created a real risk of prejudice against the defendants, which was not capable of cure by jury direction or delay, the convictions should be regarded as unsafe and unsatisfactory. The nature of the press coverage also meant that no retrial was possible.

#### CONCLUDING COMMENTS

Are "fair trial" and "free press" mutually exclusive concepts? The courts are on the whole very conscious of their competing demands. Whilst mechanisms exist for much greater control of the media, the

<sup>37</sup> *R. v. McCann, Cullen and Shanahan* (1991) 92 Cr.App.Rep. 239, 245, 250.

<sup>38</sup> Transcript, p. 18.

courts, at least at the level of review, tend to be reluctant to endorse their use.

A recent case involved an application for stay of proceedings on the grounds of abuse of process, where it was claimed that a fair trial on a charge of murder was impossible due to delay coupled with adverse publicity.<sup>39</sup> The court dismissed the application, finding that the press coverage, though adverse and at times overwhelming, was unlikely to be remembered by any potential juror outside the local area. Scott Baker J. commented acerbically: "Increasingly these days publicity is advanced as a reason why it is impossible for the defendant to have a fair trial . . . In most cases, one day's headline is the next day's firelighter."

The courts have also been unwilling to link sanctioning the media through contempt proceedings with the consequences of that reporting on the trial.

It is clear that some media reporting poses a threat to the fair trial of the defendant. The commercial imperatives of the press will ensure that this will always be a closely-fought boundary. Controversial cases such as *Taylor* are important demonstrations of the legal system's willingness to take a step towards remedying the consequences of particularly sensational reporting. They need not, and probably can not, be seen as challenging the fundamental freedoms of the press.

<sup>39</sup> *R. v. Derby Stipendiary Magistrate, ex parte Brooks* (unreported), 17 February 1994.

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# **Counter-Terrorism Laws and the Media: National Security and the Control of Information**

Lawrence McNamara

Liberal democracies presently struggle with the need to balance the demands of national security with traditional commitments to media freedom. The enactment of counter-terrorism laws since 2001 has seen the state expand its ability to control information. This article examines that expansion, drawing on interviews with journalists and lawyers to consider the potential and actual effects of the laws. It argues that the strongest, most direct effects relate to the reporting of court proceedings. The laws have not yet, it seems, had a chilling effect, but they have brought about apprehension and caution. Even if not causally affecting the flow of information, the laws remain an important part of the context in which information is controlled or limited by other means. When viewed side by side, the combination of these effects suggests that the degree of control over information does not necessarily correspond with the presence or degree of legal regulation.

Liberal democracies are faced with a task that is presently very troubling: they must balance traditional commitments to media freedom with the secrecy and closure that is often demanded by national security needs. On the one hand, there must be access to information and an ability to publish without fear of prosecution. At its best, the media plays the role of watchdog—the fourth estate that holds all branches of government to account. On the other hand, the state and its citizens have a legitimate interest in national security. That interest will at times demand that information is not made available to the media, publication will be restricted or prevented, and the criminal law will be used to enforce these limits on media freedom.

In general terms, two main legal strategies are employed to limit media freedom. First, there are laws designed to prevent the media obtaining information. Secondly, there are laws aimed at preventing publication so that, in the event information is obtained, the media cannot disseminate that information. As well as creating direct obstacles, the fact that there will be penalties for breaching the laws may have a chilling effect on the media. That is, media organisations may engage in a form of self-censorship by erring on the side of caution, especially when making decisions about what should and should not be published. Together, though in different ways, these strategies limit the extent to which the public finds out about the activities of the state or of its individual or corporate citizens.

Neither of the legal strategies is new but since 2001 they can be found more readily in Australian counter-terrorism laws. Media organisations have argued that these laws restrict the ability of the media to investigate and report on matters of public interest.<sup>1</sup> The Australian Press Council has expressed concern that the laws shield governments from public scrutiny.<sup>2</sup> Similar arguments can be found in the *Report of the Independent Audit of the State of Free Speech in Australia* which was commissioned by a coalition of Australian media organisations under the campaign umbrella of 'Australia's Right to Know'.<sup>3</sup> In the scholarly literature there is preliminary analysis that supports those claims.<sup>4</sup>

Against that background, this article explores how the tension between media freedom and national security is presently balanced. It considers especially how the new laws directly affect the media in so far as the state prevents publication or access to information and contrasts this with the ways that the laws are relevant to the control of information even in the absence of formal prohibitions or restrictions on publication.

Three different dimensions of control will be examined, each with a decreasingly significant role for the law. Part one considers the most overt controls which occur in the judicial process and under which there are express restrictions on access to information and publication. Part two turns to less easily-identified limitations and restrictions that result from self-censorship. Part three looks at how control is exercised at the very periphery of the legal framework where legislation does not always have a direct effect but forms part of the context in which information is controlled. Each of these, it will be argued, is a matter of significant concern but, importantly, it will be suggested that the degree of control over information does not necessarily correspond with the presence or degree of legal regulation.

The analysis draws substantially on a series of semi-structured interviews with journalists and lawyers which sought to ascertain and analyse the ways the media is actually being affected by the laws, considering this especially

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<sup>1</sup> Media, Entertainment and Arts Alliance [MEAA], Submission to the Senate Legal and Constitutional Committee, Inquiry into the Provisions of the Anti-Terrorism Bill (No. 2) 2005, Submission 198 (November 2005); Australian Broadcasting Corporation [ABC], Submission to the Senate Legal and Constitutional Committee, Inquiry into the Provisions of the Anti-Terrorism Bill (No. 2) 2005, Submission 196 (11 November 2005).

<sup>2</sup> Jack Herman (ed.), *State of the News Print Media in Australia 2007: Supplement to the 2006 Report* (Sydney: Australian Press Council, 2007), pp. 59-64.

<sup>3</sup> Australia's Right to Know, *Report of the Independent Audit into the State of Free Speech in Australia* (Sydney: Australia's Right to Know, 2007) esp. pp. 155-9, 162-4.

<sup>4</sup> Chris Nash, 'Freedom of the Press in the New Australian Security State', *University of New South Wales Law Journal*, vol. 28, no. 2 (2005), pp. 900-8.

in light of the potential effect of the laws.<sup>5</sup> Participants were identified through the literature, the news media, and formal and informal interviews and conversations with journalists, lawyers and academics in the field. The interviewees were ten journalists who were regularly reporting on the issues and nine lawyers. These were media lawyers (some in-house counsel and some from firms) who provide advice and make judgments about what can or cannot be published, and criminal lawyers who had been involved in proceedings where there may be attempts to regulate the media's access to, and reporting of, security-related information. The interviews were conducted in July and August 2007. It was around that time that Dr Mohamed Haneef was arrested in Queensland and charged with terrorism offences in circumstances where access to and the release of information was highly contentious.<sup>6</sup> As such, many of the interviewees had given a deal of thought to the issues that were discussed in the interviews, and the Haneef matter was referred to regularly.

These interviews canvassed the ways that the laws had restrictive effects, though neither the interviewer nor interviewees assumed that an unrestricted media was either desirable or practical. On the contrary, both journalists and lawyers accepted that secrecy is sometimes required and that means that information may need to be restricted. In addition, there was a clearly conveyed view that the media would not work against security authorities. As a lawyer put it, if a journalist thought a terrorist act was likely then "the first [priority] would be human safety" and they would go to the police "within two seconds"; "journalists aren't that intent on good stories that they would endanger [sic] an actual act of terrorism to get a good story".<sup>7</sup>

The research focused on major media outlets because these organisations have the resources and expertise needed to resist and challenge the

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<sup>5</sup> The most extensive report of this research can be found in Lawrence McNamara, 'Closure, Caution and the Question of Chilling: How Have Australian Counter-Terrorism Laws Affected the Media?', *Media & Arts Law Review*, vol. 14, no. 1 (2009), pp. 1-30.

<sup>6</sup> Dr Haneef, an Indian national, was arrested on suspicion that he was guilty of supporting terrorism through a connection to the attack at Glasgow International Airport on 1 July 2007. He was taken into custody for questioning on 2 July and held for twelve days before being charged. He was granted bail two days later but remained in detention following the Minister's immediate cancellation of his visa amid much talk of information that could not be released to the public but which implied that Haneef was meaningfully connected to terrorism. The criminal charges were withdrawn on 27 July 2007. The visa cancellation was overturned by the courts on 21 December 2007. On 13 March 2008 the Labor government elected in November 2007 established an inquiry into the Haneef case: <[www.haneefcaseinquiry.gov.au](http://www.haneefcaseinquiry.gov.au)>. On 29 August 2008 the Australian Federal Police (AFP) formally announced they were no longer investigating Haneef and the Australian Security Intelligence Organisation (ASIO) had earlier indicated they did not consider Haneef to have terrorism connections. The Clarke Inquiry reported to the government on 21 November 2008: 'Report of the Clarke Inquiry into the Case of Dr Mohamed Haneef', <<http://www.haneefcaseinquiry.gov.au/www/inquiry/haneefcaseinquiry.nsf/Page/Report>> [Accessed 10 May 2009]. The government released the report to the public two days before Christmas on 23 December 2008.

<sup>7</sup> All comments are taken from the interviews unless otherwise stated.

limitations imposed by the law. If the effects are strong on major organisations then it might be that smaller bodies face even greater obstacles or greater difficulty overcoming the same obstacles.<sup>8</sup>

Commentators and columnists were not interviewed. The principal focus is on the media's ability to report on matters involving prosecutions for terrorism and investigative reporting on matters relating to terrorism. The media's ability to present opinion and comment on terrorism, terrorist groups or government policy are clearly very important aspects of the public discussion of national security. These matters have attracted significant concern and criticism, especially with regard to the extent to which sedition laws have been revived and revised in a way that prevents the expression of opinion.<sup>9</sup> However, this piece is principally concerned with the information-based aspects of reporting on national security matters.

## Open Justice and Closed Courts

The media do not have special access to courts. Their access and ability to report on matters are derived from the principles of open justice. 'Open justice' is a central—indeed, defining—feature of judicial proceedings in Australia and other common law countries. It means that hearings will ordinarily be accessible to members of the public and that information disclosed in them can be reported to the public at large. The rationales for open justice reside in the benefits of public scrutiny of the quality of justice being administered in the courts with exposure aiming to ensure that judicial power is exercised impartially.<sup>10</sup> However, open justice does not mean that all aspects of all proceedings can be reported at any time. A range of limits applies, essentially on the basis that there are other factors to be taken into account in the administration of justice and, on occasion, the administration of justice requires some limits on openness. These limits may restrict access to the court, or they may allow access but will restrict publication.

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<sup>8</sup> It would, however, be of great interest to explore the experience of smaller organisations because they may feel different effects, especially where there is a sense that their communities are being targeted by particular laws, by sections of the wider community, and perhaps by the major media.

<sup>9</sup> The sedition laws and associated restrictions on expression in the *Criminal Code* ss 80.2ff were enacted by the *Anti-Terrorism Act (No 2) 2005* (Cth), Schedule 7. The Australian Law Reform Commission reviewed these and made recommendations for change: *Fighting Words: A Review of Seditious Laws in Australia, Report 104* (Sydney: ALRC, 2006). The Howard government did not act on the recommendations. The Rudd government has recently indicated that it will implement almost all the recommendations: 'Australian Government Response to ALRC Review of Seditious Laws in Australia: December 2008', <[http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications\\_AustralianGovernmentresponseToALRCReviewofSeditiousLawsinAustralia-December2008](http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_AustralianGovernmentresponseToALRCReviewofSeditiousLawsinAustralia-December2008)> [Accessed 19 February 2009].

<sup>10</sup> For an excellent, brief outline of the history, rationales and significance of open justice, see Des Butler and Sharon Rodrick, *Australian Media Law*, 3rd edn. (Sydney: Thomson Lawbook Co., 2007), pp. 161-3.

In criminal cases, where access is generally allowed, the laws of *sub judice* contempt will play an important role in determining what can be published, both before and during a trial. When a person is charged with a criminal offence, the media will be able to report the basic facts associated with arrest and charge. However, under *sub judice* contempt laws, the media cannot publish material which may prejudice a trial. In particular, the publication of prior convictions and photographs of the accused are not generally permitted. There is a limited public interest defence under which some prejudice to the administration of justice may be permissible if there is a competing public interest that outweighs that prejudice.<sup>11</sup> This enables limited reporting of events and allegations at the time of arrest but is still approached cautiously. Once a matter reaches trial then criminal proceedings are ordinarily open to the public. The media may report cases, including reporting the evidence given in court. They may also be able to access a wide range of documents associated with the case, including indictments, briefs of evidence and witness statements. During a trial, material cannot be published if it was not heard by a jury or if it has been suppressed by order of the court.

In terrorism matters, there may be restrictions on access as well as publication. In these cases the ability to report turns heavily on the openness of court proceedings and media access to information and documents relied upon in those proceedings, especially because security-related information may not be easily discovered outside of proceedings. There are two ways access may be restricted in terrorism cases. The first is through the closure of courts using established powers and these have been relied upon in recent terrorism cases.<sup>12</sup> However, open justice must be considered and Justice Bongiorno in the Victorian Supreme Court recently stated that:

The Court will maintain its vigilance to ensure ['protective orders'] are never unreasonably or unnecessarily applied and of course the press interests can always seek to be heard on any occasion on which [such orders] are sought to be invoked.<sup>13</sup>

The second form of restriction is based on the management of evidence. It is well-established that there may be occasions where evidence will not be admissible if it would prejudice national security.<sup>14</sup> However, the *National Security Information (Civil and Criminal Proceedings) Act 2004* (Cth) (the

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<sup>11</sup> *Ex parte Bread Manufacturers Ltd; Re Truth and Sportsman Ltd* (1937) 37 SR (NSW) 242; *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15.

<sup>12</sup> *Crimes Act 1914* (Cth) s 85B; *Criminal Code Act 1995* (Cth) s 93.2; *R v Lohdi* [2006] NSWSC 596, affirmed in *R v Lohdi* (2006) 65 NSWLR 573, [2006] NSWCCA 101; *R v Benbrika, Abdul Nacer & Ors (Ruling no 1)* [2007] VSC 141.

<sup>13</sup> *R v Benbrika, Abdul Nacer & Ors (Ruling no 1)* [2007] VSC 141 at [18]; see also *John Fairfax Publications Pty Ltd v District Court of NSW* [2004] NSWCA 24; *R v Lohdi* (2006) 65 NSWLR 573, [2006] NSWCCA 101, esp. [10], [24], [27]-[28].

<sup>14</sup> *Evidence Act 1995* (Cth) s 130.

NSI Act) establishes a regime that goes much further and, as a consequence, has the potential to place quite comprehensive restrictions on media coverage of terrorism trials.

### **NATIONAL SECURITY INFORMATION LEGISLATION**

The NSI Act was prompted by the Commonwealth's concern that if it relied on established laws to argue that security-sensitive evidence was not admissible, then prosecutions would collapse due to a lack of evidence.<sup>15</sup> The new laws were enacted

to prevent the disclosure of information ... where the disclosure is likely to prejudice national security, except to the extent that preventing the disclosure would seriously interfere with the administration of justice.<sup>16</sup>

The principal effect is that a trial can proceed where some evidence may not be made available to the accused in its original or complete form.

The procedure requires that any party wishing to rely on evidence that may relate to national security must notify the Attorney-General if that evidence is to be disclosed in the proceedings.<sup>17</sup> If the Attorney-General thinks "there is a real, and not merely a remote, possibility that [a disclosure in evidence] will prejudice national security" then she or he may ask the court to rely on a summarised form of the evidence, or a document with information deleted from it, or evidence of a witness who cannot be called.<sup>18</sup> The court will then hear argument about the extent to which the Attorney-General's view should prevail. Under section 31, the court can decide to prohibit disclosure, permit some disclosure, or permit full disclosure. In making its determination the court must consider (a) the risk of prejudice to national security; (b) whether there would be a "substantial adverse effect on the defendant's right to receive a fair hearing"; and (c) any other matter the court considers relevant. The first of these factors must be given the greatest weight.<sup>19</sup>

There is little room for consideration of open justice. Only under the third factor could any such the public interest be taken into account. Moreover, it is difficult for media organisations to make persuasive arguments for openness because, although a judge may allow media submissions on the way evidence should be handled, the media lawyers are not permitted to be in the court while prosecution, defence and government argument is heard.<sup>20</sup> As such, it will be almost impossible for the media to address—or even to know—the specific issues in contention.

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<sup>15</sup> *R v Lappas & Dowling* [2001] ACTSC 115.

<sup>16</sup> *NSI Act*, s 3.

<sup>17</sup> *NSI Act*, ss 24-25.

<sup>18</sup> *NSI Act* ss 26-27.

<sup>19</sup> *NSI Act* ss 31(8).

<sup>20</sup> *NSI Act* s 29(2); *R v Lodhi* [2006] NSWSC 571; *Lohdi v R* [2007] NSWCCA 360.

The NSI Act provides a second way of managing evidence but it is even less satisfactory. Under section 22 the prosecutor and defendant

may agree to an arrangement about any disclosure, in the proceeding, of information that relates to national security or any disclosure, of information in the proceeding, that may affect national security.

An agreement may be far more restrictive than the court would order were disclosure issues contested. The agreement must be approved by the court but even a restrictive agreement could be appealing to a judge because the trial can be managed more effectively if the parties are not resorting to the disruptive, time-consuming section 31 procedures.<sup>21</sup> It would appear that, where the effect of a section 22 agreement would be that security-related information would not be disclosed, then requirement to notify the Attorney-General (under ss 24-25) would not arise. This could mean that an agreement could also be more restrictive than any limitations which would be sought by the Attorney-General.

By June 2008, the NSI Act had been invoked in proceedings involving twenty-eight defendants, as well as in one application for a control order.<sup>22</sup>

### **THE EXPERIENCE IN TERRORISM TRIALS**

While the scope for restrictions is clearly wide, to what extent and in what ways do these restrictions play out in practice? Interviews with journalists and lawyers suggest that are two main ways that the media feels the effects of the laws. First, formal restrictions flow from the different laws, though not necessarily or solely from the NSI legislation. Secondly, informal relationships are increasingly characterised by a lack of openness and this affects the coverage of terrorism trials.

Just as the closure of courts under established powers has been a concern, the NSI laws have also attracted criticism. No interviewees argued that exclusion of the media was necessarily inappropriate or always unjustified. On the contrary, it was accepted that “there will be times when the media or a party even, shouldn’t be able to be involved—it sort of defeats the purpose if they are”. However, there was a clear feeling that applications for court closure were at times used strategically by police to ensure that no media were present at the hearing, thereby forcing the media to rely on police statements.

There was discontent with the NSI procedure which denies the media a place in the process and excludes them from hearings. This was seen as an unjustifiable and inappropriate impediment to the media’s ability to argue

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<sup>21</sup> *R v Khazaal* [2006] NSWSC 1353 at [83]-[95].

<sup>22</sup> Attorney-General’s Department, *National Security Information (Civil and Criminal Proceedings) Act 2004 Practitioners’ Guide* (Canberra: Attorney-General’s Department, 2008), p. 5.

effectively in the public interest. Media lawyers argued that while the exclusion of journalists was one thing, there was no good reason to exclude the legal representatives:

We are officers of the court, we understand our obligations to the court, we are bound by them. The chances of us saying, "We understand what the judge has said, we understand what the Act says, but we're just going to do the opposite"—that's just not likely.

The section 22 provision enabling the prosecution and defence to agree on the way evidence will be managed was also criticised. Although there has been some defence support for the media's criticisms of the legislation,<sup>23</sup> media lawyers saw the parties as being "completely preoccupied with the form in which evidence is to be presented to the other side and to the court". For the parties there is good reason to reach an agreement: it helps the prosecution keep information secret and defence lawyers—while they "don't like using it [and] don't want to have to sign up to it"—have

clients who have been in custody for a year or two. [A refusal] to sign up or [a] challenge [to] the legislation means their trial is delayed and they're in custody for even longer.

In the interviews it was usually the legislation—rather than the lawyers—which was the subject of criticism. There was an acceptance that the parties' lawyers had obligations to act in their clients' interests but, still, "trying to put a blanket order over the whole proceedings" was not seen as being in the public interest.

It is difficult to predict how any particular evidence will be dealt with under the determination process or whether courts will approve proposed agreements:

It can be a bit of a lottery [as to how the judge decides]. It can depend on all manner of [their] prior experience and prior relationships with barristers, or with the media.

Experience so far has varied but most interviewees thought judges have not closed courts without seeking good justification, though none were sanguine:

[The judge] I thought was very, very robust in making the government explain why, if they wanted the court shut. [But] what if it was someone who hated the media and didn't give a toss about openness or accountability? ... Personality becomes a very big factor.

The media experience in terrorism trials is affected not only by the formal operation of the laws but also by journalists' informal relationships with lawyers and court staff, as well as relationships between lawyers. Access to information depends on good relationships, even where there are no

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<sup>23</sup> *R v Lodhi* [2006] NSWSC 571 at [62].

technical restrictions on obtaining or publishing the information. Court staff and lawyers are busy, and lawyers will almost always exercise an innate caution that ensures as little information about their client as possible is made public, especially if they are uncertain how information will be used. Even journalists with good contacts found terrorism cases “tougher than routine”.

A tension between lawyers has become apparent, observed even by the courts:

Something of a hostile attitude has emerged between the Commonwealth and the respondents. The respondents consider that the Commonwealth overstates its position on national security matters. The Commonwealth suspects that the respondents do not have a sufficient regard for matters of national security.<sup>24</sup>

The relationships between lawyers have become very important as each side wants to ensure the other is aware of and comfortable with any media contact:

there’s a lot of sensitivity about making sure everyone’s informed. ... Normally [you] don’t have to have a lot of argument about it when you are asking basic questions. But [in terrorism cases] everyone’s gone very sensitive about it and making sure that they are seen to be doing the right thing. ... There’s a heightened awareness of making sure it’s all done the right and proper and official way.

The problem is accentuated when prosecuting lawyers are from the Commonwealth Department of Public Prosecutions and (unlike their state counterparts) rarely have established relationships with regular reporters in the criminal courts. It is perhaps unsurprising then that lawyers are reluctant to speak. One journalist gave the example of a prosecution lawyer who:

wouldn’t even give me the first name of [the] barrister, saying that [s/he’s] not allowed to talk to the media, and when I explained that “I’m not looking for comment—I’m just trying to get the spelling right”, [s/he] said, “You’re lucky I’m even talking to you.”

Is open justice in terrorism trials in danger of disappearing? The overwhelming impression from the interviews is that this is indeed a genuine concern. One lawyer said that, “The routine order being sought is ... that all security sensitive information be heard in closed court. That is now the default set of orders.” The substance and operation of the laws gave rise to the perception that whereas suppression is “not meant to be the norm” and a case must be made for matters to be suppressed, “the terror rules almost make a different assumption—you’ve almost got to say why it is we *should* be allowed to publish. It almost reverses the onus.”

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<sup>24</sup> *R v Khazaal* [2006] NSWSC 1353 at [121].

## Restrictions, Uncertainty and the Question of Self-Censorship

The effects on reporting criminal proceedings are relatively straightforward because the operation of the laws can be seen with some clarity. In the realm of investigative reporting, the impact of the laws is less certain.

Investigative reporting on terrorism and national security is governed by a range of old and new laws. Defamation will be a concern just as it always has been; suggestions of involvement in terrorist activities or other abhorrent behaviour cannot be made unless they can be proved or are reported as part of covering court proceedings. However, there is much to suggest that new counter-terrorism laws are a significant component of a political and legal environment in which there is a danger of limited access to information and increased caution. This may further diminish the public's ability to know about and engage in informed debate about national security issues.

### COUNTER-TERRORISM LAWS AND INVESTIGATIVE REPORTING

The laws with most potential to affect the media are those governing the secrecy of some questioning and detention, and those under which journalists can be questioned and required to produce documents that will identify sources.

First, stringent secrecy provisions limit the media's ability to obtain and disseminate information about the investigation of terrorism. The Australian Security Intelligence Organisation (ASIO) has been granted the power to question and detain people for the purposes of investigation.<sup>25</sup> Through the Minister, a warrant may be sought on the basis that

there are reasonable grounds for believing that issuing [it] will substantially assist the collection of intelligence that is important in relation to a terrorism offence ... [and] that relying on other methods of collecting that intelligence would be ineffective.<sup>26</sup>

A warrant can be issued by a magistrate or judge and requires a person to "give information, or produce records or things, that is/are or may be relevant to intelligence that is important in relation to a terrorism offence".<sup>27</sup>

Any person who discloses the existence of a warrant while it is in force will be liable to two years imprisonment.<sup>28</sup> In the two years after the warrant expires, it will be an offence punishable by five years imprisonment to disclose any "operational information" that is known by virtue of the issue of

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<sup>25</sup> *Australian Security Intelligence Organisation Act 1979* (Cth) ('the ASIO Act'); *ASIO Legislation Amendment (Terrorism) Act 2003* (Cth); *ASIO Legislation Amendment (Terrorism) Act 2006* (Cth).

<sup>26</sup> *ASIO Act* ss 34D(4), 34F(4).

<sup>27</sup> *ASIO Act* s 34E(4), 34G(7).

<sup>28</sup> *ASIO Act* s 34ZS(1).

the warrant or questioning under it.<sup>29</sup> “Operational information” is defined as including an “operational capability, method or plan”.<sup>30</sup> This means that the two year post-expiry secrecy is quite comprehensive. Disclosing the existence of the warrant would appear to breach the law because using warrants to obtain intelligence seems to be an operational method. In addition, it would seem almost impossible to disclose any information acquired because, even though the prohibition applies only to operational information, the nature of intelligence work makes it impossible to know whether something is or is not “operational information”.

There are also preventative detention powers under the Commonwealth *Criminal Code*. These enable a person to “be taken into custody and detained for a short period of time in order to prevent an imminent terrorist act occurring” or to “preserve evidence of, or relating to, a recent terrorist act”.<sup>31</sup> Again, strict disclosure provisions will limit both access to information and publication. A detainee can only tell the Ombudsman or a lawyer that they have been detained.<sup>32</sup> Any person who discloses the existence of the order or reveals that someone is being detained will be liable to five years imprisonment.<sup>33</sup> However, unlike the ASIO provisions that continue for two years after the life of the order, the restrictions here finish when the order expires. As a result, it is almost impossible to obtain information about a preventative detention order while it is in force, even though the public interest in the existence of the order may be very strong. However, the public interest in preventing a terrorist attack is so strong that, at least in circumstances where the attack is imminent, there is good reason to see the *Criminal Code* restrictions as justifiable.

Secondly, new laws reduce the extent to which journalists can keep sources confidential. To obtain reliable information about matters of significant public interest—a task at the heart of the media’s fourth estate role—journalists may on occasion need to assure sources that their identities will be kept confidential. The obligation to maintain confidentiality is a core element of the Code of Ethics for Journalists.<sup>34</sup> Although it has only limited legal recognition, this obligation is strongly adhered to by journalists.<sup>35</sup> There are two ways that counter-terrorism laws affect the media in this regard.

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<sup>29</sup> *ASIO Act* s 34ZS(2).

<sup>30</sup> *ASIO Act* s 34ZS(5).

<sup>31</sup> *Criminal Code* s 105.1.

<sup>32</sup> *Criminal Code* s 105.36 – 105.37. A family member or employer can be contacted so they know the detainee is safe but “not able to be contacted for the time being”; they may not be told of the detention: s 105.35.

<sup>33</sup> *Criminal Code* s 105.41(2).

<sup>34</sup> *Evidence Amendment (Journalists’ Privilege) Act 2007* (Cth); *Evidence Act 1995* (Cth) ss 126A-126F; *Evidence Act 1995* (NSW) ss 126Aff.

<sup>35</sup> In the United Kingdom courts have observed that the protection of sources is important and, while noting that journalists’ rights are not absolute in this regard, they have limited the scope of

The first is that when the Australian Federal Police (AFP) has reasonable grounds to believe a person has documents that are relevant to and will assist the investigation of “a serious terrorism offence” then it may issue a “notice to produce” documents.<sup>36</sup> Documents must relate to finance, the disposal or acquisition of assets, travel, utilities, telephone calls and accounts, or residence.<sup>37</sup> If issued against a journalist, it is likely that documents would directly or indirectly identify sources. The second and more coercive possibility is that ASIO can seek a questioning warrant if it believes a journalist may have information that will be useful for the collection of intelligence relating to terrorism offences. The journalist may be unaware that they are in possession of such information and the information need not be admissible in evidence at a criminal trial.

Journalists are not presently able to keep sources confidential without fear of punishment. When there is a case before the courts then a journalist’s failure to identify a source could be contempt of court and could result in imprisonment. For example, where a person is being prosecuted for leaking information to the press, a journalist may be asked to reveal the source of information obtained for a story. Adhering to their Code of Ethics, the journalist will not do so. However, the *ASIO Act* does not require the state to have identified a person who is to be prosecuted and against whom they have compiled a case. These laws enable the security authorities to use a questioning warrant to ask the journalist, “Who is your source?” Remaining silent or refusing to reveal sources will be an offence punishable by five years jail.<sup>38</sup> Experience suggests that a contempt penalty would be far less.<sup>39</sup>

The secrecy provisions associated with the laws are again significant. Failure to comply with a notice to produce attracts a fine up to \$3300,<sup>40</sup> but where a notice includes terms that prevent the person disclosing the nature or existence of the notice then disclosing its existence a penalty of up to two years imprisonment.<sup>41</sup> The secrecy requirements would make it impossible to gather any support from other journalists, media organisations or anyone else such as a member of parliament in order to contest the demand to reveal a source.

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orders to produce documents under the *Terrorism Act 2000*: *Shiv Malik v Manchester Crown Court* [2008] EWHC 1362 [85]-[92], [109]-[111].

<sup>36</sup> *Anti-Terrorism Act 2005* (Cth), Schedule 6; *Crimes Act 1914* (Cth) s 3ZQN. The AFP can also request a Federal Magistrate to issue a notice where it concerns “a serious offence”: s 3ZQO.

<sup>37</sup> *Crimes Act* s 3ZQP.

<sup>38</sup> *ASIO Act* s 34L.

<sup>39</sup> See, for example, Senate Standing Committee on Legal and Constitutional Affairs, *Off the Record: Shield Laws for Journalists’ Confidential Sources* (Canberra: AGPS, 1994).

<sup>40</sup> *Crimes Act* s 3ZQS.

<sup>41</sup> *Crimes Act* ss 3ZQN(3)(g), 3ZQN(4)(g); 3ZQT.

A key issue explored in the interviews was whether journalists and lawyers were concerned that they could be subjected to the coercive powers of the state or prosecuted for a breach of the laws requiring secrecy, and whether any such concerns were affecting the practice of journalism or the editorial decisions to publish. In short, could it be said that the laws have given rise to a chilling effect?

### **A CHILLING EFFECT?**

It is not merely the existence of the laws which matters. Rather, it is a sense of whether and how the laws will be applied which will inform journalistic and editorial decision-making.

Interviewees did not see the main coercive powers as a direct concern. It was largely thought that it was unlikely that journalists would be held in preventative detention. Similarly, it was thought that ASIO questioning powers were unlikely to be used against journalists. However, it troubled several interviewees that journalists can now more easily be questioned without any need for the authorities to have commenced proceedings against a person thought to be a source: “they can haul us in, they can ask the questions and they can detain us until we [answer them]”. Nothing was said to suggest that this possibility affected journalists’ practices but it was argued that “it only has to come up once in a blue moon and for it to be hanging over people’s heads for it to affect the way they do their jobs”. The possibility that a notice to produce documents could be issued was seen as far more likely and was a cause for some concern and dismay, but few would be surprised if these powers were exercised.

The most contentious issues surrounded matters of great uncertainty: would the authorities commence a prosecution if the media breached a secrecy requirement or published restricted information, even where such a breach was clearly undertaken in the public interest? The interviews revealed a difference of opinion about the ways the law would be applied and showed up a distrust of police and security authorities.

At one end of the spectrum there was complete certainty that a breach would be prosecuted. As a senior journalist put it,

They wouldn’t hesitate ... [They have an attitude of] ‘we want to teach them a lesson, get them to pull their heads in, keep them in line, we want to punish them.’

Or, as another said, “They would take the gloves off.” The certainty of prosecution was seen as being motivated by different things:

[the police] would go gangbusters because they will have been telling the court that this information is secret, vital to national security, people’s lives are in danger, etc. It would almost be necessary for them to go hard.

A media lawyer argued that the use of media interviews as evidence in the Jack Thomas prosecution (for example)

indicates a philosophy on the part of the relevant authorities that they will use whatever tools are available to them to get whatever information they think may be relevant to them even if tangentially relevant.

The fact the counter-terrorism laws provide so many tools was thus seen as a major concern.

Conversely, other interviewees thought it highly unlikely a breach would be prosecuted, especially where there was a strong public interest in publication: “No. Definitely not. Absolutely not”, said one journalist. Others shared a lawyer’s view that “the AFP will be reluctant to take on the media—a particular journalist or newspaper or television station—unless it is absolutely necessary”. The media’s tendency and ability “to bite back really hard” would cause the authorities to balk at prosecuting.

Between these views lay a middle ground of doubt:

In certain circumstances I really think they would [prosecute], but not necessarily. If it was really embarrassing or devastating to electoral prospects. [There would be] political considerations ... and maybe genuine security considerations as well. ... I think they’d weigh all that up. I don’t think there’d be a natural reluctance [to prosecute].

There was uncertainty about just what the threshold would be before the authorities would take action but it was generally thought that “all the indications ... are that it won’t be set that high”.

Uncertainty about the consequences of a breach makes the pre-publication legal question very important: would publication in the particular circumstances actually constitute a breach? Some journalists and all media lawyers said that “one of the trickiest and most difficult areas” relates to reporting what could be considered “operational information”. A “complex” and “opaque” law, it is not easy to apply:

Even if you do have the information somehow then understanding what you might be able to report in a safe way, or what has to be kept secret because of the impact of the secrecy provisions is very delicate and difficult.

The behaviour of police and security authorities does not necessarily make the question easier to answer: “Where information that you think should be kept secret has been provided by ASIO itself or the AFP itself ... what do you do in that circumstance?”

While there is clearly great concern among lawyers and journalists, it cannot yet be said that the vulnerability and uncertainty has given rise to a chilling effect. There were repeated statements from interviewees to the effect that, while aware of and concerned about the laws, journalists are not

being put off by the potential reach of the laws in terms of their approach to investigative work or the cultivation of sources. The resistance to state incursion was seen as strong, at least in the major media outlets where the ethos of the fourth estate is genuinely embraced. In exceptional cases, defiance would be a possibility: “where the journalist is convinced they are in possession of a great story that the public should know about”, both lawyers and journalists generally thought that “an editorial decision could be taken to ignore the exposure under this legislation and in fact publish”. In the general run of stories, there was no indication from journalists that they feel they are being hampered by lawyers or editors. None of the media lawyers thought there had been a chilling effect at this point in time, but there was a clear sense of disquiet and caution amongst them—“a nervousness” about the reach of and potential exposure under counter-terrorism laws—and there was no certainty that the chill will remain in abeyance:

Primarily at the moment it's perception, it's worry, it's uncertainty. ... I wouldn't necessarily put it as high as a chilling effect. ... There's a degree of trepidation I suppose' [on the part of both lawyers and journalists because of the] uncertainty about the laws and how they'll be applied. And that can have a tendency to err on the side of caution, especially when there is stuff that's unclear ... new and untested.

There is not, said another lawyer, a chilling effect but there is “a sense [that when you're] dealing with counter-terrorism laws, of not crossing the line, of not fucking it up”.

## **Sources and Information: Control at the Periphery of the Legal Framework**

Even where experiences were not directly attributable to the existence or application of counter-terrorism legislation, the laws were still seen as an indicator of the state's willingness to restrict the flow of information. They were seen as constituting an important part of the context in which relationships are formed and decisions made. Although the laws were not necessarily being applied, the interviews suggested that counter-terrorism laws and the broader legal framework are nonetheless very much in the minds of sources in the community and the state. As such, the experiences at the periphery of the legal framework are at least as important as those which are affected directly by the laws.

### **INFORMATION FROM THE COMMUNITY**

Journalists reported that Muslim communities tended not to trust the media. The strongest comment was that “the media are seen as proxies for the authorities”. Others tended to think it was a broader sense of marginalisation and distrust of major media organisations which had treated Muslim communities badly. The perception, it was said, is that even if people accepted that the media were not working for the police then it was still thought that some journalists “may look at the police favourably, ... or

their work will be used by the authorities at the end of the day. And there has been a bit of truth in that". Community cautiousness seems justified because it appears the authorities monitor and exploit the way that a person deals with the media. While journalists generally thought their phone calls or emails were not directly monitored, most worked on the basis that their sources' calls would be monitored. There are already instances where journalists' work has been used by the authorities in the prosecution of terrorism offences.<sup>42</sup> Added to this, argued one journalist, the Australian media is, on the whole, "all a bit Anglo" and does not have the base of community contacts that provide a base for the trust in the media that is needed.

Journalists have found it difficult to get information from families or friends of people charged or under investigation. Families and friends of suspects "go to ground" once a person is arrested. Police, it was said, may warn families not to talk to the media in words "along the lines of, 'Well, you know, we've got a lot of power under the new laws.'" As a lawyer put it:

[The journalist] is right. They *do* have a lot of powers. [Families of suspects] are warned by their lawyers not to talk to the media because if they go and say to a television camera, "My brother is a good man and I stand by him", then they run the risk of being prosecuted for supporting terrorism.<sup>43</sup>

Specificity is not required to make a point: "You know we've got these new laws, and you know how strict [they] are. If you don't [do as we say then] we'll consider our options."

Silence has a significant affect on what the public gets to know. When someone will not speak to the media then a journalist's inquiries and analysis will take account of that. If it is not clear why a person refuses to speak then that may lead to adverse judgments:

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<sup>42</sup> The best known in Australia concerns the prosecution of Jack Thomas. After he was acquitted of some terrorism charges, the ABC broadcast interviews they had conducted with him before the trial took place. These interviews became the basis on which a re-trial was successfully sought: *R v Thomas (No 4)* [2008] VSCA 107; S. Neighbour, 'The Convert', *Four Corners*, ABC Television, 27 February 2006, <<http://www.abc.net.au/4corners/content/2006/s1580223.htm>> [Accessed 10 May 2009]; Mark Pearson and Naomi Busst, 'Anti-Terror Laws and the Media after 9/11: Three Models in Australia, New Zealand and the Pacific', *Pacific Journalism Review*, vol. 12, no. 2 (2006), pp. 9-27. In the United Kingdom, see *Shiv Malik v Manchester Crown Court* [2008] EWHC 1362.

<sup>43</sup> The possibility of prosecution may be somewhat alleviated following the Australian government's response to recommendations following reviews of terrorism legislation, though a warning given in unspecific terms may nonetheless make people reluctant to speak. See 'Australian Government responses to the Clarke Inquiry and other counter-terrorism reviews', 23 December 2008, <[http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications\\_AustralianGovernmentresponsestotheClarkeInquiryandothercounter-terrorismreviews-December2008](http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_AustralianGovernmentresponsestotheClarkeInquiryandothercounter-terrorismreviews-December2008)> [Accessed 19 February 2009].

if you ask a question and they don't answer, you might form a different judgment about why they aren't speaking, whether they've got something to hide. It has an impact on the story.

One journalist with significant contacts in Muslim and Arab communities argued that there was a more widespread silencing of opinion, stretching from individual interviews through to general discussion and talkback radio:

I think people were forthcoming before, they were much more vocal. ... I think that people have become much more paranoid now [and] they're not speaking. ... There's a self-censorship.

This, it was said is a cause for concern: "we don't know what their thoughts are because they're not talking any more".

### **INFORMATION FROM THE STATE**

The steadiest stream of information about terrorism comes from the government and its agencies, especially the police. Formal press statements, informal background briefing, and contacts within organisations are all important sources of information. Journalists and lawyers identified problems that affected their ability to get reliable information and, especially, information that can be tested across different sources.

Every journalist interviewed believed that access to information from sources in police and government has become more limited. This was partly, it was thought, because high levels of secrecy surrounding terrorism matters meant that fewer people in government have access to information. However, of much greater concern was that view that institutional sources are very vulnerable to prosecution:

I think [people are] very conscious [of what they are saying and leaking]. I get that broad picture stuff from contacts but people are pretty wary of giving you specific information. ... I think here there is a culture of fear—people see cases like Allan Kessing and that—fear for their own jobs.

Kessing was a public servant in the Customs department who in 2003 wrote an internal report on security problems at Sydney Airport. After being 'buried' for more than two years, the report was leaked to a national newspaper in 2005 with the result that the government spent over \$200 million improving airport security. Kessing has always denied he leaked the report but was charged with doing so. In 2007 he was found guilty and received a nine-month suspended prison sentence.<sup>44</sup> Described as an example of the "ruthless pursuit of whistleblowers and anyone else who contributes to the disclosure of government information", the Kessing matter was referred to often. Journalists and lawyers alike had little doubt that where information adverse to the government was leaked then the leaker

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<sup>44</sup> See generally, 'Strictly Confidential: Information, Secrecy and Government', *Insight*, SBS Television, 25 September 2007 (transcript available on request from <[www.sbs.com.au/insight/archive](http://www.sbs.com.au/insight/archive)>).

would be aggressively pursued. This was contrasted to occasions where it seemed that sensitive or secret information was strategically disclosed to the media; in almost every interview there was a mention of the presence of television cameras (from one organisation only) at a raid by the AFP.<sup>45</sup>

The second major observation concerned the ways that police managed information. As well as attempts to minimise media access to trials and court hearings, there was a perception amongst interviewees that the phrase “operational information” was deliberately employed to enable the government and the police to selectively disclose or withhold information. It was accepted that sometimes these are necessary steps for the authorities to take but there was much cynicism and a view that, too often, the intention was to restrict or manipulate media coverage rather than provide information which would enable a full and fair account in the press. The perceived strategic use of press conferences was heavily criticised. Lawyers were especially critical of police or ministerial statements made between the time a person was arrested and charged, and the time—which is often just hours—the person came before a court to apply for bail. Mohamed Haneef’s barrister, Stephen Keim, has argued that his client was:

subjected to an unrelenting campaign to damage his prospects before any future jury. From the moment of his arrest, law enforcement sources campaigned, albeit anonymously, to destroy his reputation in the community even though they must have been aware that their leaks were, variously, either misleading or simply untrue.<sup>46</sup>

Generally, the police and government approach to the media was seen as “calculated” and it was thought “there is a real, real concern” that there are “layers of spin doctors” involved in the provision of information. A journalist observed that in one matter, “the authorities knew what they had and didn’t have, but didn’t move to correct anything they saw was obviously wrong”. Accordingly, there is great caution about relying on information provided by the police.

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<sup>45</sup> This was the subject of complaint and an investigation which found that ASIO had not authorised any communication with the media by its own officers or those of police agencies, and that there had been no unauthorised disclosure from within ASIO: *Annual Report of the Inspector General of Intelligence and Security 2005-06* (Canberra: Commonwealth of Australia, 2006), pp. 23-4; cf. George Negus, ‘Rob Stary Interview’, *Dateline*, SBS Television, 29 June 2005, <[http://news.sbs.com.au/dateline/rob\\_stary\\_interview\\_130535](http://news.sbs.com.au/dateline/rob_stary_interview_130535)> [Accessed 10 September 2008]; T. Cookes, ‘ASIO Leaks’, *Dateline*, SBS Television, 3 August 2005, <[http://news.sbs.com.au/dateline/asio\\_leaks\\_130554](http://news.sbs.com.au/dateline/asio_leaks_130554)> [Accessed 10 September 2008].

<sup>46</sup> S. Keim, ‘Dr Haneef and Me’, *Alternative Law Journal*, vol. 33, no. 2 (2008), pp. 99-102 at 100 (references omitted). Similar criticisms have been made by criminal lawyer Rob Stary: Cookes, ‘ASIO Leaks’.

## **SCEPTICISM, DISTRUST AND SECURITY**

Police and security agencies face immense difficulties in assessing and addressing security threats and clearly do not want to be seen to fail in these tasks. Journalists and lawyers acknowledged this and saw a direct link between the difficulties and the tendency towards secrecy:

The authorities are very, very wary of being caught short. Not doing enough. ... Take Haneef, he's on his way to the airport, etc ... I think they take that very seriously and there are reasons for that. There is a whole err on the side of caution and [because of that] there is a tendency to keep information secret.

The media criticisms of the state did not, then, turn on the issue of secrecy of itself. Rather, the criticism centred around arguments that the government, police and security authorities have misjudged or responded poorly to security issues in circumstances that suggest secrecy has been either unnecessary or unjustified. The Haneef case was uppermost in the minds of all interviewees given the timing of the interviews, and comments suggest it has done inestimable damage to the trust the media have in the state. It was repeatedly cited as an example of the mismanagement of a prosecution and manipulation of information by government and police.<sup>47</sup> One of the more moderate comments was that it

increase[s] the realm of scepticism when you see that kind of crying wolf going on, so you don't tend to side ... with government claims about the need for all this stuff.

The Report of the Clarke Inquiry is unlikely to settle these doubts: the criticism that documents were "over-classified" in terms of secrecy, the criticism of the Immigration Minister and Department, and the AFP submission that there should be a formal restriction on the release of interview material will not put minds at ease.<sup>48</sup>

But the scepticism was not limited to Haneef. A media lawyer's experience was that there is "a real culture of secrecy" in the offices of the Commonwealth Attorney-General's and Director of Public Prosecutions that goes "way beyond" what is necessary. Journalists echoed this, reporting an "environment of secrecy" in which officials conveyed the sense that "secret information is held which indicates that there is something more than what you have been told". When information is released the view was that

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<sup>47</sup> For example, Chris Merritt states that the AFP handling of the matter makes the organisation look "sly": 'Cynical attempt to fool media', *The Australian*, 30 August 2008. It might be argued that the damage to trust is influenced by, and should be viewed in light of, broader events in the past decade; see generally Clive Hamilton and Sarah Maddison (eds.), *Silencing Dissent* (Sydney: Allen & Unwin, 2007); David Marr, *His Master's Voice: The Corruption of Public Debate under Howard (Quarterly Essay N.o 26)* (Melbourne: Black Inc, 2007).

<sup>48</sup> *Report of the Clarke Inquiry*, pp. 5, 160-161, 195-199, 285-286; see also Andrew Lynch, 'Learning from Haneef', *Inside Story*, 5 February 2009, <<http://inside.org.au/learning-from-haneef/>> [Accessed 19 February 2009].

they have an agenda for making it available. In most of this stuff I just tend to find every bit that comes out, they're dragged kicking and screaming to let it come out.

Another cautioned that the problem when information is released is that not only does it have an agenda, but “you don't know what you're getting—you don't know what agenda's being run”. The tendency to secrecy is damaging because “when things become so secretive and nebulous then reporters—not all, but some—conjure up fictions”. Journalists become vulnerable to off the record briefings, especially by police; if that is the only information that can be obtained and it is difficult to test then that is the information most likely to be published. But when the authorities are shown to have been secretive and to have been wrong then it will inevitably—and rightly—result in a resounding attack on the state.

## Conclusion

The enactment of counter-terrorism laws has been a response driven by security needs. The pursuit of security has seen a significant impact on the ability of the media to obtain information and convey it to the public. In large part, the potential effects of the laws remain far greater than the actual effects. However, although the resilience and robustness of the media persists for the time being, it does not mean that this situation will continue.

The relationship between security and media freedom in this context is not a straightforward one. While law can be vitally important—as the NSI legislation makes clear—the effects on media freedom do not directly correlate with restrictions (or freedoms) that are embodied in legislation. In particular, as the analysis above indicates, information is controlled in ways that are not dependent on the law being applied in a coercive or punitive way. The legislative framework can be seen as an indicator of priorities and approaches to information; it is a contextual beacon that signals and reflects the push for constant caution and secrecy. Indeed, at the periphery of the legal framework—where there are few provisions with direct effect—there appears to be a sweeping attempt to control of information. This sits in contrast with the ways that formal legal mechanisms have not yet had a chilling effect.

Information is controlled not merely by the authority of law, but by interwoven bonds of secrecy and trust. To the extent that control over information is necessary for national security, then these bonds are essential. However, there is much to suggest they are in danger of being loosened. It might be fairly said that the media will not be trusted by the state unless it can prove itself to have standards and practices that warrant that trust, but it is not a crisis of trust in the media that has given rise to concerns; it is a diminution of trust in the state that is troubling. The Haneef matter is emblematic of the dangers and problems but, as the interviews with media professionals indicate, closure and control and of information is pervasive. This is deeply

troubling; when events cast doubt upon the proposition that those who keep things secret can be trusted, then it is not merely the balance of security and media freedom which rests precariously, but security itself.

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# Contempt of Court and the New Media

Ian Cram and Nick Taylor<sup>1</sup>

*In November 2012 the Law Commission published a consultation paper<sup>2</sup> on the subject of contempt of court with particular reference to the efficacy of the current law in the context of new media. Given that existing contempt laws pre date the internet the report is a timely and necessary one. This paper recognizes the continuing need to reconcile the needs of open justice and free expression with the need for an unimpeded judicial system and fair trial rights in a fast moving new context. The paper focuses on certain key aspects of the consultation paper and provides analysis of the current law. Ultimately, to carry credibility, proposals for reform must engage with a principled analysis of the competing interests at stake if they are to maintain their relevance in a swiftly changing media environment.*

## Introduction

The law of contempt attempts to reconcile two sometimes conflicting sets of interests namely those concerned with the unimpeded functioning of the judicial system (including the right of defendants to enjoy a fair trial) on the one hand and those of the general public in learning through the media about court proceedings. English courts have long warned against ‘trial by media’ reflecting a concern that sensational and/or selective reporting may prevent defendants receiving a fair trial.<sup>3</sup> What is sometimes less readily acknowledged is the role played by publicity and open proceedings in safeguarding the right to a fair trial by discouraging arbitrary judicial conduct and more generally informing members of the public about the justice that is carried out in their name.

Where the requisite risk of contempt is made out, proprietors, editors and journalists respectively have faced a range of penalties including fines and (in theory at least) imprisonment. In addition to post-publication sanction, English law has a formidable array of prior restraints and automatic

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<sup>1</sup> Professor and senior lecturer, respectively, at the School of Law, University of Leeds.

<sup>2</sup> The Law Commission, *Contempt of Court: A Consultation Paper* (2012) Consultation Paper No. 209.

<sup>3</sup> “There has long been and there still is in this country a strong and generally held feeling that trial by newspaper is wrong and should be prevented. I find, for example, in the report in 1969 of Lord Salmon’s committee dealing with the Law of Contempt in relation to Tribunals of Inquiry (Cmnd. 4078) a reference to the “horror” in such a thing (p. 12, para. 29). What I think is regarded as most objectionable is that a newspaper or television programme should seek to persuade the public, by discussing the issues and evidence in a case before the court, whether civil or criminal, that one side is right and the other wrong.” Lord Reid in *Attorney General v Times Newspapers* [1974] AC 273, 300.

reporting restrictions that can be deployed to restrict what may be published about trials (and connected trials), victims and witnesses concerned in the proceedings.<sup>4</sup>

In its Consultation Paper the Law Commission recognises that vast changes in the way in which media organisations and individuals communicate have naturally given rise to questions about the appropriateness of a legal framework enacted decades before the advent of dedicated 24 hour broadcast news channels and, more recently, Google, Facebook, Twitter etc. Any serious attempt at reform of contempt laws – one that seeks not to have become obsolescent in as short a time frame as ten or fifteen years in the future - needs to consider the available evidence about emerging trends in which news content is generated and disseminated. In September 2012, the *Pew Research Center* – a Washington DC-based, independent public opinion research centre published data about the consumption of news stories by US citizens.<sup>5</sup> This provides one of the most recent data sets about the sources from which US news consumers across acquire information. Not only did the research confirm a previously detected decline in print newspaper sales,<sup>6</sup> it also revealed that television news had begun to lose a younger generation of news consumers. This group (comprising adults under the age of 30) is turning increasingly to online/mobile sources of news information. Across all age groups, the percentage of US citizens that acquired their news from a social networking site more than doubled from 9% in 2010 to 19% in 2012. For the under-30s, social networking sites provided the preferred source of news for 33% of this group. By comparison, television news broadcasts were viewed by 34% of under-30s whilst just 13% obtained their news from a newspaper (in print and digital formats). The *Pew Center's* figures are indicative of a broader trend outside the US. In the UK, sales of print newspapers are also in sharp decline. Currently, free newspapers such as *Metro* and *The Evening Standard* (in London) have begun to eat into the share of the market hitherto occupied by paid-for titles. In November 2011, the total daily sales of paid-for national newspapers fell to 8,897,221 copies, down from 9,540,993 a year previously.<sup>7</sup> It is not clear however that even free printed newspapers will survive in the medium term in a rapidly evolving and highly competitive market. Advertisers who currently finance the free sheets can reach a new generation of potential

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<sup>4</sup> I. Cram, 'Automatic reporting restrictions in criminal proceedings' [1998] *European Human Rights Law Review* 742.

<sup>5</sup> *Pew Research Center Press Release*, "In Changing News Landscape Even Television is Vulnerable" September 27<sup>th</sup> 2012 available electronically at <http://www.people-press.org/2012/09/27/in-changing-news-landscape-even-television-is-vulnerable/>

<sup>6</sup> See further J. Fuller, *What is Happening to News* (2010, University of Chicago Press, Chicago) esp ch.1.

<sup>7</sup> Figures quoted by R. Greenslade, 'The true measure of print decline' in *The Guardian* (2011) December 9 - <http://www.guardian.co.uk/media/greenslade/2011/dec/09/national-newspapers-abcs>. In the same period *Metro* increased its distribution levels by 2.4% (and in London by 4.4%).

customers via social networking sites and are likely to take their marketing activities increasingly online. If US trends are anything to go by, the *Metro* and its like will soon disappear.<sup>8</sup> Aside from the issue of news consumption, the explosion in social media platforms and other modern media now allows all of us (whether professional journalists or not) to communicate information and opinion (and falsehoods!). This in turn creates the potential for each of us to cause a risk to the administration of justice by creating web pages/blogging/tweeting/emailing/ to others material of a highly prejudicial nature about current or pending proceedings. Indeed, the chances of such material appearing on electronic media would seem to be all the greater because of the absence of editorial checking processes usually employed in traditional print and broadcast news media and (in the case of substantial number of tweeter/bloggers etc.) legal knowledge/access to legal advice about the reach of contempt laws. So stated, a practical problem for law enforcement agencies inevitably arises: how to monitor the vast numbers of individual communicative acts for compliance with legal standards in the law to contempt and more generally? Consider for example the recent revelation by Twitter CEO Dick Costolo that his micro-blogging service processes half a billion tweets each day.<sup>9</sup> It is within this changed and changing context that any analysis of the shape of future contempt laws must be situated. What follows is an analysis of key aspects on chapters two (contempt by publication) and three (publications and the new media) of the consultation paper.

### **Contempt by publication**

Contempt by publication as outlined in the Contempt of Court Act 1981 emanated from two main sources: the conclusion of the Phillimore Committee;<sup>10</sup> and the adverse finding against the UK by the European Court in the case of *Sunday Times v UK*.<sup>11</sup> In brief, it was clear that the existing common law both gave too little regard to the importance of expression and was unclear in its scope such that its boundaries were not well defined. The CCA made provision, inter alia, for a definition of when the period during which certain publications might prejudice a trial was to run, a test to define when a publication might reach the threshold of producing a risk that the course of proceedings might be prejudiced, and a ‘defence’ protecting discussion deemed to be in the public

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<sup>8</sup> H. Dawley, “For the *Metro* the future looks bleak” (2008) October 30 – noting that US free newspapers are up for sale with no takers,

[http://www.medialifemagazine.com:8080/artman2/publish/newspapers\\_24/for\\_metro\\_the\\_future\\_looks\\_doubtful.asp](http://www.medialifemagazine.com:8080/artman2/publish/newspapers_24/for_metro_the_future_looks_doubtful.asp)

<sup>9</sup> D. Terdman, “Report: Twitter hits half a billion tweets a day” (2012) October 26, [http://news.cnet.com/8301-1023\\_3-57541566-93/report-twitter-hits-half-a-billion-tweets-a-day/](http://news.cnet.com/8301-1023_3-57541566-93/report-twitter-hits-half-a-billion-tweets-a-day/)

<sup>10</sup> *Report of the Committee on Contempt of Court* (1974) Cmnd. 5794 (The Phillimore Committee).

<sup>11</sup> *Sunday Times v United Kingdom* (1979) 2 EHRR 245.

interest. The punishments available include fines and possible imprisonment. However, during the last thirty years there has been relatively limited caselaw development with the House of Lords judgment in *English*<sup>12</sup> still recognised as the leading authority in this area. Deference has been paid to *English*, but it might be suggested that this has been more rhetoric than reality in recent years, particularly following the passage of the Human Rights Act 1998, and as such, the interpretation and application of contempt by publication now lacks both precision and consistent application. In addition, the widespread use of the internet and its globalised nature further calls into question the applicability of the Act to a new social landscape with some critics suggesting the Act is now outdated and unworkable.<sup>13</sup>

#### *The 'at risk' period.*

Consistent with the need for restrictions on expression to be only when necessary and proportionate,<sup>14</sup> the period during which publications may be under scrutiny for their ability to adversely impact upon a trial should be both clear and minimal.<sup>15</sup> Currently, the 'at risk' period is known as the active period (s.2(3)) and, in criminal cases, runs from the point or arrest; issue of warrant for arrest; issue of summons; service of indictment; or oral charge, whichever occurs first.<sup>16</sup> The identification of a clear point is essential but two questions remain: is it the most appropriate point; and are publishers aware of when this point actually occurs in practice?

As to the former, undoubtedly the identification of a definite point provides more clarity than the previous common law test of 'imminence'.<sup>17</sup> Nevertheless, it is the case that the point of arrest might be (and often will be) many months before the proceedings, particularly if the defendant is bailed for a period of months before charge. Therefore, a more liberal approach to expression might be to measure the at risk period from a later point in the process, for example, from the charge itself.<sup>18</sup> This has the advantage of being not only a clear point but one from which a trial is likely to follow. However, it is clear that publications immediately following arrest might be sufficiently prejudicial to

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<sup>12</sup> *Attorney General v English* [1982] 1 AC 116.

<sup>13</sup> A.T.H. Smith, "The Future of Contempt of Court in a Bill of Rights Age" (2008) 38 HKLJ 593.

<sup>14</sup> As required by Article 10 of the European Convention on Human Rights. I. Cram, "Criminal Contempt, Article 10 and the First Amendment – A Case for Importing Aspects of US Free Speech Jurisprudence?", (2000) 7 *Maastricht Journal of European and Comparative Law* 244 at p. 258.

<sup>15</sup> *Worm v Austria* (1998) 25 EHRR 454 at para. 38.

<sup>16</sup> The active period for civil cases is contained in Schedule 1 para.12-13. Given that it is lay participants in the trial who are susceptible to prejudicial comment it would only be in rare instances that a contempt action would follow a civil case, though the issue of impeding the course of proceedings will still be a relevant factor.

<sup>17</sup> See *R v Savundranayagan* [1968] 1 WLR 1761.

<sup>18</sup> This was in fact the recommendation of the Phillimore Committee (1974) op. cit., para.123.

adversely affect subsequent proceedings. This was held to be the case in *AG v MGN*<sup>19</sup> following the arrest of Christopher Jefferies for the murder of Joanna Yeates. The case was a novel application of contempt law in that Mr Jefferies was never charged with an offence following the subsequent arrest of Vincent Tabak who admitted his responsibility for the death. No trial would ever take place against Mr Jefferies but the High Court found that the publicity following arrest would have caused serious risk to the preparation of his defence, through, for example, deterring witnesses from coming forward. “The impact of these articles on potential defence witnesses would have been extremely damaging to Mr Jeffries”.<sup>20</sup> It is recognised that such instances as this are likely to be rare, but given the potential impediment to a fair trial taking place it is suggested therefore, that the ‘active’ period is retained at its current point. It should also be noted that the ‘at risk’ period does not bring about a prohibition on the reporting of information about serious criminal cases in which there is legitimate public interest – it simply places the media (and other publishers) on notice that material they publish may run the risk of prejudicing or impeding a case.

Clearly what follows from this is a need to ensure that a consistent and accurate method of releasing information about arrestees needs to be instituted. Such a method would need to ensure appropriate safeguards are in place, for example, to guarantee anonymity in appropriate cases and the Law Commission’s proposals to involve ACPO in drawing up relevant guidance is a welcome step.<sup>21</sup> Though there may be rare occasions when there is potentially prejudicial material published even before arrest the risk to the proceedings is consequently low and therefore it is suggested that restrictions on expression before the point of arrest would amount to a disproportionate interference.<sup>22</sup>

The active period currently runs until sentence is passed. In practical terms this is not always adhered to and this is scarcely problematic given that, by that stage, there is little that can be materially affected by prejudicial publicity.<sup>23</sup> It is suggested that the law should reflect this reality and the active period should end when the verdict is given and should be reinstated if any appeal orders a retrial. Undoubtedly there may be a period immediately after the verdict is given where, particularly

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<sup>19</sup> [2011] EWHC 2074 (Admin).

<sup>20</sup> *Ibid.*, para 35.

<sup>21</sup> Consultation Paper, *op.cit.*, para.2.20.

<sup>22</sup> This type of publication might also be considered to be ‘intentional contempt’ under the common law. For reasons of clarity this form of contempt might be placed on a statutory footing but arguably it does still have a role to play in the mosaic of contempt offences.

<sup>23</sup> It has been said on many occasions that the judiciary are not susceptible to the type of prejudicial comment that might affect a lay participant in a trial. See, for example, *Re Lombro plc* [1990] 2 AC 154 at 209.

in notorious cases, a great deal of very prejudicial comment is published, but arguably it would be a disproportionate interference with expression to curtail this when the active period can be reinstated later in the process, if necessary, in addition to further neutralising measures.

*The threshold test.*

The test currently used to determine contempt by publication is outlined in s.2(2).

The strict liability rule only applies to a publication which creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.

This double threshold betrays a number of ambiguities.<sup>24</sup> What does the word ‘substantial’ add to the degree of risk required? What does the word ‘serious’ add to the degree of impediment or prejudice required? What is the distinction, if any, between impediment and prejudice? All of these issues have received some judicial attention, although not always in a manner offering real clarity. As stated above, the major precedent on s.2(2) remains the case of *English* in 1982 but the enactment of the HRA in the interim has seen a subtly different approach taken by the courts – one that is certainly more publication friendly – but this has not been clearly expressed in the cases nor successive Attorney Generals’ prosecution policy, but can be reasonably implied. The result is a threshold that lacks precision and can be criticised as being both over and under inclusive in the same breath.

‘Substantial risk’ has been interpreted in the House of Lords to exclude only those risks which are minimal,<sup>25</sup> which, on its face, is a low threshold and might be said to be over inclusive. However, the Phillimore Committee had originally recommended that *any* risk of serious prejudice should be avoided which explains the court’s exclusion of only *de minimis* risks. The High Court has added the gloss that the risk must be “neither remote nor theoretical”,<sup>26</sup> and that the test is predictive, given that the degree of risk has to be assessed at the time of publication. Whilst the logic of the statute can be seen, the word ‘substantial’ has perhaps introduced unnecessary ambiguity.<sup>27</sup> In 1997 Schiemann LJ provided practical guidance on what the relevant factors might be in determining if a

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<sup>24</sup> See H. Fenwick and G. Phillipson, *Media Freedom Under the Human Rights Act* (2006) p.275-279.

<sup>25</sup> *Attorney General v English* [1982] 1 AC 116, 141-142.

<sup>26</sup> *Attorney General v Guardian Newspapers Ltd. (No.3)* [1992] 1 WLR 874 at 881.

<sup>27</sup> The word ‘substantial’ was introduced at the Bill’s committee stage by Lord Elwyn-Jones: Hansard (HL), 15 Jan 1981, vol 416, col 182. Lord Hailsham thought the addition of ‘substantial’ added nothing but the amendment was passed without opposition.

risk was substantial:<sup>28</sup> the likelihood of the publication coming to the attention of a potential juror; the likely impact of the publication on the reader at the time of publication; and the residual impact on the juror at the time of the trial. This concise test provides an excellent framework from which to determine how a risk might be seen as ‘substantial’. He also added that the court would need to be certain that such a risk had been created. However, it is clear that the question of whether a publication is likely to come to the attention of a juror has changed considerably in light of the widespread use of the internet and social networking and the consequent ease and speed with which one can search for and disseminate relevant information about cases or individuals. Traditionally, the court would account for factors such as the proximity in time and space of the publication to the trial, the circulation and so forth. Similarly, the ‘likely impact at the time of publication’ is also affected to a large degree by internet developments. For ‘traditional’ publications the court would consider the prominence of the piece, its novelty and the sensational style in which it may have been reported. No longer is news comment so swiftly outdated but instead forms part of an easily searchable database that might more easily produce a jigsaw of prejudicial material.

The third element of Schiemann’s framework is to consider the residual impact on a notional juror at the time of the trial.<sup>29</sup> It has been suggested that following a number of cases determined in the climate surrounding the passage and implementation of the HRA it appeared that the fade factor<sup>30</sup> coupled with the ability of jurors to remain focussed on the events before them at trial meant that the ‘at risk’ period was in practice concurrent with the trial or its immediate lead in.<sup>31</sup> Though somewhat scarce, evidence from the UK and the Commonwealth does suggest that juries in the main are effective at ignoring much pre trial comment and concentrating on the issues and evidence before them.<sup>32</sup> It appears that the judiciary, too, are convinced by the approach of juries.<sup>33</sup>

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<sup>28</sup> *Attorney General v Mirror Group Newspapers Ltd and Others* [1997] 1 All ER 456.

<sup>29</sup> The concentration in this part concerns pre trial publicity. The same principles apply to publicity during the course of the trial itself and recent cases indicate that this is an area where the Attorney General is still active. See, for example: *Attorney General v Associated Newspapers and News Group Newspapers Ltd* [2011] EWHC (Admin) 418; *Attorney General v Associated Newspapers* [2012] EWHC (admin) 2029.

<sup>30</sup> See, for example, *Attorney General v Independent Television News and Others* [1995] 1 Cr. App. R. 204.

<sup>31</sup> Fenwick and Phillipson (2006) *op. cit.*, p.260.

<sup>32</sup> C. Thomas, *Are Juries Fair* (Ministry of Justice Research Series 1/10 (2010) p.40-42; W. Young, N. Cameron and Y. Tinsley, *Law Juries in Criminal Trials, Part Two: A Summary of Research Findings*, (Law Commission of New Zealand Preliminary Paper 37, vol. 2, 1999) p.60-62; M. Chesterman, J. Chan and S. Hampton, *Managing Prejudicial Publicity: An Empirical Study of Criminal Jury Trials in New South Wales* (2001) accessed at [www.lawfoundation.net.au](http://www.lawfoundation.net.au)

<sup>33</sup> For example, Sir Igor Judge, then President of the Queen’s Bench Division stated that “juries up and down the country have a passionate belief in, and a commitment to, the right of a defendant to be given a fair trial. They know it is integral to their responsibility... the integrity of the jury is an essential feature of our trial process. Juries follow the

This suggests that the satisfaction of a ‘substantial’ risk is a rather higher threshold than that described in *English*, given that juries would forget or could ignore most pre trial comment. However, subsequent scenarios, it has been argued, actually show that the more liberal attitude being adopted to pre trial comment has led to a failure to institute contempt actions in a number of high profile cases thus leaving the law a virtual “dead letter”, no longer capable of drawing an appropriate boundary.<sup>34</sup> Media comment surrounding cases such as Rosemary West,<sup>35</sup> the July 2005 bombers, Abu Hamza<sup>36</sup> and the so called ‘Suffolk Strangler’ was certainly adverse, sustained and prone to create an atmosphere of hostility, without, in most instances being part of a wider public interest analysis of the events surrounding these cases. If the degree of comment in these cases did not lead to a ‘substantial’ risk then one is drawn to agree that the law in this regard is largely unworkable. Unworkable but, arguably, not unnecessary. In some of these cases the AG did issue ‘advisory notices’ to the media about the content of their publications – a clear indication of the AG’s concern about possible prejudice arising - and this can be of real benefit in avoiding a fatal impact on the proceedings. However, great care needs to be taken to ensure that publishers are not to be led to believe that what the AG does not forbid is fair game. Instead, greater clarity in a law reflecting modern realities would be preferable to ad hoc guidance.

It would be too great a step to state that juries are able to ignore *any* pre trial comment such that the law should have no place.<sup>37</sup> “It could be expected that a completely unregulated media market would render it impossible to empanel a jury of people whose views had not been shaped by matters that are irrelevant to the legal inquiry they need to undertake and that may well predispose them to accepting that an accused is guilty”.<sup>38</sup> A ‘substantial’ risk, which is merely more than remote yet no longer seems capable of being satisfied in relation to *pre* trial publicity, is largely empty of meaning. Rather than dispose of Schiemann’s basic framework for determining the level of risk, which is workable, a reformulation of the words might add clarity. A ‘significant’ or ‘real’ risk might be more

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directions which the judge will give them to focus exclusively on the evidence and to ignore anything they may have heard or read out of court”. See also; B [2006] EWCA Crim 2692 at para. 32; *R v Kray* (1969) 53 Cr. App. R. 412; *Ex. P. Telegraph* (1994) 98 Cr. App. R. 91; *R v Abu Hamza* [2007] 1 Cr. App. R. 27.

<sup>34</sup> A.T.H. Smith, “The Future of Contempt of Court in a Bill of Rights Age” (2008) 38 HKLJ 593.

<sup>35</sup> [1996] 2 Cr. App. R. 374.

<sup>36</sup> [2007] QB 659.

<sup>37</sup> For a discussion of the position in the US see, G. Phillipson, “Trial by Media: The Betrayal of the First Amendment Purpose”, (2008) 71 *Law & Contemp. Probs.* 15.

<sup>38</sup> Law Reform Commission of Western Australia, *Report on the Review of the Law of Contempt*, (2003) Project No. 93, at p.19.

workable.<sup>39</sup> This would exclude risks that were little more than remote or trivial, and would place emphasis on something that amounted to a genuine threat – an operative risk – that the proceedings will be seriously impeded or prejudiced. Recent cases admit of few instances of the latter perhaps because it is well recognised that certain issues should not be discussed and as a result rarely are, for example, the publication of a defendant’s previous convictions.<sup>40</sup> Therefore, this change to the statutory language would not effect a major change but would simply add some clarity to the idea that the risk to be avoided is a real and practical one.

Robust and nuanced jury directions have been, and continue to be developed<sup>41</sup> to cater for developments in technology. In assessing the risk it is appropriate that account is taken of the potential effect of these robust directions. However, additional neutralising measures<sup>42</sup> beyond this should be seen as exceptional and therefore, whilst such measures *might* ensure the safety of the trial they do not prevent the risk arising. Given that the risk is to be determined at the time of publication it is suggested that there is no conflict between finding a publication guilty of contempt in a scenario where the trial went ahead without apparent unfairness. Equally, there may well be occasions where a trial is stayed because of prejudicial publicity but on the basis of cumulative coverage where no individual publication has overstepped the limits. In practice, the two decisions will be congruent more often than not, but to rely wholly on a situation whereby a contempt prosecution was only initiated when a trial has been stayed or verdict overturned on appeal due to the risks created by publication before or during the trial would be to encourage the pernicious erosion of fair trial rights. The risk should be determined at the point at which it occurs and in the context of ‘standard’ neutralising measures applicable to any case.

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<sup>39</sup> Fenwick and Phillipson speak of a ‘likelihood of risk’. See, *Media Freedom Under the Human Rights Act* (2006) p.275-279. The test used in New Zealand is whether or not the “actions of a particular respondent caused a real risk of interference with the administration of justice”. See: *Solicitor General v Wellington Newspapers* [1995] 1 NZLR 45 at 47; and A.T.H. Smith, *Reforming the New Zealand Law of Contempt of Court: An Issues/Discussion Paper* (2011) paras.2.10-2.16, available at: [www.crownlaw.govt.nz/uploads/contempt\\_of\\_court.pdf](http://www.crownlaw.govt.nz/uploads/contempt_of_court.pdf)

<sup>40</sup> See, for example, the remarks of Mason CJ of the High Court of Australia in *Hinch v AG (Vic)* (1987) 164 CLR 15 at 28: ‘The Courts have always taken a serious view of the published disclosure of the prior conviction of the person accused of a criminal offence when proceedings for that offence are pending... knowledge of a prior conviction is likely to prejudice a jury against an accused person and induce the jury to conclude that he had a propensity to commit the offence charged.’

<sup>41</sup> See *The Crown Court Bench Book* (2010) Ch.1 and 18, and Judge S. Tonking and Judge J. Wait, *The Crown Court Bench Book Companion* (2012) Ch 1 and 18 available at: [www.judiciary.gov.uk](http://www.judiciary.gov.uk).

<sup>42</sup> For a consideration of the potential neutralising measures such as: judicial directions; sequestration; postponement; and change of venue, see: A.T.H. Smith (2011) *op. cit.*, paras 2.31-2.47; G. Phillipson (2008) *op. cit.*, p.25-29.

In more recent times the contempt prosecution in the case of Christopher Jefferies has brought to the fore another aspect of the ‘substantial risk’ test. The type of sensational and lurid personal background information discussed in relation to Jefferies’ situation was not found by the court necessarily to be seriously prejudicial to potential jurors, but did amount to a serious impediment to the effective preparation of a defence case.<sup>43</sup> Thus, there are clearly two issues to consider: the substantial risk of serious prejudice and the substantial risk that the course of proceedings will be seriously impeded. These are not synonymous but have been given little attention as separate heads of liability. It is suggested that for the sake of clarity they should be represented as distinct issues in the law, allowing the publisher greater clarity as to what his liability might be and therefore allowing for a more effective response. A substantial risk of serious impediment to the course of proceedings is clearly established where an effective defence cannot be made out by the suspect because the nature of the publicity has the result that witnesses might be reluctant to come forward with relevant information. Schiemann’s framework remains valid here, though it would be more appropriate to speak of ‘those likely to be involved in the proceedings’ rather than simply notional jurors when the issue is serious impediment rather than (or as well as) serious prejudice. It will be in rare instances that one could presume a publication had had the effect of deterring witnesses and it is important to re-emphasise Schiemann’s point that the court must be *sure* that such a risk has materialised before instituting action against the alleged contemnor. In addition, in terms of creating a risk, it has been argued that any publication which influences a defendant to act in a particular way will amount to a serious impediment.<sup>44</sup> In order to ensure the ‘impediment’ head does not produce a chill on comment it must reflect a tightly drawn and high threshold but it is argued that it still has a relevant place in the armoury of measures protecting both the administration of justice and publications surrounding the proceedings.

It might be suggested that requiring a real or significant risk of *any* prejudice should be a sufficient test to reflect the necessary protection of Article 6 rights. The word ‘serious’ adds little if the test is taken as whole. If there is a risk of prejudice then it must be neutralised, and if it cannot be neutralised by standard directions then that risk becomes real or significant.<sup>45</sup> Publications that are at risk of creating prejudice include: publications of a defendant’s previous convictions;<sup>46</sup> reports about

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<sup>43</sup> *Attorney General v Mirror Group Newspapers Ltd* [2011] EWHC 2074 (Admin) paras. 34-38. See also, Lord Justice Leveson, *An Inquiry into the Culture, Practice and Ethics of the Press: Report, vol II* (2012) HC 780-II, p. 558-564.

<sup>44</sup> D. Eady and A.T.H. Smith, *Arlidge, Eady and Smith on Contempt*, (4<sup>th</sup> ed. 2011) paras. 4-105 – 4-106.

<sup>45</sup> See *Attorney General v Random House Group Ltd.* [2009] EWHC 1727.

<sup>46</sup> *Attorney General v Independent Television News Ltd* [1995] 2 All ER 370.

a defendant's bad character;<sup>47</sup> assertions about the defendant's guilt; descriptions or photographs of a defendant where identity is likely to be in issue at trial<sup>48</sup> – these are all well recognised as “obvious areas over which care must be taken”.<sup>49</sup> Further research which looks at juror susceptibility to pre-trial comment may enable greater clarity or confirmation as to what type of information is particularly problematic.

It follows that s.5, often (though inaccurately) referred to as the public interest defence, should be revisited with a view, at least, to offering some clarification as to its ambit. Again, it has not been the subject of much judicial comment and has not had its limits tested fully, though does appear to have been interpreted relatively broadly.<sup>50</sup> At the most basic level, in order that expression is only curtailed in a proportionate manner one must be conscious of the need not to stifle the discussion of issues in the public interest. However, it would be difficult to reconcile the idea that causing a real risk of prejudice to legal proceedings could be in the public interest. Equally, if material which can cause a real risk of prejudice to proceedings can be published and the trial remains unaffected, there might be a question over the very existence of s.2(2).

It was suggested above that when considering whether the threshold test is satisfied the court should have regard to robust judicial directions and the integrity of the jury. Where a publication seeks justification as being in the public interest, the use of additional neutralising measures, such as postponement, should be relevant factors to be taken into account. This would have the effect that the integrity of the trial would have been maintained albeit that special accommodation had been made to ensure that expression was not stifled. The court could adequately draw a distinction between expression that is justifiably an issue of genuine public interest and the type of comment that is sensationalist in nature and aimed rather more at issues which ‘interest the public’.<sup>51</sup> Therefore, whilst accepting that a real risk of serious impediment or prejudice was caused, the court might accept that because of the nature of the publication (its contribution to the public interest) it

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<sup>47</sup> *Attorney General v Associated Newspapers Ltd and MGN Ltd* [2012] EWHC 2029.

<sup>48</sup> *Attorney General v Express Newspapers Ltd* [2004] EWHC 2859.

<sup>49</sup> F. Quinn, *Law for Journalists*, (Pearson, 2<sup>nd</sup>. ed. 2009) p.71. The same categories are reflected in other standard journalists' texts: M. Hanna and M. Dodd, *McNae's Essential Law for Journalists*, (Oxford, 21<sup>st</sup> ed. 2009) p.219. Cram has also highlighted ‘common’ prejudicial themes, see: I. Cram, “Reconciling Fair Trial Interests and the Informed Scrutiny of Public Power? An Analysis of the United Kingdom's Contempt of Court Laws”, in *Il Rapporto Tra Giustizia e Mass Media*, Resta G (ed.). Editoriale Scientifica (2010).

<sup>50</sup> See *Attorney General v English* [1983] 1 AC 116; *Attorney General v Times Newspapers Ltd* (1983) *The Times*, February 12; *Attorney General v TVS and Southby* (1989) *The Independent* July 7.

<sup>51</sup> Fenwick and Phillipson argue that the current wording of s.5 does not allow for an appropriate legal analysis to take place. See Fenwick and Phillipson (2006) *op. cit.*, p.282.

was necessary to take special measures to protect both Article 6 and 10. Again, because the culpability of the publication is to be determined at the time of publication, the actual fairness of the trial in fact is not a consideration. The court must make a determination as to the contribution of the publication to the public interest, which may involve some analysis as to the value<sup>52</sup> of the speech in question, and the likely impact of special neutralizing measures.

The Law Commission raises the possibility of the publication of factors which the AG takes into account, similar in some respects to the Code used by the Crown Prosecution Service. This would encourage consistency in decision making and would provide transparency for the public. It would also provide much needed clarity as to the scope of s.5 and the factors relevant to the public interest, providing publishers with greater clarity as to when it would apply. The absence of clarity is likely to produce a chill on comment.

#### *Procedural issues.*

Throughout the consultation paper there is a suggestion of moving away from the special processes attending contempt actions and adopting more mainstream criminal process practices. Suggestions of this nature are made with regard to contempt by publication, juror misconduct and contempt in the face of the court.

Contempt by publication is currently tried before the Divisional Court in a somewhat strange hybrid procedure of civil and criminal processes. Though contempt by publication historically was tried on indictment, the House of Lords made clear in *Re Lonrho*<sup>53</sup> that this was a position that should not be revived. However, the landscape is changing swiftly and reforms to the law must be capable of reacting to this context. The Law Commission sees merit in treating contempt by publication as a standard criminal offence and this is particularly relevant when seen in the context of publications which may increasingly be the responsibility of individual bloggers and tweeters rather than major media organisations. In a process that is deemed to be criminal for the purposes of Article 6 it seems anomalous that the procedure lacks the safeguards available in the criminal process. Dealing with contempt by publication as a standard criminal offence would ensure that the relevant protections for individuals at the investigation and trial stage would be automatically triggered. Such rights that

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<sup>52</sup> For a discussion of the values underpinning expression in the context of contempt by publication see: G. Phillipson (2008) *op.cit.*, p18-21; Law Reform Commission of Western Australia (2003) *op. cit.*, p.20-23.

<sup>53</sup> [1990] 2 AC 154.

surround arrest, detention, investigation, bail, disclosure and so on that satisfy the demands of Articles 5 and 6 need to be reflected in contempt proceedings.

A difficulty that may be encountered in treating contempt by publication as a standard criminal offence would be trial by judge and jury to determine whether the threshold has been met. It could be a concern that in a trial to determine whether a publisher has committed contempt, a jury might exhibit little concern for the individual who is the subject of the publication and about whom they have seen allegations of a most prejudicial nature. As such, rather too much weight could be afforded to the expression interest rather than the fairness of that individual's proceedings. It might seem contradictory that on one hand the evidence is that juries should be trusted to carry out their role with integrity whilst on the other hand rejecting it in this instance. However, there is a qualitative difference in asking a jury to ignore external comments surrounding a case which in any event may be superseded by the evidence in court, and asking a jury whether the content of a particular report about a notorious offender would cause prejudice to them. It might be that jurors feel that they should be entitled to see such material and therefore are unwilling to see it restricted or punished, or further, deliver perverse verdicts. Additionally, it would follow that decisions may lack consistency (and reasons) and therefore leave publishers in an unenviable position of having to second guess the outcome. One response of the Law Commission to address this is a hybrid process whereby this is a standard criminal process save that it is determined by a judge alone. This has some merit. The defendant has all the relevant protections but the final decision, as now, is undertaken by a judge alone, who might be better placed to carry out the somewhat technical balancing act between the importance of free expression and open justice and the avoidance of prejudice to a trial. Whilst there may be some disquiet over the creation of a trial on indictment without the possibility of a jury trial it should be recognized, as currently, that contempt actions are not easily classified as standard and the move is one aimed at greater rather than fewer protections.

### *Reporting Restrictions*

Resort in English and Scots law to forms of prior restraint (imposed via the exercise of judicial discretion) and automatic reporting restrictions (restraints effected via statute without the need for judicial activation) is commonplace. There exist a veritable panoply of such provisions across the criminal and civil law although it is worth noting at the outset that the purposes behind restriction vary from safeguarding the fairness of current/pending proceedings from prejudice to protecting the

privacy interests of witnesses, complainants and other persons who have become involved in proceedings.<sup>54</sup> In this section we focus almost exclusively upon postponement orders issued under s.4(2) of the 1981 Act.

A criticism that has been levelled at domestic contempt law centres upon the lack of a principled commitment to the processes of the open administration of justice. For all the rhetorical flourishes from the courts about the vital importance of justice as a non-cloistered virtue, the courts and legislature have each played significant roles in closing the doors of our courts to public scrutiny.<sup>55</sup> In the case of both prior and automatic restraints, limits on court reporting appear to have grown in an *ad hoc* manner bereft of a value-driven understanding of the opposing arguments for open and less-open justice.<sup>56</sup> If it is accepted that court reporting serves to bring to the wider public's attention that which occurs in their name in the courts, then limits on media freedom to report court proceedings will need to be justified by important, countervailing individual/societal interests. Prior restraints in this jurisdiction have never received the sort of intense scrutiny accorded to equivalent laws under First Amendment standards. From the Supreme Court ruling in *Near v Minnesota*,<sup>57</sup> carrying through to the *Pentagon Papers* case,<sup>58</sup> *Nebraska Press Association v Stuart*<sup>59</sup> and beyond, the notion that prior restraint constitutes a particularly serious threat to freedom of speech has been an enduring theme of First Amendment jurisprudence. More pertinently for domestic purposes, Strasbourg jurisprudence also takes a strongly sceptical approach to prior restraints. In the 'Spycatcher' litigation, UK prior restraints impacted upon the ability of news organisations to report a former MI5 officer's allegations of a security service plot to destabilise the democratically elected government of Harold Wilson. Here the European Court of Human Rights reminded national authorities that this type of restriction would be scrutinized particularly closely.<sup>60</sup>

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<sup>54</sup> For an overview see *Halsbury's Laws of England* Volume 24 Courts and Tribunals (5<sup>th</sup> edn, 2010) at para 615 *et seq.*

<sup>55</sup> B. Van Niekerk, *The Cloistered Virtue, Freedom of Speech and the Administration of Justice in the Western World* (1987, Praeger).

<sup>56</sup> I. Cram, 'Automatic Reporting Restrictions in Criminal Proceedings and Article 10 ECHR' [1998] *European Human Rights Law Review* 742.

<sup>57</sup> (1931) 283 US 697.

<sup>58</sup> *New York Times v United States* (1971) 403 US 713.

<sup>59</sup> (1976) US 427 US 539, 'Prior restraints on speech and publication are the most serious and least tolerable infringement on First Amendment rights.'

<sup>60</sup> *The Observer & Guardian v UK* (1992) 14 EHRR 153.

Central to the case against prior restraints is the idea that they constitute a uniquely destructive force on speech. For US jurist Alexander Bickel, prior restraints were especially objectionable because they produced

a loss in the immediacy of speech, the impact, of speech... The violator of a prior restraint may be assured of being held in contempt; the violator of a statute punishing speech criminally knows that he will go before a jury and take his chance, counting on a possible acquittal... A criminal statute chills, prior restraint freezes.<sup>61</sup>

Bickel's point is that prior restraints restrict expression interests excessively when compared to alternative, *post*-publication sanctions. Likewise Thomas Emerson, another First Amendment scholar, who had previously pointed to pre-publication restraints as a sinister attempt to limit the flow of information on matters which citizens were entitled to access.<sup>62</sup> Certainly, the ephemeral nature of much news coverage in an era of 24 hour dedicated broadcast news programming means that the *practical* effect of a postponement order can be to prevent a newsworthy story from reaching the audience in a way that facilitates the informed scrutiny of public power.

Others however have doubted whether judicially-imposed publication bans do in fact erode the exercise of free speech to a greater extent than *post*-publication criminal sanctions.<sup>63</sup> The precisely defined nature of prior restraints which impact upon specific material and identified parties means that only minor, carefully crafted incursions into speakers' freedoms are incurred. By contrast, the reliance in penal statutes upon vaguely phrased standards such as 'substantial risk of serious prejudice' means that *post*-publication criminal sanctions can deter a range of speech activities by inducing publishers to self-censor, ultimately at the cost of curbing some lawful expression. Such acts of self-censorship not only damage the speaker's interests but also impact upon the audience who are denied access to the suppressed material.

The excerpt from Bickel above advances a separate objection to prior restraint forms that needs further elucidation – namely the notion that breach of a prior restraint is always a contempt of court. In other words, unless and until the order is varied or set aside on appeal, breach of the order is a

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<sup>61</sup> *The Morality of Consent* (1975, Yale University Press) at 61.

<sup>62</sup> 'The Doctrine of Prior Restraint' (1955) 20 *Law & Contemp Probs* 648, 649. Emerson had in mind developments such as the non-Communist oath of the Taft-Hartley Act.

<sup>63</sup> See J.C. Jeffries, 'Rethinking Prior Restraint' (1983) 92 *Yale LJ* 408.

contempt of court. This reflects a more fundamental concern of the rule of law that court orders must be obeyed until such time as they are set aside or overturned.<sup>64</sup> Unlike *post*-publication sanctions, the publisher is denied the choice of whether to run the risk of publishing in the first place. Whatever else may be said about *sub judice* laws, they at least allow the responsibility for deciding whether something should be published to remain with the publisher, not the state.

#### *Postponement Orders - Section 4(2) Contempt of Court Act 1981*<sup>65</sup>

The rationale behind s.4(2) is that unfettered reporting of on-going proceedings can threaten to the administration of justice in two situations. First, where matters are revealed in court in the absence of the jury, such as guilty pleas to some counts on the indictment or where a ‘trial within a trial’ occurs to determine the admissibility of evidence or to hear other legal submissions. Second, where related trials are scheduled to take place after the conclusion of the present proceedings. Postponement orders can apply to a part or the whole of proceedings – a fact which makes them a fairly draconian limitation of media freedom, although they cannot extend beyond the conclusion of a specified set of proceedings,<sup>66</sup> something which renders them less restrictive than prohibition orders issued under s.11 of the CCA. Notwithstanding the principled concerns outlined above, the higher courts in England take seriously claims to media freedom in s.4(2) cases. It is submitted that the problem of excessive restriction (if it exists) is more likely to lie at a local level, although the absence of such data makes this claim somewhat speculative.

The precise nature of the courts’ power to make a postponement order has been judicially discussed on a number of occasions.<sup>67</sup> In *MGN Pension Trustees*<sup>68</sup> Lindsay J stated that s.4(2) orders should only be made when (i) there is a substantial risk of prejudice to the administration of justice in the current or a pending trial; and (ii) it appears to be necessary for avoiding that risk that there should be made

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<sup>64</sup> *Attorney General v Guardian Newspapers Ltd (No 3)* [1992] 1 WLR 874 at 884–885, DC, per Brooke J.

<sup>65</sup> S.4(2) permits a court in any proceedings where it appears necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, (to) order that the publication of any report of the proceedings, or any part of the proceedings, be postponed for such period as the court thinks necessary for the purpose.

<sup>66</sup> *Re Times Newspapers Ltd* [2008] 1 All ER 343

<sup>67</sup> For an analysis of the earlier caselaw see I. Cram, ‘Section 4(2) orders: media reports of court proceedings under the Contempt of Court Act 1981’, *Yearbook of Media and Entertainment Law* (eds. Barendt *et al*, OUP) 1996(2) at 87-108.

<sup>68</sup> *MGN Pension Trustees v Bank of America National Trust Savings Association and another* [1995] 2 All ER 355.

some order postponing publication of report of the current proceedings;<sup>69</sup> and (iii) balancing the public interest in learning of the present proceedings and the countervailing arguments in favour of a postponement order, the latter outweigh the former. It is noteworthy that the structure of s.4(2) ultimately prioritises the freedom to report proceedings even where media reports pose a substantial risk of prejudice and where no practical alternative to a s.4(2) order exists as a means of avoiding that risk. This prioritisation is valid when the arguments in favour of informing the public about the nature of proceedings are recognised to be ‘weightier’ than the resultant risk of prejudice to legal proceedings which attaches to publication.<sup>70</sup>

More recently, the Court of Appeal in *Ex Parte Telegraph*, reflecting (entirely properly) notions of rational connection and proportionality in the HRA-era, directed courts to consider whether

- (i) reporting would give rise to a not insubstantial of prejudice. If not, that is the end of the matter;
- (ii) If such a risk is perceived to exist, would an order eliminate it? If not there can be no necessity to impose such a ban. However, even if satisfied that an order would achieve the objective, the judge will have to consider whether the risk can satisfactorily be overcome by less restrictive means;
- (iii) the judge might still have to ask whether the degree of risk contemplated should be regarded as tolerable in sense of a being the lesser of two evils.<sup>71</sup>

Before an order is made, media representatives may ask the court to exercise discretion to permit representations against the making of the order.<sup>72</sup> This might entail a short adjournment to proceedings to allow for the briefing of counsel. However, resource issues may prevent a number of news outlets from taking advantage of this opportunity. Local and regional journalists are more likely than colleagues working in major media centres such as London to be disadvantaged here (lacking direct/regular access to experienced media lawyers) - a fact which would mean that

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<sup>69</sup> Where an alternative practical means does exist, a s.4(2) order cannot be lawfully imposed, see the remarks of Lord Lane CJ in *Ex parte Central Television plc* [1991] 1 WLR 4 at 8.

<sup>70</sup> *R v Beck, ex p Daily Telegraph plc* [1993] 2 All ER 177.

<sup>71</sup> *Ex parte Telegraph* [2001] EWCA 1075.

<sup>72</sup> *R v Clerkenwell Metropolitan Stipendiary Magistrate, ex p Telegraph plc* [1993] QB 462.

reporting restrictions imposed in regional and local courts were less likely to be challenged than their metropolitan equivalents.<sup>73</sup>

The 1982 Practice Direction requires courts to state the precise scope, duration and purpose of a s.4(2) order.<sup>74</sup> Despite this effort to ensure greater consistency and clarity, there has in the past been evidence of an occasional failure to attain such standards as when a trial judge in a fraud trial at Manchester Crown Court failed to indicate to media representatives whether the s.4(2) order issued by the court prevented reporting of the fact and terms of the order itself.<sup>75</sup>

The Consultation Paper is particularly concerned with the issue of media notification and comments that ‘many media organisations told us they struggle to obtain information about whether an order is in existence, and if so, what its terms are...’<sup>76</sup> It points out that in Scotland an online list of s.4(2) orders is held by the High Court of Justiciary comprising orders sent by issuing courts.<sup>77</sup> Members of the media can ask to be put on an email list that will alert them to newly issued orders and their terms. Those requiring more information about the order are able to telephone the High Court for clarification. The Consultation Paper sensibly urges that thought be given to a similar system for England and Wales and possibly expanded over time to include other types of prior restraint. In terms of facilitating compliance with restriction orders, this proposal is eminently practical, although the resource implications for court administrators would require careful thought.

## **Publishers and the New Media**

Chapter three of the Consultation Paper frames its approach to the new environment by asking the following questions:

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<sup>73</sup> Appeals against orders made in the Crown Court are made by ‘persons aggrieved’ to the Court of Appeal under s.159, Criminal Justice Act 1988. In the case of orders made by magistrates, challenge is by way of an application for a quashing order in judicial review.

<sup>74</sup> [1982] 1 WLR 1475.

<sup>75</sup> *Attorney General v Guardian Newspapers* [1992] 3 All ER 38.

<sup>76</sup> *Consultation Paper* No 209 at para.2.100.

<sup>77</sup> *Ibid.* at para 2.102. The website address for the online system is [http://www.scotcourts.gov.uk/current/court\\_announcements.asp#coc](http://www.scotcourts.gov.uk/current/court_announcements.asp#coc)

- (a) what is a publication?; (b) when is a publication addressed to the public at large or any section of the public?; (c) who is responsible for the publication; (d) when does a publication occur? (e) where does publication take place?<sup>78</sup>

With some justification, the Law Commission believes that there is nothing in the nature of the new means of communication that calls for the abandonment of the concept of ‘publication’ in s.2(1).<sup>79</sup> The definition appears broad enough to apply to tweets, blogs etc. As to whether a communication is addressed to the public at large or any section of the public, the Commission notes the absence of a statutory definition of ‘section of the public’ and seeks the views of consultees as to whether this is proving problematic in practice. This issue does not seem to have generated significant litigation thus far.

Of more pressing concern arguably is the concept of responsibility for a publication (and therefore the identity of a ‘publisher’ upon whom liability for prejudicial material falls). Those ‘responsible’ for a publication could include the author of the prejudicial materials, providers of Internet access services and social media platforms such as Facebook and Twitter that hold content posted by a user and make it available to others, providers of search engines that direct users to prejudicial material. In the case of intermediaries providing access to possibly prejudicial material previously put online by others, contempt liability may be avoided by virtue of either s.3(1) of the 1981 Act on the basis that

at the time of publication (having taken all reasonable care) (the intermediary) ...does not know and has no reason to suspect that relevant proceedings are active.

or, as disseminators of prejudicial material under s.3(2) of the Act, if

at the time of distribution, (having taken all reasonable care) (the intermediary) ... does not know that it contains such matter and has no reason to suspect that it is likely to do so

In both instances the burden of proof is on the intermediary to make good the defence. The latter defence is designed to come to the aid of disseminators of problematic material. The former would

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<sup>78</sup> Consultation Paper, *op.cit.*, para.3.4.

<sup>79</sup> Defined as including “any speech, writing, programme included in a cable programme service or other communication in whatever form.”

only be relevant where the intermediary is deemed a publisher.<sup>80</sup> Those entities providing access to internet content created by others would seem to be best treated as disseminators rather than publishers for the purposes of s.3 of the 1981 Act. If this analysis is sound, it would follow that once an intermediary is made aware (or ought to have had a reason to suspect) that material caught by the strict liability rule is being disseminated via the service provided by the intermediary, then the intermediary also incurs liability under the Act.

The related issue of *when* a publication takes place in the case of online publication is plainly one that authors, users and intermediaries will have a keen interest particularly as it affects archive material which, at the time of initial publication, did not incur liability under the Act because no proceedings were active at that time. When, at a later time, the defendant is arrested on an unrelated matter, archive material detailing his previous conviction and discoverable via a search engine such as Google may be thought to pose a s.2(2) substantial risk of serious prejudice/impediment. As the Consultation Paper notes, the new media have made such cases ‘more likely to occur’.<sup>81</sup> Under s.2(3) of the 1981 Act, the strict liability rule applies only if the proceedings are active ‘at the time of publication’. If publication is considered to be a one-off event that occurs at the time the material is first made available to third parties, then there can be no liability on the part of the original publisher for archive material which is discovered by online users via a search engine. There may however be thought to be a fresh publication if a user then sends a hyperlink to the archived page to others. Equally, if the user describes the contents of the archive to third parties then there would seem to be little difficulty in the way of treating the act of description as a fresh publication.

What case law there exists on the question tends to reject the one-off view of publication, preferring instead to see publication as a continuing event that starts when the material is first made available to others and only ending when the material is taken down and no longer available.<sup>82</sup> In *HM Advocate v Beggs* for example, Lord Osborne was persuaded of the analogy between publishing material electronically and the continuous availability of a book or other hard copy printed material. Just as a publisher of a book will be deemed to have engaged in a continuous act of ‘publishing’ the book at

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<sup>80</sup> A further defence of uncertain scope is offered by Electronic Commerce (EC Directive) Regulation 2002 Regs 17-19. This is discussed in some detail by the Commission at paras. 3.43 – 3.46.

<sup>81</sup> Consultation Paper, *op.cit.*, para. 3.52.

<sup>82</sup> *HM Advocate v Beggs (No 2)* 2002 SLT 139 Lord Osborne, subsequently followed by Australian (Victorian Court of Appeal) ruling in *Digital News Media Pty Ltd v Mokbel* [2010] VSCA 51.

all times that the book remains on sale to members of the public, so too in Lord Osborne's view, must the publisher of a web site containing archive material be considered to be engaged in a continuous act of publishing throughout the time that members of the public can access the archive via a search engine request. The Law Commission clearly has doubts about whether *Beggs* offers the best way forward and is concerned that the notion of continuing publication forces publishers to continuously monitor their archives and remove materials that become problematic in contempt terms long after their initial (and perfectly lawful) publication. Whether this on-going (and onerous) obligation on publishers constitutes a proportionate restriction under Article 10 is open to question. Consultees are therefore asked whether s.2(3) should be amended so that the phrase 'at the time of publication' is to be read as 'time of first publication' thus effectively reversing *Beggs*.

One consequence of a reversal of *Beggs* in the case of material published online before proceedings became active is that its continuing availability might pose a risk to the fairness of later proceedings. The Law Commission envisages that the requisite level of risk under s.2(2) will arise in rare cases only. However in these cases, it is proposed somewhat controversially to permit prosecutors and defence lawyers the opportunity to apply for temporary removal orders.<sup>83</sup> These orders will be available against anyone with 'sufficient control'<sup>84</sup> over the accessibility of the material, a definition that is intended to bring intermediaries such as social media platforms within the ambit of the power (where for example the originator of the material is a blogger located outside England and Wales) as well as the newspapers' and broadcasters' online archives of their own previously published stories. Failure to comply with an order will be a contempt of court. Aside from principled free speech concerns about making intermediaries criminally liable for the speech of others (and thereby disinclining intermediaries to take a speech-protective stance), the proposal ignores the practical problem that arises when those deemed to have 'sufficient control' are physically located outside the jurisdiction. It is not far-fetched for example to conceive a US intermediary (such as Twitter) invoking federal statutory immunity from California in order to resist claims from a court in England that it take down temporarily material that, at the time it was published, conformed (from a First Amendment perspective) to the already excessive demands of English contempt law.

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<sup>83</sup> The Attorney-General's consent would not be needed under the Commission's proposals, Consultation Paper, *op.cit.*, para. 3.82

<sup>84</sup> Consultation Paper, *op.cit.*, para 3.79. The meaning of the phrase is to be determined on 'a case-by-case basis'.

## Conclusion.

Without doubt, there are aspects of the current law relating to contempt that are ill-equipped for the demands of the new media landscape. Reform is essential. Further, it is recognized that in the UK a degree of primacy is given to fair trial rights in Article 6 over the right to free expression in Article 10.<sup>85</sup> Not to give the rights coordinate status is not necessarily problematic, but it does mean that when reform takes place a very keen eye should monitor any moves to further restrict expression. Aside from strong principled arguments, there are two strong practical reasons for this. Firstly, it is arguably unrealistic to assume that expression can be curtailed in modern conditions where everyone can be a publisher and publish globally. Secondly, if research findings and judges continue to suggest that juries are robust and act with integrity then faith must be invested in them to carry out their important task without unduly restricting expression for the majority. The latter might require considerable attention to the education of potential jurors as to the important civic responsibility they might undertake and possibly the composition of juries. These are broader questions but are ones that should be considered alongside more specific questions about statutory language if we are to reform the law of contempt in a way that can withstand the challenges ahead.

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<sup>85</sup> See, *R v B* [2007] HRLR 1 at para. 28. Contrast the position under the Canadian Charter as seen in *Dagenais v Canadian Broadcasting Corporation* [1994] 3 S.C.R. 835.

# Lessons Learnt

## Terrorism and the Media

*Alexander Spencer*

### Introduction

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The relationship between terrorism and the media is well researched and has been one of the central questions terrorism research has struggled with (Paletz and Schmid 1992; Weimann and Winn 1994; Nacos 1994). It has become widely accepted that there is an almost symbiotic relationship between terrorism and the media as terrorism provides for exciting and violent stories which help sell the news product and the media provides terrorist groups with a means of spreading their message and creating fear among the general public. This paper will address two interrelated questions:

- 1) What role does western media play in carrying the terrorist message?
- 2) What would happen if the media made no reference to terrorism?

The first part of the paper will examine the role of western media and illustrate how this news media, as the general public's dominant source of information about terrorism, is central to the whole idea of what makes terrorism terrorism, i.e. the spread of terror and the public perception of insecurity. By indicating a correlation between the salience of terrorism in the media and public concern, the argument will be made that acts of terrorism without the media's attention lose one of the central components of terrorism as a communication strategy. If terrorism does not reach a wider target audience such as the British general public and 'only' affects the immediate victims of the attack, then the attack's supposed effect of gaining public attention and spreading fear in order to gain leverage for political change is greatly reduced.

The second part of the paper will briefly reflect on the possibility of not reporting terrorism in the media by contemplating both normative and practical difficulties of such a media blackout. The normative side will show the incompatibilities of media censorship with the democratic principles of British society while the practical side will illustrate the impossibility of stopping western media and in particular new internet media channels of reporting on terrorist acts.

The final part of the paper will re-read the last question and rather than reflecting on the idea of not reporting terrorism at all, it will consider the possibilities of framing the terrorist act. Starting from ideas taken from PR and media framing theory the paper will illustrate how cognitive linguistics can be helpful for understanding how particular words and references in media reporting influence public opinion. For illustrative purposes

the paper will articulate the vital importance of metaphors for the cognitive thought process and indicate how metaphors shape public opinion on terrorism. Thereby the paper will indicate how the use of particular metaphors could alleviate one of the central components of terrorism: the public's feeling of terror and insecurity.

### 1) *The role of the media in portraying terrorism*

The relationship between terrorism and the media depends very much on what one considers terrorism to mean. While some definitions focus on the physical act of violence others stress the centrality of the innocent or civilian target, the political nature of the act or the sub-state status of the terrorist actor. Alex Schmid and Albert Jongmann (1988) compiled one of the most famous studies using 109 different definitions of terrorism and came up with a list of possible definitional elements which could be used to forge some sort of consensus definition.

*Table 1: Frequency of definitional elements in 109 definitions*

Elements	Frequency (%)
1. Violence, force	83.5
2. Political	65
3. Fear, terror emphasised	51
4. Threat	47
5. (Psych.) effects and (anticipated) reactions	41.5
6. Victim-target differentiation	37.5
7. Purposive, planned, systematic, organised crime	32
8. Method of combat, strategy, tactic	30.5
9. Extranormality, in breach of accepted rules, without humanitarian constraints	30
10. Coercion, extortion, induction of compliance	28
11. Publicity aspect	21.5
12. Arbitrariness; impersonal, random character; Indiscrimination	21
13. Civilians, non-combatants, neutrals, outsiders as victims	17.5
14. Intimidation	17
15. Innocence of victims emphasised	15.5
16. Group, movement, organisation as perpetrator	14
17. Symbolic aspects, demonstration to others	13.5
18. Incalculability, unpredictability, unexpectedness of occurrence of violence	9
19. Clandestine, covert nature	9
20. Repetitiveness; serial or campaign character violence	7
21. Criminal	6
22. Demand made on third parties	4

Source: Schmid and Jongman (1988:5)

One aspect which was not explicitly named, but plays an important role in many of the elements mentioned in table 1 is the idea of terrorism as a communication strategy. If one considers terrorism to involve more than simple violence against civilians by sub-state groups for political purposes and includes some sort of communicational element in order to spread a message, then the media are central to the understanding of what makes violence terrorism. Traditionally terrorism research considered the media to be vital for a terrorist group as they not only spread the fear or terror to a far larger audience than the relatively small group of immediate victims but the media provide the means of attracting attention and spreading the message of the group. So the central aim of terrorism is not so much the act of violence or the killing of a target, but rather the dissemination of terror and uncertainty among a population as well as the spread of the group's message through the newsworthiness of the violent act. Here one may consider the media to be the terrorist's 'accomplices' (Schmid 1989: 540) or even their 'best friend' (Hoffman 2006: 183) as it appears to provide the 'oxygen of publicity' (Thatcher cited in Wilkinson 2000: 175).<sup>1</sup> As one of the leading terrorism scholars Bruce Hoffman points out:

*The modern news media, as the principal conduit of information about such acts, thus play a vital part in the terrorists' calculus. Indeed, without the media's coverage the act's impact is arguably wasted, remaining narrowly confined to the immediate victim(s) of the attack rather than reaching the wider "target audience" at whom the terrorists' violence is actually aimed. Only by spreading the terror and outrage to a much larger audience can the terrorists gain the maximum potential leverage that they need to effect fundamental political change (Hoffman 2006: 174).*

Terrorism tries to use the media in three ways: firstly terrorism attempts to gain the public's attention, secondly, it thereby, tries to gain sympathy for its cause and, thirdly, terrorism aims to spread concern and terror in the general public and thereby effect political change. Out of these three strategies only two are generally successful. As Bruce Hoffman (2006: 184) points out, there is no evidence that the portrayal of terrorism in the media actually leads to the public's increase in sympathy towards those perpetrating the terrorist act or their cause. For example in a study conducted in the 1980s the RAND Corporation found out that despite the media's prolonged coverage of terrorist hijackings at the time the public approval was almost nonexistent (Downes-Le Guin and Hoffman 1993).

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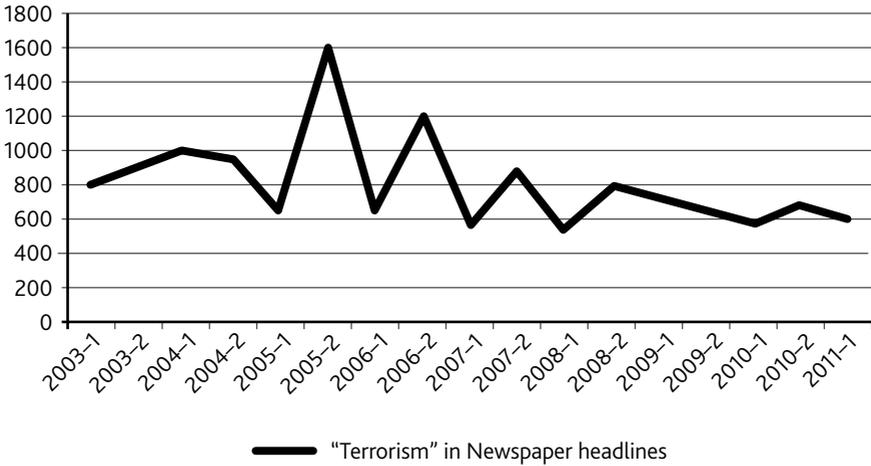
<sup>1</sup> At the same time it has been noted that terrorists provide the media with emotional, exciting and bloody news which helps them sell their product (Ganor 2005: 231). Therefore there are mutual benefits for both and the relationship could be described as 'symbiotic' (Schmid 1989).

In comparison the other two strategies, the gaining of public attention and the spreading of fear seem far more effective. While terrorism in the past was concerned predominantly with the former (the spread of their particular message through for example TV interviews with terrorists during hijackings or hostage situations), many claim that the latter (the spread of fear among a civilian population through maximum violence) has become the central component of Islamist terrorism today (Nacos 2006: 213). Scholars such as Brian Jenkins (1977: 8) point out that 'old terrorists' wanted many people watching not many people dead. 'New terrorist' in contrast are said to want to kill as many people as possible (Laqueur 1999; Simon and Benjamin 2000; Kurtulus 2011). The logic of and relationship between terrorism and the media, however, seems to stay the same if one considers that the number of casualties is proportional to the salience of a terrorist act in the media (Spencer 2006a). In other words one can expect that increasingly violent attacks lead to more public attention. As visible from figure 1 the salience of terrorism in the media in Britain was highest in the six months following the London bombings in July 2005. Considering, for example, the media savvy public messages of Osama bin Laden and the "perfectly" choreographed events of 9/11 on live TV one may metaphorise terrorism as theatre (Jenkins 1975).

In this regard the role of issue salience is important for the analysis of both the strategies of gaining attention and spreading fear and the overall relationship between terrorism, the media, public opinion and counterterrorism. Here salience analysis can be particularly helpful, as it looks into how prominent different issues are in the public sphere (Edwards et al. 1995; Franklin and Wlezien 1997; Oppermann and Viehrig 2011). The central idea is that if terrorism can be shown to be a salient concern for the general public, decision-makers are likely to come under pressure to act on these concerns and their decisions on the respective issues will be under particular public scrutiny. The higher the public salience of terrorism the less leeway governments have to formulate their policies without taking public opinion into account and the more efforts they can be expected to take in order to bring the public on their side (Oppermann and Spencer, forthcoming).

Methodologically, the salience of phenomena such as terrorism to general publics can be measured either by public opinion polls or by media content analyses. With regard to media content analyses, assessing the amount of an issue's coverage in the media offers indirect insights into that issue's public salience, which can be expected to rise with the amount of media reporting on it (Epstein and Segal 2000: 66-67): there is a strong correlation between the prominence of an issue in media coverage and the importance attached to it by general publics (McCombs and Shaw 1972; Miller and Krosnick 2000).

Figure 1: Salience of terrorism in leading British newspapers<sup>2</sup>



With regards to opinion polls, the most valid indicator of issue salience is aggregate data on the respondents' denomination of the 'most important issues' on the political agenda. Looking at the public attention to international terrorism in Britain, for example, the evidence clearly shows that the issue was highly salient in the post-9/11 years. For one, the semi-annual Standard Eurobarometers have investigated the most important issues to European publics from 2003 onwards (see table 2). The data show that the issue of international terrorism has – with one exception – always been among the top-five concerns of the British public between 2003 and 2007 and that it has on average been ranked as one of the two most important political issues by 24% of respondents during this time. It is only since 2008 that public attention to the issue in Britain has decreased significantly.

<sup>2</sup> The graph is based on data taken from database of Lexis Nexis, searching for the concept of "terrorism" or "terror" in newspaper headlines and "terrorism" in the text body. The newspapers selected include: *The Guardian*, *The Independent*, *The Financial Times*, *The Times*, *The Daily Mail*, *The Mirror* and *The Sun*. The searches (conducted 8.11.2011) covered a time period between the 1st January – 15th June and 16th June – 31st December each year in order to roughly correspond to the data of the *Eurobarometer* survey in table 2.

*Table 2: Terrorism as the most important issue in British public opinion<sup>3</sup>*

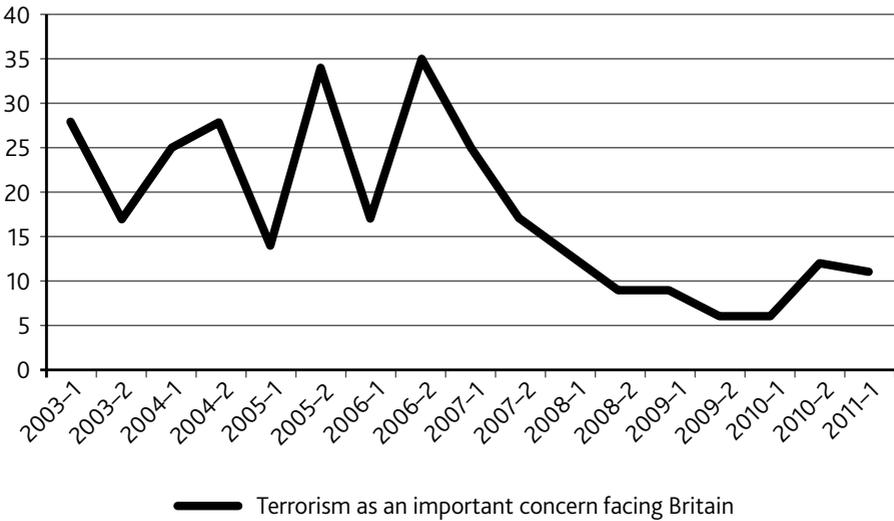
Standard Eurobarometer	Percentage	Rank
2003-1	28%	3
2003-2	17%	4
2004-1	25%	3
2004-2	28%	2
2005-1	14%	6
2005-2	34%	2
2006-1	17%	5
2006-2	35%	2
2007-1	25%	3
2007-2	17%	4
2008-1	13%	6
2008-2	9%	8
2009-1	9%	8
2009-2	6%	8
2010-1	6%	9
2010-2	12%	7
2011-1	11%	8

Converting the data from table 2 into a flowchart (figure 2) and comparing it to the salience of terrorism in the media (figure 1), it becomes apparent, that there is a correlation between the salience of terrorism in the news media and the importance of terrorism in public opinion. Obviously both are directly related to actual incidents of terrorism such as the London bombings in July 2005 where there is a peak in both media reporting and the level of importance people attribute to the phenomena. However, the relationship between the physical act of terrorism, media reporting and the public concern is not necessarily always a chronological or causal one where a terror act leads to increased media reporting and then to public concern. If one considers for example the end of 2006, the relatively high number of headlines mentioning "terrorism" and the even slightly higher level of concern of terrorism in the British public does not correspond to any large-scale physical attack in the UK or on other western targets. Similarly the terrorist attack at Glasgow Airport on the 30th of June 2007 seems to have a fairly small

<sup>3</sup> Source: Standard Eurobarometer No. 59-74, Q: What do you think are the two most important issues facing Britain at the moment? Percentage of respondents naming terrorism as one of the two most important issues facing Britain. Rank of the issue of terrorism on the list of the most important issues to the British public. Table adapted from Oppermann and Spencer (forthcoming).

impact on the reporting or the public concern. This seems to indicate and support the idea that public perception and concern of terrorism is not necessarily directly related to real world events but rather a result of media attention. As a number of scholars have pointed out the public concern about terrorism and their estimated personal risk of falling victim to a terrorist attack stand in no relation to the statistical probability of actually being directly affected by such an attack (Schneier 2003; Jackson 2005). A phenomenon often referred to as the “probability neglect” leads people to worry far more about remote personal risks such as shark attacks or terrorism than statistically more likely dangers such as cancer or traffic accidents (Sunstein 2003; Spencer 2006b).

*Figure 2: Percentage of respondents naming terrorism as one of the two most important issues facing Britain<sup>4</sup>*



<sup>4</sup> Source: Data taken from Standard Eurobarometer No. 59-74, available at: [http://ec.europa.eu/public\\_opinion/archives/eb\\_arch\\_en.htm](http://ec.europa.eu/public_opinion/archives/eb_arch_en.htm) [11.11.2011].

## 2) Preventing media reporting on terrorism?

If the news media is so central to the terrorist strategy of gaining public attention and spreading fear in the population, what possibilities are there of preventing the media reporting on terrorism? Any kind of media blackout of terrorist attacks faces two grave problems, one normative and one practical. Starting with the normative problem of censoring and restricting media reporting on terrorism one has to point out that free media, although itself not always a bastion of liberal democratic values, is nevertheless a key characteristic of a British democratic society. As Paul Wilkinson, one of the leading experts on terrorism in the UK, pointed out:

*It is widely recognized that it is important to avoid the mass media being hijacked and manipulated by terrorists, but if the freedom of the media is sacrificed in the name of combatting terrorism one has allowed small groups of terrorists to destroy one of the key foundations of a democratic society. It is also an insult to the intelligence of the general public, and would totally undermine confidence in the veracity of the media if censorship was to be introduced (Wilkinson 2000: 185).*

Although the media is always censored to some extent as there are limits to what one can publicly say (for example inciting racial hatred), a specific ban on the reporting of terrorist attacks is not compatible with basic democratic values on which Britain is based. This, however, does not mean that media channels should not be encouraged to think about voluntary guidelines for reporting on terrorism. For example, as will be illustrated in more detail below, this could include more reflection on the use of particular phrases, concepts or metaphors. It is however important that these rules retain their voluntary “best-practice” character and do not become hard law.<sup>5</sup>

Apart from the normative problem of media censorship, the practicability of such a policy is questionable if one considers the vast range of new media channels available to the general public over satellite and now more importantly over the Internet. Not only does the public now have access to a large number of different satellite and freeview TV news media channels from all over the world including highly professional English speaking non-western channels such as Aljazeera, but with an internet coverage of nearly 80% of all households and the rise of mobile internet usage on smartphones<sup>6</sup>, the public now have access to millions of different news channels on the world wide web, some of which

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<sup>5</sup> For more information on the issue of media censorship with regard to terrorism see Nacos (2002).

<sup>6</sup> See the Office for National Statistics (2011) Internet Access – Households and Individuals, 2011, available at: [www.ons.gov.uk/ons/rel/rdit2/internet-access---households-and-individuals/2011/stb-internet-access-2011.html](http://www.ons.gov.uk/ons/rel/rdit2/internet-access---households-and-individuals/2011/stb-internet-access-2011.html) [10.11.2011].

do necessary involve any kind of news agency or organisation but are the result of peoples own experiences and reporting via email, blogs, Facebook or Twitter. As the Revolutions in the Arab world have again indicated, control over these channels is extremely difficult for an authoritarian regime and surely impossible for a democracy such as Britain where such measures would produce a public outcry and the close proximity and easy access to other democracies in Europe would make an information ban difficult to uphold.<sup>7</sup>

So preventing media reporting on terrorism altogether is not only normatively problematic in a democracy such as Britain, the vast range of new media outlets and channels of communication via the Internet make it impossible to stop the reporting of terrorist acts.<sup>8</sup> Therefore one cannot prevent terrorist groups from gaining public attention. However, considering the communicative strategy by terrorist groups of spreading fear in the general public, one may be able to at least alleviate this psychological effect of the terrorist acts on the public by officially framing "terrorism" in a particular kind of way.

### **3) The framing of terrorism in the media and the role of metaphors**

Having briefly illustrated the impossibility of preventing the media, and especially the new internet based media channels from making references and reporting acts of terrorism, the paper will now turn to the idea of media framing (Norris et al 2003; Craft and Wanta 2004; Papacharissi and de Fatima Oliveira 2008). It is widely accepted not only in academia but also in policy circles that the media greatly influence public opinion (Woods 2007; Herron and Jenkins-Smith 2006). So rather than reading the second question posed in the introduction as an enquiry into the possible results of preventing the spread of knowledge about acts of terrorism, the paper will consider the implications of how knowledge about terrorism is presented in the media and how the choice of language influences public perceptions and may ultimately influence the spread of terror as one of the key components of terrorism. Although it is impossible to fully control the media, public announcements by politicians and press briefings by government officials can attempt to frame terrorism in certain ways and thereby aid a particular kind of construction of "terrorism" which is then picked up by the media by quotes or paraphrasing of statements and communicated to the public, thereby lessening the public's feeling of concern.

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<sup>7</sup> For more information on how terrorist organisations use the internet see Tsfati and Weimann (2002).

<sup>8</sup> One may even go as far as arguing that if media channels do not report on act of terrorism, the terrorist group may resort to increasingly.

One particularly important figure of speech which influences the public perception of political phenomena such as terrorism is the linguistic device commonly referred to as metaphor (Hülse and Spencer 2008). The general idea of what a metaphor is has more recently been discussed by a vast range of different scholars from very different disciplines using a varying degree of complexity to express their understandings. For example, Kenneth Burke (1945: 503) quite simply believes metaphors to be 'a device for seeing something in terms of something else' and Susan Sontag (1989: 93) describes metaphors as 'saying a thing is or is like something-it-is not'. Paul Ricoeur (1978: 80) argues that 'metaphor holds together within one simple meaning two different missing parts of different contexts of this meaning' and most recently Jonathan Charteris-Black (2004: 21) has defined a metaphor as 'a linguistic representation that results from the shift in the use of a word or phrase from the context or domain in which it is expected to occur to another context or domain where it is not expected to occur, thereby causing semantic tension'. So metaphors do not simply substitute one term for another, but create a strong perceptual link between two things (Bates 2004).

While some may consider metaphors to be unimportant rhetorical devices to illustrate factual statements, others have stressed their vital importance for the human cognitive system (Chilton and Lakoff 1999: 56; Chilton 1996: 359; Charteris-Black 2004: 25; Gozzi 1999: 9; Beer and De Landtsheer 2004: 5). In particular, Lakoff and Johnson (1980) are among the most influential scholars in this respect as they have managed to export the study of metaphor from linguistics into other disciplines such as psychology, sociology and political science. For them, the 'essence of metaphor is understanding and experiencing one kind of thing in terms of another' (Ibid: 5). In their book 'Metaphors We Live By' they argue that metaphors structure the way people think and that the human conceptual system as such is fundamentally metaphorical. '[T]he way we think, what we experience and what we do everyday is very much a matter of metaphor' (Ibid: 297). They believe that metaphors make humans understand one conceptual domain of experience in terms of another by projecting knowledge about the first familiar domain onto the second more abstract domain. 'Metaphors [...] are devices for simplifying and giving meaning to complex and bewildering sets of observations that evoke concern' (Edelman 1971: 65). The central idea here is that metaphors map a source domain, for example war, onto a target domain, for example terrorism, and thereby make the target domain appear in a new light.

Here we have to distinguish between two kinds of metaphors: the *metaphoric expression* and the *conceptual metaphor*. The conceptual metaphor, for example terrorism is war, involves the abstract connection between one 'conceptual domain' to another by

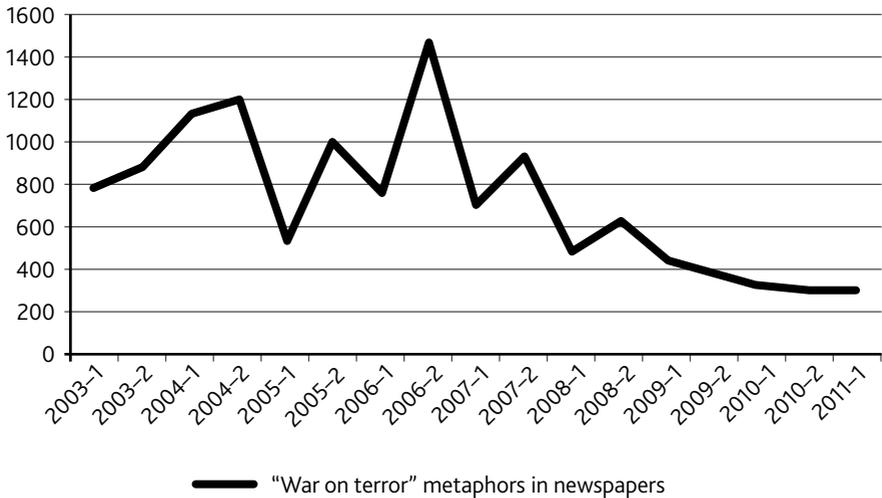
mapping a source domain (war) and a target domain (terrorism) (Lakoff 1993: 208-209). Mapping here refers to 'a set of systematic correspondences between the source and the target in the sense that constituent conceptual elements of B correspond to constituent elements of A' (Kövecses 2002: 6). 'Thus, the conceptual metaphor makes us apply what we know about one area of our experience (source domain) to another area of our experience (target domain)' (Drulák 2005: 3). Conceptual metaphors do not have to be explicitly visible in discourse. However, metaphorical expressions are directly visible and represent the specific statements found in the text which the conceptual metaphor draws on. 'The conceptual metaphor represents the conceptual basis, idea or image' that underlies a set of metaphorical expressions (Charteris-Black 2004: 9).

As Chilton and Lakoff point out, metaphors 'are concepts that can be and often are acted upon. As such, they define in significant part, what one takes as 'reality', and thus form the basis and the justification for the formulation of policy and its potential execution' (Chilton and Lakoff 1999: 57). Metaphors in the media structure the way people define a phenomenon and thereby influence how they react to it: they limit and bias our perceived policy choices as they determine basic assumptions and attitudes on which the public acceptance of decisions and policies depends (c.f. Milliken 1999; Chilton 1996; Mio 1997). One has to be careful when talking about the idea that metaphors shape or 'cause' the public acceptance of certain counter terrorism policies as metaphors are only one among many linguistic devices and other practices which play a role in the framing of public opinion. 'The nature of metaphor does not lend itself easily to rigorous demonstrations of causality. Metaphorical power may exist, but it is hard to nail down' (Beer and Landtsheer 2004: 7). Metaphors do not entail a clear set of policies, but open up space for policy possibilities. Metaphors offer a discursive construct which frames the situation in a certain way. Metaphors in the media shape the public's general approach to an issue as they inform and reflect the conceptual foundation of a political phenomenon such as terrorism and thereby make certain policies acceptable while other remain outside of the options considered appropriate (Shimko 1994: 665).

Considering, for example, the metaphors found in the media after 9/11 constituting terrorism as a war. Apart from the most obvious metaphorical expressions such as 'war on terror' or 'war against terrorism' (see figure 3) the attacks were commonly metaphorised as 'acts of war'. One frequently encounters metaphorical expressions which draw comparisons to the Second World War by involving metaphors such as 'Pearl Harbor' and the 'blitz' and comparing the threat of terrorism to the Nazis and fascism. Apart from these, one encounters a whole range of other metaphors in the media mapping the concept of war onto the concept of terrorism. For example, the conflict is said to include

'battles', 'sieges' and 'warzones' demarcated by 'frontlines'. Here Osama bin Laden is predicated to be a 'terror war lord' who, together with his 'second in command', has 'declared war' and is now 'mobilising' his 'troops' on the 'battlefield' from the safety of his 'command centre'. Terrorists after 9/11 were often metaphorised as 'suicide squads' or 'units' in a terror 'army' made up of 'brigades'. These Al-Qaeda 'forces', similarly to any normal military, are hierarchically organised and included 'footsoldiers', 'lieutenants' and 'commanders'. They used their 'military training' and their 'military arsenal' to conduct 'operations' and 'missions' as part of a large Al-Qaeda 'campaign' supervised by a 'council of war' from 'bases' and 'fortresses' in Afghanistan paid for by a 'warchest' (for more detail see Spencer 2010).

Figure 3: The salience of the “war on terror” metaphor in newspapers<sup>9</sup>



The question now remains, of what these metaphors in the media do. How do they influence public perceptions of terrorism? Above all, the metaphorisation of terrorism as a war makes a military response seem appropriate (Simon 1987; Shimko 1995; Sarbin

<sup>9</sup> The graph is based on data taken from database of Lexis Nexis, searching for the concept of “war on terror” or “war against terrorism” in the text body. The newspapers selected include: *The Guardian*, *The Independent*, *The Financial Times*, *The Times*, *The Daily Mail*, *The Mirror* and *The Sun*. The searches [conducted 8.11.2011] covered a time period between the 1st January – 15th June and 16th June – 31st December each year in order to roughly correspond to the data of the *Eurobarometer* survey in table 2

2003). And overall, the general public also seems to share this kind of understanding of terrorism as a number of opinion polls indicate that the United Kingdom's active participation in the 'war on terrorism' fits into the general public's understanding of what terrorism is and therefore how it should be fought. A survey in October 2001 found that between 67 and 74 percent of those questioned supported or approved of the military action by the United States and Britain against Afghanistan.<sup>10</sup> Similarly, 57 per cent approved of sending British troops into Afghanistan to take part in the fighting on the ground.<sup>11</sup> In 2002 between 76 and 78 percent of those questioned in Great Britain supported air strikes and attacks by ground troops against terrorist 'bases' and other facilities and 84 percent even 'supported the use of one's own troops to destroy terrorist camps'.<sup>12</sup> Even in 2004 56 percent in Britain still agreed that military action was the most appropriate way of fighting terrorism.<sup>13</sup> Interestingly together with a downturn in the number of war metaphors in the media at the end of 2006 there also seems to be a recession in the public support for the war on terror and the military response to terrorism indicating a correlation between the use of war-like metaphors in the media and the public understanding of it considered appropriate against terrorism. For example in 2007 only around 25 per cent believed that British troops should remain in Afghanistan<sup>14</sup> and in 2011 a majority of 57 per cent of those questioned wanted all troops brought home immediately.<sup>15</sup>

Another kind of metaphor commonly found in connection to terrorism is the conceptual metaphor of "evilness". This is indicated through metaphorical expressions which constitute terrorists are 'possessed', 'evil' 'hydras' who perform 'monstrous' acts and those aiding them as an 'Axis of Evil', thereby, interestingly, combining both the metaphor of war and evilness into one expression. Furthermore, the terrorist is described as an 'inhuman' 'monster' with 'tentacles' spread around the globe. These 'subhuman' 'evil beasts' 'without a soul' are said to have spun a 'web of evil'. They are unrivalled in

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<sup>10</sup> 'The Guardian Poll October 2001', *ICM Research*, 10-11.10.2001, available at: [www.icmresearch.co.uk/pdfs/2001\\_october\\_guardian\\_afghanistan\\_poll\\_1.pdf](http://www.icmresearch.co.uk/pdfs/2001_october_guardian_afghanistan_poll_1.pdf), [14.4.2009] or 'Evening Standard London Poll October 2001/ War in Afghanistan', *ICM Research*, 10-11.10.2001, available at: [www.icmresearch.co.uk/pdfs/2001\\_october\\_evening\\_standard\\_war\\_in\\_afghanistan.pdf](http://www.icmresearch.co.uk/pdfs/2001_october_evening_standard_war_in_afghanistan.pdf), [14.4.2009].

<sup>11</sup> 'The Guardian Afghan Poll- October 2001', *ICM Research*, 26-28.10.2001, available at: [www.icmresearch.co.uk/pdfs/2001\\_october\\_guardian\\_afghanistan\\_poll\\_2.pdf](http://www.icmresearch.co.uk/pdfs/2001_october_guardian_afghanistan_poll_2.pdf), [14.4.2009].

<sup>12</sup> Worldviews 2002, European Public Opinion & Foreign Policy, The Chicago Council on Foreign Relations and the German Marshall Fund of the United States, pp. 20-21, available at: [www.worldviews.org](http://www.worldviews.org) [21.4.2009].

<sup>13</sup> Transatlantic Trends 2004, The German Marshall Fund of the United States and the Compagnia di San Paolo, p. 18, available at: [www.transatlantictrends.org/trends/doc/2004\\_english\\_key.pdf](http://www.transatlantictrends.org/trends/doc/2004_english_key.pdf) [22.4.2009].

<sup>14</sup> See: [www.angus-reid.com/polls/507/britons\\_upset\\_with\\_afghanistan\\_mission](http://www.angus-reid.com/polls/507/britons_upset_with_afghanistan_mission) [15.11.2011].

<sup>15</sup> See: [www.comres.co.uk/polls/The\\_Index\\_%28Afghanistan%29\\_2\\_Oct11.pdf](http://www.comres.co.uk/polls/The_Index_%28Afghanistan%29_2_Oct11.pdf) [15.11.2011].

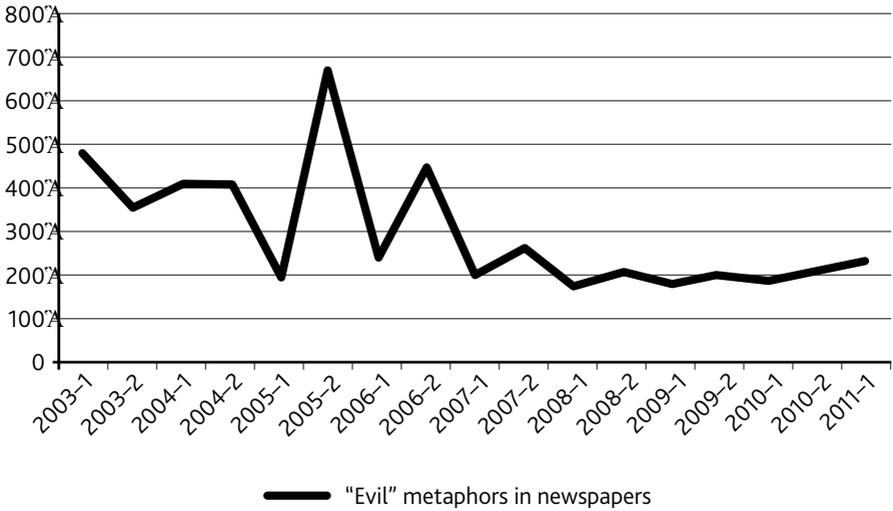
'wickedness' and their 'doomsday attacks' created an 'inferno' and 'hell' on earth likened to 'Armageddon' or the 'Apocalypse'.<sup>16</sup>

Above all these kinds of metaphor cause a clear cut polarisation and thereby heightens the level of public fear as it outcasts the actor and his/her actions and dichotomises and antagonises them (the out-group) and us (the in-group) (Lazar and Lazar 2004). As there are only two sides to the conflict, good and evil, the construction of the 'evil' other automatically constitutes the self as the binary opposite 'good'. 'Here the dichotomy between the in- and the out-group is a religious and spiritual one, the "good" outcasting the "evil" from the moral order that is instituted by the good itself' (Bhatia 2009: 282). So the construction of terrorism as 'evil' creates only two camps. This polarisation leads to the situation where 'people and countries must choose which side they are on' (Rediehs 2002: 71). While the conceptual metaphor war mentioned above implied the possibility of neutrality the predication of terrorism as evil eliminates this option. The dichotomy of good versus evil leaves no space for anything in-between. Overall, this extreme kind of othering and demonisation increases the apprehension and fear of the unknown evil other. As visible in figure 4 the salience of "evil" metaphors in the media again correlates with level of concern of terrorism in the public.

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<sup>16</sup> For more detail on these metaphorical expressions see Spencer (2010: 124-128).

Figure 4: Salience of “Evil” metaphors in newspapers<sup>17</sup>



<sup>17</sup> The graph is based on data taken from database of Lexis Nexis, searching for the concept of “terrorism” and “evil” in the text body. The newspapers selected include: *The Express Newspapers; The Express; The Guardian; The Mirror; The Daily Mail; The Daily Telegraph; The Independent; The Observer; Morning Star; The Sunday Express; The Sunday Telegraph; The People*. The searches (conducted 15.11.2011) covered a time period between the 1st January – 15th June and 16th June – 31st December each year in order to roughly correspond to the data of the *Eurobarometer* survey in table 2.

## Conclusion

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This paper hopes to have given an insight into the connection between terrorism and the media by indicating the central importance of communication for the strategy of terrorism. It has illustrated that terrorism needs the media. On the one hand the media is vital for a terrorist group as they provide the means of attracting attention and spreading the message of the group. At the same time it has been noted that terrorists provide the media with emotional, exciting and bloody news which help them sell their product. On the other hand, the media can also play an important part in countering terrorism by framing the phenomena in a less fear provoking manner. While, the paper was skeptical of whether a media censorship is the answer to this 'symbiotic' relationship between the two for both normative and pragmatic reasons, it hopes to have shown how the framing of terrorism through linguistic devices such as metaphors can help construct terrorism in a particular kind of way by highlighting certain characteristics and downplaying others. Government officials can actively take part in this construction of terrorism. As for example Ken McDonald, Director of Public Prosecutions, attempted after the July bombings in 2005 when he explicitly criticised the use of war metaphors and instead, for example, pleaded for the use of criminal metaphors:

*London is not a battlefield. Those innocents who were murdered on July 7 2005 were not victims of war. And the men who killed them were not, as in their vanity they claimed on their ludicrous videos, 'soldiers'. [...] We need to be very clear about this. On the streets of London, there is no such thing as a 'war on terror', just as there can be no such things as 'war on drugs'. [...] The fight against terrorism on the streets of Britain is not a war. It is the prevention of crime, the enforcement of our laws and the winning of justice for those damaged by their infringement.<sup>18</sup>*

Although the statements by officials will not always succeed in projecting a complete desired construction of terrorism to the public as only some aspect and snippets will be taken up by the media, the importance of small seemingly trivial linguistic devices such as

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<sup>18</sup> See: [www.telegraph.co.uk/news/uknews/1540399/There-is-no-war-on-terror-says-DPP.html](http://www.telegraph.co.uk/news/uknews/1540399/There-is-no-war-on-terror-says-DPP.html) [15.11.2011].

metaphors can be used to cognitively transfer at least some understandings to the public. This particular kind of framing can for example help reduce the fear generated by the media's constitution of terrorism.

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# Media Censorship and Access to Terrorism Trials: A Social Architecture Analysis

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# MEDIA CENSORSHIP AND ACCESS TO TERRORISM TRIALS: A SOCIAL ARCHITECTURE ANALYSIS

DERIGAN SILVER\*

## I. INTRODUCTION

Although censorship, in its most basic form, deals with prior restraints on the press, because of the judiciary's traditional antipathy toward prior restraints<sup>1</sup>—even when national security information is involved<sup>2</sup>—and the ease of dissemination brought about by the Internet, preventing the media from accessing information has become an alternative to outright media “censorship.” For example, soon after the Pentagon first dealt with the dissemination of national security information via WikiLeaks,<sup>3</sup> Defense Secretary Robert Gates tightened media access to the Pentagon by requiring all department officials to notify the Department of Defense's Office of Public Affairs prior to any communication with the news media or the public.<sup>4</sup> Gates reminded government employees that revealing unclassified but “sensitive, pre-decisional or otherwise restricted information” to the press without approval was prohibited.<sup>5</sup> Similarly, recent terrorism trials have made the federal courts a battleground for access to information related to terrorism and a proxy for media censorship.

Although the U.S. Supreme Court has repeatedly found there is a First Amendment right of access to judicial proceedings for the press and the public,<sup>6</sup> the terrorist attacks of September 11, 2001 gave rise to new access controversies as the government

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1. See, e.g., *Org. for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Near v. Minnesota*, 283 U.S. 697 (1931).

2. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

3. See Stephanie Strom, *Pentagon Sees a Threat from Online Muckrakers*, N.Y. TIMES, Mar. 18, 2010, at A10.

4. Memorandum from Robert Gates, Sec'y of Def., to Deputy Sec. of Def. (July 2, 2010) (on file with author), available at [http://www.rcfp.org/news/items/docs/20100910\\_105806\\_dod\\_memo\\_2.pdf](http://www.rcfp.org/news/items/docs/20100910_105806_dod_memo_2.pdf) (regarding interactions with the media).

5. *Id.*

6. See, e.g., *Press-Enter. Co. v. Riverside County Superior Court*, 478 U.S. 1 (1986) [hereinafter *Press-Enter. II*]; *Press-Enter. Co. v. Riverside Cnty. Superior Court*, 464 U.S. 501 (1984) [hereinafter *Press-Enter. I*]; *Globe Newspaper Co. v.*

sought to close judicial proceedings and seal records in cases with connections to terrorism. The first such controversy began just ten days after the attacks when Chief Immigration Judge Michael J. Creppy issued a directive mandating closure of all "special interest" immigration hearings.<sup>7</sup> In December, 2001, a Michigan immigration judge held a closed hearing to decide if Rabih Haddad, who had overstayed his tourist visa and was suspected of having connections to al-Qaeda, could be deported. Several media organizations, along with members of Haddad's family and the public, sued, contending the closed proceeding was unconstitutional. Both a federal trial court and the U.S. Court of Appeals for the Sixth Circuit agreed that the First Amendment right of access established in *Richmond Newspapers, Inc. v. Virginia*<sup>8</sup> applied, even though the immigration hearings were not actually court proceedings but administrative, quasi-judicial proceedings. The courts held that the Creppy directive requiring blanket closure of all "special interest" hearings was unconstitutional.<sup>9</sup> A few months later, however, in a case involving closed deportation hearings in Newark, New Jersey, the Third Circuit issued a contradictory decision, ruling 2-1 that there was no constitutional right of access to such proceedings.<sup>10</sup> In 2003, the U.S. Supreme Court refused to hear an appeal in the case, thereby failing to resolve the conflict between the two circuits.<sup>11</sup>

Five years later, the Court's 2008 ruling that foreign detainees at Guantánamo Bay have the right to challenge their imprisonment in civilian courts opened the door for more battles over government secrecy.<sup>12</sup> In more than 100 cases brought as a result of the ruling, the Justice Department filed unclassified documents under seal, thereby restricting access to judges, lawyers and government officials. The secrecy, the government said, was

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Superior Court, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

7. E-mail from Michael Creppy, Chief Immigration Judge of the U.S., to all Immigration Judges (Sept. 21, 2001, 12:20 PM) (on file with author), available at <http://fll.findlaw.com/news.findlaw.com/hdocs/docs/aclu/creppy092101memo.pdf>. (regarding cases requiring special procedures). "Special interest" cases are those in which sensitive or national security information may be presented, including any information related to terrorist investigations.

8. 448 U.S. at 573.

9. *Detroit Free Press v. Ashcroft*, 195 F. Supp. 2d 948 (E.D. Mich.), *aff'd*, 303 F.3d 681 (6th Cir. 2002).

10. *N.J. Media Group, Inc. v. Ashcroft*, 308 F.3d 198 (3d Cir. 2002), *cert. denied*, 538 U.S. 1056 (2003).

11. *N.J. Media Group, Inc. v. Ashcroft*, 538 U.S. 1056 (2003).

12. *Boumediene v. Bush*, 553 U.S. 723 (2008).

necessary because some unclassified documents mistakenly contained classified information. On June 1, 2009, a federal district judge ruled the wholesale sealing of unclassified documents violated the public's First Amendment and common law right of access to judicial records.<sup>13</sup> "Public interest in Guantánamo Bay generally and these proceedings specifically has been unwavering. The public's understanding of the proceedings, however, is incomplete without the factual returns. Publicly disclosing the factual returns would enlighten the citizenry and improve perceptions of the proceedings' fairness," Judge Thomas Hogan wrote.<sup>14</sup> He gave the government until July 29 to make public the unclassified documents or request continued secrecy for specific words or lines highlighted in colored marker with an explanation of why the material should be protected.<sup>15</sup>

Unfortunately, these battles have continued well into 2010. In April, a federal appeals court judge abruptly closed the courtroom just one minute after arguments began in the case of a Guantánamo Bay detainee.<sup>16</sup> The move was particularly unsettling because the detainee's representative and the Justice Department had both consented to a public hearing. In May, the Pentagon barred four reporters from reporting on the military commission proceedings at Guantánamo Bay because they published articles identifying a witness whose identity had been protected by the presiding judge, even though the witness's name had already been released to the public on multiple occasions.<sup>17</sup> Although the Pentagon recently received praise from news organizations that had protested Guantánamo policies as unduly restrictive when the Department of Defense (DOD) revised its rules for reporters covering military trials at Guantánamo,<sup>18</sup> these incidents show that the battles over access and

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13. *In re Guantánamo Bay Detainee Litig.*, 624 F. Supp. 2d 27 (D.D.C. 2009).

14. *Id.* at 37.

15. *Id.* at 34. See also *Parhat v. Gates*, 532 F.3d 834, 853 (D.C. Cir. 2008) (ordering the government to "specifically explain[] why protected status is required for the information" it sought to keep secret).

16. See Nadia Tamez-Robledo, *D.C. Appeals Court Suddenly Closes Guantánamo Detainee Hearing*, REPS. COMMITTEE FOR FREEDOM PRESS (Apr. 5, 2010), <http://www.rcfp.org/newsitems/index.php?i=11353>.

17. See Jeff Stein, *Papers Protest Reporters' Ejection From Guantánamo*, WASH. POST SPY TALK (May 6, 2010), [http://blog.washingtonpost.com/spy-talk/2010/05/papers\\_protest\\_reporters\\_eject.html](http://blog.washingtonpost.com/spy-talk/2010/05/papers_protest_reporters_eject.html).

18. See Rosemary Lane, *Pentagon Relaxes Reporter Guidelines at Guantánamo Bay*, REPS. COMMITTEE FOR FREEDOM PRESS, (Sept. 14, 2010, 6:19 PM), <http://www.rcfp.org/newsitems/index.php?i=11555> (noting that new guidelines allowed media organizations to use edited photos and videos, narrowed the definition of "protected information," and provided for an appeals process in

media censorship are far from settled. In addition, they raise numerous important questions about the balance of power between the government, the people and the press in the United States of America.

This Article contends that using the social architecture metaphor—which focuses on how the law creates and distributes power between groups—is particularly well suited to understanding the importance of access to the trials of terrorist suspects. Specifically, the article argues it is important that the “architecture of power”<sup>19</sup> created by the U.S. Supreme Court in cases that have provided for a First Amendment right of access to criminal trials not be replaced with an architecture that more closely resembles cases that have dealt with access to national security information and locations. In these cases, rather than decide cases by focusing on the societal benefits of open government, courts have typically focused on the individual facts of each case without an eye toward the larger social architecture the decisions create. This article posits that an architecture of presumptive access that still allows for a case-by-case closure—as opposed to an architecture of presumptive secrecy with case-by-case disclosure—is consistent with the original architecture of the Constitution and First Amendment and advances trust in the government as it fights terrorism.

Part II discusses social architecture theory and the law, with a focus on how the theory has been applied to cases involving access to government information. Part III examines the social architecture of the Supreme Court’s rulings in cases that have established a First Amendment right of access to judicial proceedings. Part IV describes cases in which courts have considered a First Amendment right of access to national security information and locations and the architecture—or lack of architecture—created by these cases.<sup>20</sup> Part V argues that if this architecture is applied to terrorism trials, it will breed distrust of the government and its handling of terrorism and undermine the independence of the judiciary. In addition, it argues that limit-

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which organizations could challenge decisions to classify information as “protected”). See also U.S. DEP’T OF DEF., MEDIA GROUND RULES FOR GUANTÁNAMO BAY, CUBA (Sept. 10, 2010), <http://www.defense.gov/news/d20100910groundrules.pdf> [hereinafter GUANTÁNAMO MEDIA GROUND RULES].

19. Daniel J. Solove, *Digital Dossiers and the Dissipation of Fourth Amendment Privacy*, 75 S. CAL. L. REV. 1083, 1087 n.19 (2002) (the term “architecture of power” refers to a “particular power structure [created] . . . by the law.”).

20. Because the Supreme Court has considered so few cases dealing with access to national security information, this section discusses both Supreme Court cases and lower court cases dealing with a First Amendment based right of access.

ing access to these proceedings is unnecessary because of the allowance for case-by-case closure and the ability of federal judges to use the Classified Information Procedures Act (CIPA),<sup>21</sup> which is designed to protect national security information during federal criminal proceedings. Finally, this Article contends that through the use of proper public policy, such as the Pentagon's new guidelines, judicial decisions and statutory law, such as CIPA, the architecture established by the Constitution, the First Amendment and the Court's judicial access jurisprudence can be used to reinforce the public's right to know about the prosecution of terrorists, advance the press' ability to report on matters of public concern and strengthen the independence of the judiciary.

## II. SOCIAL ARCHITECTURE THEORY AND THE LAW

Several authors have used the social architecture metaphor to "emphasize that legal and social structures are products of design"<sup>22</sup> and judicial decisions create architectures of power that can determine who controls information. Applying the concept to privacy law, Daniel J. Solove, one of the first scholars to apply the term "social architecture" to refer to the social structures created by law,<sup>23</sup> wrote that the metaphor captures how the law structures social control and freedom in a society.<sup>24</sup> Just as the architecture of a building can be designed to determine how people interact,<sup>25</sup> Solove and others suggest that social architecture can be designed by law to determine how groups interact in society.<sup>26</sup> Legal and computer science scholar Barbara van Schewick wrote, "Just as the architecture of a house describes its basic inner structure, the architecture of a complex system describes the basic inner structure of the system."<sup>27</sup> The term "architecture" has been used to describe how computer code can

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21. 18 U.S.C. app. 3 §§ 1-16 (2006).

22. Daniel J. Solove, *Identity Theft, Privacy, and the Architecture of Vulnerability*, 54 HASTINGS L.J. 1227, 1239 (2003).

23. Solove credited Lawrence Lessig and Joel R. Reidenberg for the idea that architecture refers to more than the design of physical spaces. See Solove, *supra* note 19, at 1087 n.19; Solove, *supra* note 22 at 1239.

24. Solove, *supra* note 22, at 1239.

25. See generally THOMAS A. MARKUS, BUILDINGS AND POWER: FREEDOM AND CONTROL IN THE ORIGIN OF MODERN BUILDING TYPES (1993) (describing how architecture can be used to influence social structure); Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039 (2002) (describing how the way that neighborhoods and buildings are designed can affect criminal behavior).

26. Solove, *supra* note 22, at 1239.

27. BARBARA VAN SCHEWICK, INTERNET ARCHITECTURE AND INNOVATION 3 (2010).

determine whether the Internet is a vehicle for freedom of expression or an instrument of control,<sup>28</sup> to examine judicial behavior in a collegial context by exploring how judicial behavior is impacted by socially prominent and proximate jurists,<sup>29</sup> and to analyze the public policy and technological foundations of telecommunication and Internet companies and technologies that promote the dissemination of information by private citizens.<sup>30</sup>

Recently, social architecture theory has also been applied to laws governing access to government information,<sup>31</sup> congressional deliberations regarding a federal shield law,<sup>32</sup> and the power relationships created by cases dealing with national security information.<sup>33</sup> Professor Cathy Packer wrote that law is both the means and the product of a construction process and that legal analysis that goes beyond discussing individual cases by examining the architecture they create “brings a much clearer understanding of the impact of and solutions for a variety of legal problems.”<sup>34</sup> The key idea behind the social architecture metaphor is that creating an architecture of power is about “the common good as much as it is about individual rights.”<sup>35</sup> Packer wrote that when courts discuss the distribution of power between groups they are actively creating architecture, whether they acknowledge it or not, in addition to deciding individual cases. For example, Packer wrote, “[O]ne of the clearest examples of a court constructing social architecture” is *New York Times v. Sulli-*

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28. See, e.g., LAWRENCE LESSIG, *CODE 2.0*, at 2 (2006); SCHEWICK, *supra* note 27, at 3; Joel R. Reidenberg, *Lex Informatica: The Formulation of Information Policy and Rules Through Technology*, 76 *TEX. L. REV.* 553, 553–55 (1998); Joel R. Reidenberg, *Rules for the Road for Global Electronic Highways: Merging Trade and Technical Paradigms*, 6 *HARV. J.L. & TECH.* 287, 296 (1999); Timothy Wu, *Network Neutrality, Broadband Discrimination*, 2 *J. ON TELECOMM. & HIGH TECH. L.* 141 (2003).

29. See Daniel M. Katz, Derek K. Stafford, & Eric Provins, *Social Architecture, Judicial Peer Effects and the Evolution of the Law: Toward a Positive Theory of Judicial Social Structure*, 24 *GA. ST. U. L. REV.* 977 (2008).

30. See Jack M. Balkin, *Media Access: A Question of Design*, 76 *GEO. WASH. L. REV.* 933 (2008).

31. See Cathy Packer, *Don't Even Ask! A Two-Level Analysis of Government Lawsuits Against Citizen and Media Access Requestors*, 13 *COMM. L. & POL'Y* 29 (2008).

32. See Cathy Packer, *The Politics of Power: A Social Architecture Analysis of the 2005–2008 Federal Shield Law Debate in Congress*, 31 *HASTINGS COMM. & ENT. L.J.* 395 (2009).

33. See Derigan Silver, *Power, National Security and Transparency: Judicial Decision Making and Social Architecture in the Federal Courts*, 15 *COMM. L. & POL'Y* 129 (2010).

34. Packer, *supra* note 31, at 39.

35. Solove, *supra* note 19, at 1116.

*van*,<sup>36</sup> in which “the Court empowered the media to scrutinize the behavior of government officials by creating a constitutional defense against libel suits filed by public officials.”<sup>37</sup> According to Packer, “[T]he social architecture created by *Sullivan* tipped the balance of power toward government critics and away from government officials.”<sup>38</sup> Professor Jack Balkin, on the other hand, noted that *Sullivan* was just as important in that it created architecture that favored “powerful media organizations” increasing their private power without necessarily granting any power to private citizens.<sup>39</sup> Thus, the case is so important because it created an architecture of power that went beyond the protection of an individual right and created an architecture of power between the press and the government as well as between the press and the people.

In addition to providing a metaphor for how law structures the power relationship between individuals or groups and the government, social architecture theory is an excellent conceptual framework for examining how power is distributed among the branches of government. In this way, social architecture is simply a new way to describe the important concept of separation of power outlined by individuals such as James Madison, who wrote at length about the distribution of power in *The Federalist*.<sup>40</sup> As Packer noted, “While the social architecture metaphor is new in the law, the idea that law distributes power” was a key issue for the Framers of the Constitution.<sup>41</sup> In addition, political scientists have noted that the power structures established by the Constitution are the beginning of the process, rather than the end. For example, although they did not use the term social architecture, basing their analysis on the strategic account of judicial decision-making, Lee Epstein and Jack Knight wrote that members of the

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36. 376 U.S. 254 (1964).

37. Packer, *supra* note 31, at 33 n.23.

38. Packer, *supra* note 32, at 404.

39. Balkin, *supra* note 30, at 943. It is important to note that lower courts continue to struggle with who should receive protection in defamation cases. Although *Sullivan* focused on the identity of the plaintiff in a defamation suit and a later Supreme Court case, *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), focused on the subject matter of the defamatory statement, due to dicta in multiple Supreme Court opinions some lower courts still focus on the identity of the *defendant* in defamation cases. These courts continue to hold that private citizens are not granted the same level of protection—or architecture of power—as media defendants when sued for defamatory statements. See Ruth Walden & Derigan Silver, *Deciphering Dun & Bradstreet: Does the First Amendment Matter in Private Figure-Private Concern Defamation Cases?*, 14 COMM. L. & POL'Y 1, 31–34 (2009).

40. See THE FEDERALIST NOS. 47, 48, 51 (James Madison).

41. Packer, *supra* note 32, at 398.

judiciary must actively balance their desires with the powers and desires of other government institutions.<sup>42</sup> They argued that judges must be strategic actors who consider the preferences of other actors and the institutional context in which they act. According to this line of reasoning, judges must be cognizant of the power structure that exists between the branches of government and behave strategically when making decisions that alter or affect that architecture.

### III. ACCESS TO THE COURTS

#### A. *Supreme Court Cases*

The U.S. Supreme Court has found that the First Amendment guarantees a broad right of access to criminal judicial proceedings and documents. It is important to note, however, that the Court did not initially frame access to the judiciary as a First Amendment issue. Although the Court addressed judicial secrecy in a number of cases between 1947 and 1966,<sup>43</sup> the Court discussed access in terms of the Sixth Amendment, not the First, and said the Sixth Amendment right to a public trial belonged to the accused, rather than the public or the press.<sup>44</sup> For example, in a 1979 case involving a pretrial evidence suppression hearing, the Court wrote, "The Constitution nowhere mentions any right of access to a criminal trial on the part of the public; its guarantee, like the others enumerated, is personal to the accused."<sup>45</sup>

In 1978, the Court considered a right of access to judicial documents in *Nixon v. Warner Communications, Inc.*,<sup>46</sup> when television networks appealed an order of the U.S. District Court for

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42. See LEE EPSTEIN & JACK KNIGHT, *THE CHOICES JUSTICES MAKE* 10 (1998). See also Robert Lowry Clinton, *Game Theory, Legal History, and the Origins of Judicial Review: A Revisionist Analysis of Marbury v. Madison*, 38 AM. J. POLI. SCI. 285 (1994); Lori Hausegger & Lawrence Baum, *Inviting Congressional Action: A Study of Supreme Court Motivations in Statutory Interpretation*, 43 AM. J. POLI. SCI. 162 (1999); Jack Knight & Lee Epstein, *On the Struggle for Judicial Supremacy*, 30 LAW & SOC'Y REV. 87 (1996).

43. See, e.g., *Sheppard v. Maxwell*, 384 U.S. 333, 349-50 (1966) (stating that the Supreme Court has traditionally been unwilling to place direct limitations on the freedom of the news media to report on courtroom proceedings); *Estes v. Texas*, 381 U.S. 532, 538-39 (1965) (discussing the importance of public trials); *In re Oliver*, 333 U.S. 257, 268-69 (1948) (discussing the "Anglo-American distrust for secret trials"); *Craig v. Harney*, 331 U.S. 367, 374 (1947) ("A trial is a public event. What transpires in the court room is public property.").

44. See, e.g., *In re Oliver*, 333 U.S. at 266-68 (discussing the purpose of the Sixth Amendment).

45. *Gannett Co. v. DePasquale*, 443 U.S. 368, 379-80 (1979).

46. 435 U.S. 589 (1978).

the District of Columbia that held that the networks could not make copies of tape recordings made by the Nixon administration and introduced into evidence at the Watergate criminal trials. Although the Court acknowledged a common law right of access to documents in the possession of the judiciary,<sup>47</sup> instead of framing the question in terms of access, the Court ducked the question of a right of access and took a position that was not argued by either side or contained in any brief.<sup>48</sup> Instead of ruling on the existence of a right of access, the Court held that the release of the records would ultimately be controlled by the Presidential Recordings Act.<sup>49</sup> Writing for the Court, Justice Lewis F. Powell, Jr. justified this rationale by relying on a textual analysis of the Act<sup>50</sup> and the reasoning that courts were not as well equipped to handle the details of access to presidential records as were the other two branches of government.<sup>51</sup> The Court failed to address any of the major legal issues raised by either side in a meaningful way, dismissing any access arguments in one short section by citing *Saxbe v. Washington Post Co.*, *Pell v. Procunier* and *Zemel* for the proposition that the press had no greater rights of access than the public.<sup>52</sup>

One year later, in *Gannett Co. v. DePasquale*,<sup>53</sup> the Court once again dismissed the First Amendment claims of the press, focusing on the Sixth Amendment instead. *Gannett* involved the closure of a courtroom during a pretrial hearing to suppress evidence in a murder case.<sup>54</sup> Although the trial judge indicated there was a constitutional right of access to judicial proceedings, he concluded that such a right had to be balanced with the

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47. *Id.* at 597.

48. *Id.* at 602–03 (“At this point, we normally would be faced with the task of weighing the interests advanced by the parties in light of the public interest and the duty of the courts. . . . We need not decide how the balance would be struck if the case were resolved only on the basis of the facts and arguments reviewed above. There is in this case an additional, unique element that was neither advanced by the parties nor given appropriate consideration by the courts below.”).

49. *Id.* at 603. The Presidential Recordings Act is currently codified at 44 U.S.C. §§ 2201–2207 (2006).

50. *Nixon*, 435 U.S. at 603 n.15. Both sides argued that the Act did not apply to the records. The Court quoted from the text of the Act to support its ruling that it did.

51. *Id.* at 606.

52. *Id.* at 608–10 (citing *Estes v. Texas*, 381 U.S. 532, 589 (1965) (Harlan, J., concurring); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974); *Zemel v. Rusk*, 381 U.S. 1, 16–17 (1965)).

53. 443 U.S. 368 (1979).

54. *Id.* at 375.

accused's right to a fair trial.<sup>55</sup> Relying upon *In re Oliver*<sup>56</sup> and *Estes v. Texas*<sup>57</sup> to support its argument, the Court ruled that the "constitutional guarantee of a public trial is for the benefit of the accused."<sup>58</sup> Although Justice Potter Stewart's majority opinion discussed the need for transparency in a democracy,<sup>59</sup> ultimately Stewart concluded that "[r]ecognition of an independent public interest in the enforcement of Sixth Amendment guarantees is a far cry . . . from the creation of a constitutional right on the part of the public."<sup>60</sup> Stewart avoided discussing *Gannett's* claim that the order violated the First Amendment by noting even if there was such a right,<sup>61</sup> the trial judge had already dealt with the issue by weighing the competing societal interests involved.<sup>62</sup>

Despite these rulings, in 1980—just one year after *Gannett*—the Court limited the ability of judges to bar the public from attending trials based on the First Amendment in *Richmond Newspapers, Inc. v. Virginia*<sup>63</sup> and began the process of creating an architecture of presumptive access. *Richmond* began when a judge ordered a courtroom closed during a murder trial.<sup>64</sup> Although the trial was over, in a seven-to-one decision that produced seven different opinions, the Court reversed the order for closure, holding that the First Amendment prohibited closing a criminal trial to the public "[a]bsent an overriding interest articulated in findings."<sup>65</sup>

The various opinions in *Richmond* focused heavily on historical and structural/functional analyses of the First Amendment's role in self-governance. In part, *Gannett* explains this—because the Court had just ruled the previous term there was no constitutional right of access to trials under the Sixth Amendment, the justices had to distinguish *Richmond* by finding a right of access in

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55. *Id.* at 392–93.

56. 333 U.S. 257 (1948).

57. 381 U.S. 532 (1965).

58. *Gannett*, 443 U.S. at 381.

59. *Id.* at 383.

60. *Id.* Furthermore, the Court noted that even if there had been a common law right to attend trials that was intended to be incorporated by the Sixth Amendment, there was certainly no evidence there had ever been a common law right to attend pretrial hearings. *Id.* at 387–89.

61. *Id.* at 392. ("We need not decide in the abstract, however, whether there is any such constitutional right. For even assuming, *arguendo*, that the First and Fourteenth Amendments may guarantee such access in some situations, a question we do not decide, this putative right was given all appropriate deference by the state *nisi prius* court in the present case.")

62. *Id.* at 392–93.

63. 448 U.S. 555 (1980).

64. *Id.* at 559.

65. *Id.* at 581.

the First Amendment. Although Chief Justice Warren Burger's plurality opinion distinguished *Richmond* from *Gannett* because it dealt with *trials* as opposed to *pretrial hearings*,<sup>66</sup> as Justice Harry Blackmun pointed out in his concurring opinion, the *Gannett* majority wrote twelve separate times that its opinion applied "to the *trial* itself."<sup>67</sup> Thus, as Justice Byron White noted in his concurring opinion, because of *Gannett* the Court was "required" to make *Richmond* a First Amendment case.<sup>68</sup>

Chief Justice Burger's plurality spent ten pages discussing "the history of criminal trials being presumptively open" and the benefits openness brings to society.<sup>69</sup> Considering the benefits of transparency, Burger wrote that "[p]eople in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."<sup>70</sup> Justice William Brennan's concurring opinion also delved deeply into historical analysis, examining the "legacy of open justice" to conclude that "[a]s a matter of law and virtually immemorial custom, public trials have been the essentially unwavering rule in ancestral England and in our own Nation."<sup>71</sup>

Chief Justice Burger's plurality also included a functional analysis of the First Amendment, discussing the "right of access," the "right to gather information," and the "right to receive information and ideas," all rights he found in the First Amendment.<sup>72</sup> Burger went on to examine "constitutional structure" and the Framers' intent, reasoning that even though the Constitution contained no provision explicitly guaranteeing the right to attend criminal trials, the Court had recognized that some unenumerated fundamental rights were "indispensable to the enjoyment of rights explicitly defined."<sup>73</sup>

Justice Brennan's concurrence also discussed democratic theory, the structural benefits of openness to society,<sup>74</sup> how dif-

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66. *Id.* at 564.

67. *Id.* at 601-02 (Blackmun, J., concurring).

68. *Id.* at 581-82 (White, J., concurring) ("This case would have been unnecessary had [*Gannett*] construed the Sixth Amendment to forbid excluding the public from criminal proceedings except in narrowly defined circumstances. But the Court there rejected the submission of four of us to this effect, thus *requiring* that the First Amendment issue involved here be addressed." (emphasis added)).

69. *Id.* at 564-75 (plurality).

70. *Id.* at 572.

71. *Id.* at 590-93 (Brennan, J., concurring).

72. *Id.* at 576 (plurality). Ultimately, Burger concluded it was not crucial how the right was described. *Id.*

73. *Id.* at 580.

74. *Id.* at 593-97 (Brennan, J., concurring).

ferent First Amendment theories or values might support a right of access, and the "countervailing interests" that might justify restricting access.<sup>75</sup> While Justice John Paul Stevens also discussed how to balance access and other interests,<sup>76</sup> he wrote that the case represented a landmark First Amendment decision that newsgathering was protected. Stevens wrote: "This is a watershed case. Until today the Court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever."<sup>77</sup> Importantly, Justice Stevens' opinion suggested the case was about a broad right of access that included—but might not be limited to—access to the judiciary,<sup>78</sup> a fact that would later be discussed by several cases dealing with access to national security information.

Two years after *Richmond*, the Court continued to expand access to the judiciary based on the First Amendment. In *Globe Newspaper Co. v. Superior Court*<sup>79</sup> the Court held unconstitutional a Massachusetts statute<sup>80</sup> that had been construed as requiring trial judges to exclude the press and public from trials for sexual offenses involving a victim under the age of 18 during the testimony of the victim. Writing for the six-to-three majority, Justice Brennan held that a court could only deny the constitutional right of access to trials on a case-by-case basis when the denial was necessary to advance a compelling governmental interest and was narrowly tailored to serve that interest.<sup>81</sup>

In *Globe*, Brennan elaborated on the structural benefits transparency brings. Although Brennan was quick to acknowledge that the right of access to the judiciary was not explicitly mentioned in the First Amendment, he relied on the Framers' intent to support his claim that there was a broad constitutional right of access. He wrote:

[T]he Framers were concerned with broad principles, and wrote against a background of shared values and practices. The First Amendment is thus broad enough to encompass those rights that, while not unambiguously enumerated in

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75. *Id.* at 597-600.

76. *Id.* at 583 (Stevens, J., concurring).

77. *Id.* at 582.

78. *Id.* at 584 ("[T]he First Amendment protects the public and the press from abridgment of their rights of access to information about the operation of their government").

79. 457 U.S. 596 (1982).

80. MASS. GEN. LAWS ANN., ch. 278, § 16A (West 1981).

81. *Globe*, 457 U.S. at 607.

the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights.<sup>82</sup>

Brennan went on to cite and quote previous decisions that supported the idea that a right of access was protected by the First Amendment because access was necessary to protect the free flow of information about government in order to ensure the proper functioning of a democratic society.<sup>83</sup> Brennan also wrote that the right of access was protected by the Amendment both because of the history of open judicial proceedings and the "particularly significant role" a right of access to the judiciary "play[ed] . . . in the functioning of the judicial process and the government as a whole."<sup>84</sup> Thus, like Stevens' concurring opinion in *Richmond*, Brennan's language suggested that access to the judiciary was just one part of a broader constitutional right of access.

The Court continued to expand access to courtrooms in the 1980s, consistently deciding the cases based on a First Amendment right of access, or at least a need to balance access with the proper functioning of the judicial system. In 1984, in *Press-Enterprise Co. v. Riverside County Superior Court (Press-Enterprise I)*,<sup>85</sup> the Court ruled that as an integral part of a criminal trial, jury selection was subject to the First Amendment presumption of openness. In the opinion of the Court, Burger used both the historical arguments<sup>86</sup> he articulated in previous cases and Brennan's discussion of the structural benefits openness brings to the justice system.<sup>87</sup> Perhaps the most detailed First Amendment argument came in Justice Stevens' concurring opinion. Once again, the language of Stevens' opinion was not limited to the benefits of transparency in the judicial process. Returning to his focus on democratic theory and the benefits of open government, Stevens wrote that access to the judiciary was simply a part of a greater right of access to information held by the government.<sup>88</sup>

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82. *Id.* at 604.

83. *Id.* at 604–05 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966), and citing *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940); *Richmond*, 448 U.S. at 587–88 (Brennan, J., concurring); *id.* at 575 (plurality) (the "expressly guaranteed freedoms" of the First Amendment "share a common core purpose of assuring freedom of communication on matters relating to the functioning of government").

84. *Id.* at 606.

85. 464 U.S. 501 (1984).

86. *Id.* at 506–08.

87. *Id.* at 508–10.

88. *Id.* at 517 (Stevens, J., concurring) (quoting *Richmond*, 448 U.S. at 575 (plurality opinion); *id.* at 584 (Stevens, J., concurring)). In addition, Stevens

In 1986, in *Press Enterprise v. Riverside County Superior Court* (*Press-Enterprise II*),<sup>89</sup> the Court held that a First Amendment-based presumption of openness extended to criminal pretrial hearings as well. Writing for the majority once again, Chief Justice Burger used both historical and structural arguments to establish a test for deciding when a particular type of judicial proceeding was presumptively open. Under the so-called "experience and logic" test, if a court proceeding was traditionally open to the public and "public access play[ed] a significant positive role in the functioning of the particular process in question," the proceeding was presumptively open to the public.<sup>90</sup>

Interestingly, using historical analysis and First Amendment theory to support his arguments, Justice Stevens dissented. Although Stevens again clearly stated his belief that "a proper construction of the First Amendment embraces a right of access to information about the conduct of public affairs,"<sup>91</sup> he disagreed that preliminary hearings in criminal trials should be open. Citing his own dissent in *Globe* as well as his own concurring opinion in *Richmond*, Stevens wrote, "[T]he freedom to obtain information that the government has a legitimate interest in not disclosing . . . is far narrower than the freedom to disseminate information, which is 'virtually absolute' in most contexts."<sup>92</sup> Stevens contended that the majority's historical analysis did not support a constitutional right of access because Burger's discussion focused on common law access<sup>93</sup> while its structural analysis would go too far, requiring almost all judicial proceedings, including civil and grand jury proceedings, to be open to the public.<sup>94</sup> Although Stevens reaffirmed his belief in a constitutional right of access, he wrote that in the situation at hand, "The constitutionally grounded fair trial interests of the accused if he is bound over for trial, and the reputation interests of the accused if he is not, provide a substantial reason for delaying access to the transcript for at least the short time before trial."<sup>95</sup>

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cited two cases, *Zemel v. Rusk*, 381 U.S. 1, 17 (1966) and *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972), in which, according to Stevens, the Court had "implicitly endorsed" a right of access.

89. 478 U.S. 1 (1986).

90. *Id.* at 8.

91. *Id.* at 18 (Stevens, J., dissenting).

92. *Id.* at 20.

93. *Id.* at 24-25.

94. *Id.* at 26-28.

95. *Id.* at 29.

#### IV. ACCESS TO NATIONAL SECURITY INFORMATION AND LOCATIONS

##### A. *Supreme Court Cases*

Although there is evidence that military documents were marked “secret” as early as the Revolutionary War, the official system that controls classified information in the United States traces its origins to an executive order<sup>96</sup> issued by Franklin D. Roosevelt in March 1940.<sup>97</sup> The system was modified shortly after the conclusion of World War II,<sup>98</sup> and important changes came again in an executive order issued in September 1951.<sup>99</sup> Nineteen years after President Roosevelt created the modern classification system, the Supreme Court first reviewed the executive’s ability to classify national security information in a case involving the government’s revocation of a civilian contractor’s security clearance in *Greene v. McElroy*.<sup>100</sup> Although on the surface the case was not about access to national security information, an important dissent in the case made it the first time a member of the Supreme Court wrote about the power of the executive branch to prevent access to national security information.

In 1951, William L. Greene was vice president and general manager of Engineering and Research Corporation (ERCO), a company that developed and manufactured various mechanical and electronic products for the armed forces.<sup>101</sup> While working on classified projects, Greene was denied a renewal of his security clearance based on information indicating he had associated with Communists, visited officials of the Russian Embassy, and

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96. Exec. Order No. 8,381, 3 C.F.R. 634 (1938–1943).

97. HAROLD C. RELYEA, CONG. RES. SERVICE, SECURITY CLASSIFIED AND CONTROLLED INFORMATION: HISTORY, STATUS, AND EMERGING MANAGEMENT ISSUES 2 (2008), <http://www.fas.org/sgp/crs/secrecy/RL33494.pdf>.

98. Exec. Order No. 10,104, 3 C.F.R. 299 (1949–1953), *reprinted as amended in* 18 U.S.C. § 795 (1970).

99. Exec. Order No. 10,290, 3 C.F.R. 789 (1949–1953). There were three “sweeping innovations” introduced in Executive Order 10,290. First, because the order indicated the Chief Executive was relying upon “the authority vested in [him] by the Constitution and statutes, and as President of the United States,” it strengthened the President’s discretion to make official secrecy policy. Second, information was now classified in the interest of “national security” rather than in the interest of “national defense.” Finally, the order extended classification authority to nonmilitary entities throughout the executive branch so long as they had “some role in ‘national security’ policy.” See RELYEA, *supra* note 97, at 3. For a discussion of the evolution of the ability to classify information from 1953 to 2008, see *id.* at 3–5.

100. *Greene v. McElroy*, 360 U.S. 474 (1959).

101. *Id.* at 475.

attended a dinner given by an allegedly Communist front organization.<sup>102</sup> Although the court of appeals recognized that Greene had suffered substantial harm from having his security clearance revoked, it held that Greene's suit presented no justiciable controversy. That is, the court held there was no controversy present "which the courts can finally and effectively decide, under tests and standards which they can soundly administer within their special field of competence."<sup>103</sup> The court concluded the executive branch alone was responsible for the classification of national security information.<sup>104</sup>

Although the case presented issues related to the inherent powers of Congress and the President to control national security information, avoiding the larger issues presented by the case, the Supreme Court identified the principle question of law as whether Greene had been denied due process. In an opinion by Chief Justice Earl Warren, the Court validated Greene's claim that the DOD had "denied him 'liberty' and 'property' without 'due process of law' in contravention of the Fifth Amendment."<sup>105</sup> The Court held that without explicit authorization from either the President or Congress, the DOD was not empowered to create a security clearance program "under which affected persons may lose their jobs and may be restrained in following their chosen professions on the basis of fact determinations concerning their fitness for clearance made in proceedings in which they are denied the traditional procedural safeguards of confrontation and cross-examination."<sup>106</sup> Thus, the majority was very clear that it was steering away from legal questions of access and executive power.<sup>107</sup>

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102. *Id.* at 478.

103. *Greene v. McElroy*, 254 F.2d 944, 953 (D.C. Cir. 1958) ("Greene makes no claim of lack of compliance by the Government with its own regulations. He attacks the Secretary's decision on its merits and as a matter of constitutional right. But for a court to hear de novo the evidence as to Greene's fitness to be assigned to a particular kind of confidential work would be a bootless task, involving judgments remote from the experience and competence of the judiciary.")

104. *Id.* ("[A]ny meaningful judgment in such matters must rest on considerations of policy, and decisions as to comparative risks, appropriate only to the executive branch of the Government. It must rest also on a mass of information, much of it secret, not appropriate for judicial appraisal." (citing *Dayton v. Dulles*, 254 F.2d 71 (D.C. Cir. 1958), *rev'd on other grounds*, 357 U.S. 144 (1958))).

105. *Greene*, 360 U.S. at 492.

106. *Id.* at 493.

107. *See id.* at 508 (reiterating that the Court was not deciding "whether the President has inherent authority" to create a program that suspended due

Justice Tom C. Clark, however, wrote an important dissenting opinion, which argued the case presented a “clear and simple” legal question: was there a constitutional right of access to government information?<sup>108</sup> Taking this characterization of the case directly from the Solicitor General’s brief,<sup>109</sup> Clark was critical of the majority’s narrowing of the issue as well as its reasoning. He argued that the Court was ignoring “the basic consideration in the case . . . that no person, save the President, has a constitutional right to access to governmental secrets.”<sup>110</sup> Clark wrote that although the majority’s opinion *claimed* to avoid answering the constitutional question of the executive branch’s ability to classify information, its decision was actually establishing a dangerous precedent during a dangerous time. Alluding to the Cold War, Clark wrote that the Court’s decision to strike down the program “for lack of specific authorization” was “indeed strange, and hard for me to understand at this critical time of national emergency.”<sup>111</sup> In addition, although the majority opinion never mentioned a “right of access” and Clark’s dissent did not specifically mention a First Amendment right of access to government information, Clark concluded that the majority opinion would be read to guarantee some sort of broad right of access in the future.<sup>112</sup>

In *Zemel v. Rusk*, a case which would later be cited by a number of access cases, the Court was asked to determine if Louis Zemel had a First Amendment right to travel to Cuba in order to “satisfy [his] curiosity about the state of affairs in Cuba and make [himself] a better informed citizen.”<sup>113</sup> In 1962, roughly one year after the United States broke diplomatic ties with Cuba and declared U.S. passports invalid for travel to Cuba “unless specifically endorsed for such travel under the authority of the Secretary of State,”<sup>114</sup> Zemel filed a suit seeking a judgment declaring that he was “entitled under the Constitution and laws of the

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process, “whether congressional action” was necessary to create such a program, or even “what the limits on executive or legislative authority may be”).

108. *Id.* at 510–11 (Clark, J., dissenting).

109. *Id.* at 511 n.1 (“My brother Harlan very kindly credits me with ‘colorful characterization’ in stating this as the issue. While I take great pride in authorship, I must say that in this instance I merely agreed with the statement of the issue by the Solicitor General and his co-counsel in five different places in the Brief for the United States.”).

110. *Id.* at 513.

111. *Id.* at 515.

112. *Id.* at 524.

113. 381 U.S. 1, 4 (1965).

114. *Id.* at 3.

United States to travel to Cuba and to have his passport validated for that purpose."<sup>115</sup>

Although the Court acknowledged that banning travel to Cuba and "the Secretary's refusal to validate passports for Cuba renders less than wholly free the flow of information concerning that country," it refused to acknowledge the existence of a First Amendment issue.<sup>116</sup> Instead, relying on a First Amendment theory that did not embrace newsgathering, the Court concluded, "The right to speak and publish does not carry with it the unrestrained right to *gather* information."<sup>117</sup>

While the majority did not agree there was a First Amendment issue at stake, a dissent authored by Justice William O. Douglas and joined by Justice Arthur Goldberg identified a "peripheral" First Amendment issue presented by the case. Relying on *Kent v. Dulles*,<sup>118</sup> Douglas concluded the Court had already established that the right to travel both at home and overseas was protected by the Constitution.<sup>119</sup> Delving deeper into First Amendment theory, Douglas used a classic marketplace of ideas approach to support his contention that although the Secretary could prevent travel to dangerous locations, Cuba did not qualify as such a location.

[T]he only so-called danger present here is the Communist regime in Cuba. The world, however, is filled with Communist thought; and Communist regimes are on more than one continent. They are part of the world spectrum;

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115. *Id.* at 4.

116. *Id.* at 16-17. ("We must agree that the Secretary's refusal to validate passports for Cuba renders less than wholly free the flow of information concerning that country. While we further agree that this is a factor to be considered in determining whether appellant has been denied due process of law, we cannot accept the contention of appellant that it is a First Amendment right which is involved. For to the extent that the Secretary's refusal to validate passports for Cuba acts as an inhibition (and it would be unrealistic to assume that it does not), it is an inhibition of action. There are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow.")

117. *Id.* at 17 (emphasis added).

118. 357 U.S. 116 (1958).

119. *Zemel*, 381 U.S. at 23-24 (Douglas, J., dissenting) ("We held in *Kent v. Dulles* that the right to travel overseas, as well as at home, was part of the citizen's liberty under the Fifth Amendment. That conclusion was not an esoteric one drawn from the blue. It reflected a judgment as to the peripheral rights of the citizen under the First Amendment. The right to know, to converse with others, to consult with them, to observe social, physical, political and other phenomena abroad as well as at home gives meaning and substance to freedom of expression and freedom of the press.")

and if we are to know them and understand them, we must mingle with them . . . .

The First Amendment presupposes a mature people, not afraid of ideas. The First Amendment leaves no room for the official, whether truculent or benign, to say nay or yea because the ideas offend or please him or because he believes some political objective is served by keeping the citizen at home or letting him go.<sup>120</sup>

Douglas concluded his opinion: "Restrictions on the right to travel in times of peace should be so particularized that a First Amendment right is not precluded unless some clear countervailing national interest stands in the way of its assertion."<sup>121</sup>

In 1988, a majority opinion finally addressed a right of access when the Court, in *Department of Navy v. Egan*,<sup>122</sup> ruled that it was solely the executive's role to classify and protect information and make decisions about access to national security information. In 1983, Thomas M. Egan lost his position at the Trident Naval Refit Facility in Bremerton, Washington when he was denied a required security clearance.<sup>123</sup> Egan appealed the decision to the Merit Systems Protection Board as provided by the section of the U.S. Code under which he was dismissed.<sup>124</sup> Although Egan initially won his appeal to the head of the Board, after the full Board ruled it had no power to review security clearance decisions, he appealed to the Court of Appeals for the Federal Circuit. The court of appeals, by a divided vote, reversed the full Board's decision that the Board had no authority to review the merits of a security-clearance decision.<sup>125</sup>

Identifying two legal issues presented—the right of access to information and the power of the executive branch—in a five-to-three decision, the Court reversed. Justice Blackmun's majority opinion began by noting, "It should be obvious that no one has a 'right' to a security clearance."<sup>126</sup> Blackmun wrote that although the statutory language of § 7513, which granted the power to review employment decisions to the Board was important, the

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120. *Id.* at 25–26.

121. *Id.* at 26.

122. 484 U.S. 518 (1988).

123. *Id.* at 520. Egan was denied clearance based upon California and Washington state criminal records for assault and being a felon in possession of a gun and for his failure to disclose on his application for federal employment two earlier convictions for carrying a loaded firearm. *Id.* at 521.

124. 5 U.S.C. § 7513 (1982).

125. *Egan v. Dep't of Navy*, 802 F.2d 1563 (Fed. Cir. 1986).

126. *Egan*, 484 U.S. at 528.

statute did not fundamentally alter the power of the executive under the Constitution to control national security information:

The President, after all, is the Commander in Chief of the Army and Navy of the United States. His authority to classify and control access to information bearing on national security and to determine whether an individual is sufficiently trustworthy to occupy a position in the Executive Branch that will give that person access to such information flows primarily from this constitutional investment of power in the President and exists quite apart from any explicit congressional grant.<sup>127</sup>

Next, Blackmun wrote there was a compelling need to keep information secret and the executive branch had the unique ability to decide what should be kept secret, noting that the Court had long "recognized the Government's 'compelling interest' in withholding national security information from unauthorized persons in the course of executive business."<sup>128</sup> He wrote that "for reasons . . . too obvious to call for enlarged discussion," the protection of classified information must be committed to the broad discretion of the agency responsible<sup>129</sup> and it was "the generally accepted view that foreign policy was the province and responsibility of the Executive."<sup>130</sup> In conclusion he wrote, "Thus, unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs."<sup>131</sup>

### B. Lower Court Cases

In 1973, in *Brunnenkant v. Laird*,<sup>132</sup> a relatively obscure and rarely cited case,<sup>133</sup> the D.C. District Court ruled that the First Amendment prevented the government from removing Siegfried

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127. *Id.* at 527.

128. *Id.* (citing *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980); *United States v. Robel*, 389 U.S. 258, 267 (1967); *United States v. Reynolds*, 345 U.S. 1, 10 (1953); *Totten v. United States*, 9 U.S. 105, 106 (1876)).

129. *Id.* at 529 (quoting *CIA v. Sims*, 471 U.S. 159, 170 (1985)).

130. *Id.* (quoting *Haig v. Agee*, 453 U.S. 280, 293-94 (1981)).

131. *Id.* at 530 (citing *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953); *Burns v. Wilson*, 346 U.S. 137, 142, 144 (1953); *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973); *Schlesinger v. Councilman*, 420 U.S. 738, 757-58 (1975); *Chappell v. Wallace*, 462 U.S. 296 (1983)).

132. 360 F.Supp. 1330 (D.D.C. 1973).

133. Westlaw.com's "Citing References" function reported only a single, unreported case that cited *Brunnenkant*, *Doviak v. Dep't of the Navy*, Appeal No. 01860381, 1987 WL 908627 (E.E.O.C. 1987).

Brunnenkant's security clearance solely for voicing his social and political opinions.<sup>134</sup> Although the court noted that in most cases involving national security the key legal issue was to balance competing interests, it wrote there was no need to engage in balancing here because the evidence overwhelmingly showed that Brunnenkant, a resident alien in the employ of a private contractor working for the U.S. government, lost his security clearance solely for voicing "heterodox political, social and economic views."<sup>135</sup> Relying upon the Supreme Court's ruling in *Bridges v. California*<sup>136</sup> and "other opinions too numerous to cite,"<sup>137</sup> District Judge John H. Pratt granted Brunnenkant's request for declaratory and injunctive relief. Although Pratt mentioned "balancing" competing interests in his opinion, he did not address any separation of powers issues. At no point did he mention deferring to the executive in matters of national security, hint that the court might be exercising its power in an area in was not meant to, or even cite *Greene*.<sup>138</sup>

Four years later, in 1977, the D.C. Circuit Court of Appeals heard two access cases. The first, *United States v. American Telephone & Telegraph, Co.*,<sup>139</sup> addressed national security information and the inherent power of both the executive and legislative branches of government. In the course of an investigation into the Justice Department's wiretapping program, the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce issued a subpoena for all national security request letters in the possession of the American Telephone & Telegraph Co. (AT&T). The Justice Department sued to enjoin AT&T from complying with the subpoena on the grounds "that compliance might lead to public disclosure of the documents, with adverse effect on national security."<sup>140</sup>

The court focused almost entirely on the separation of powers issues. First, the court addressed what it considered the "primary issue"<sup>141</sup> of the case, the political question doctrine.<sup>142</sup>

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134. *Brunnenkant*, 360 F.Supp. at 1332. ("[T]he withdrawal of plaintiff's security clearance, as a result of his expressions of opinion, is an unconstitutional invasion of his rights under the First Amendment.").

135. *Id.*

136. 314 U.S. 252 (1942).

137. *Brunnenkant*, 360 F.Supp. at 1332.

138. The entire opinion only cites one case other than *Bridges*, *United States v. Robel*, 389 U.S. 258 (1967).

139. 567 F.2d 121 (D.C. Cir. 1977).

140. *Id.* at 123-24.

141. *Id.* at 125-26.

142. The political question doctrine deals with the appropriateness of having a case decided by a court. A political question is one "that a court will

Both the legislative branch and the executive branch claimed in their briefs that the court did not have the authority to make a "determination of the propriety of [their] acts."<sup>143</sup> While Congress based its claim of "absolute discretion" on the Speech or Debate Clause,<sup>144</sup> the executive relied "on its obligation to safeguard the national security."<sup>145</sup>

The court disagreed with both parties, holding that "neither the traditional political question doctrine nor any close adaptation thereof is appropriate where neither of the conflicting political branches has a clear and unequivocal constitutional title, and it is or may be possible to establish an effective judicial settlement."<sup>146</sup> Citing the U.S. Supreme Court's 1962 decision in *Baker v. Carr*,<sup>147</sup> the court noted that simply because a political controversy or conflict existed between the other two branches of government did not inherently mean the issue was beyond the competency of the judiciary to decide.<sup>148</sup> Instead, the court wrote, the political question doctrine applied when only one branch had the "constitutional authority" to make a decision that would settle the dispute.<sup>149</sup>

The court then discussed at length which branch had the constitutional authority to control information classified for national security purposes. The court relied on the Framers' intent and the text of the Constitution, in combination with the Supreme Court's decision in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>150</sup> to reach its conclusion. First, the court concluded that the

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not consider because it involves the exercise of discretionary power by the executive or legislative branch." BLACK'S LAW DICTIONARY 1197 (8th ed. 2004).

143. *AT&T*, 567 F.2d at 127.

144. U.S. CONST. art. I, § 6, cl. 1.

145. *AT&T*, 567 F.2d at 127 n.17.

146. *Id.* at 127.

147. 369 U.S. 186, 217 (1962).

148. *AT&T*, 567 F.2d at 126.

149. *Id.* In addition, in a footnote the court cited a number of cases to support its conclusion that "disputes concerning the allocation of power between the branches have often been judicially resolved." *Id.* at n.13 (citing *United States v. Nixon*, 418 U.S. 683 (1974); *Humphrey's Ex'r v. United States*, 295 U.S. 602 (1935); *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952); *Myers v. United States*, 272 U.S. 52 (1926); *Campaign Clean Water, Inc. v. Train*, 489 F.2d 492 (4th Cir. 1973), *vacated on other grounds*, 420 U.S. 136 (1975); *State Highway Comm'n v. Volpe*, 479 F.2d 1099 (8th Cir. 1973)).

150. *Youngstown*, 343 U.S. 579. *Youngstown* involved an executive order issued in response to a strike called by the American Steel Workers Union in the latter part of 1951. The order directed the Secretary of Commerce to take possession of most of the steel mills in the country and keep them running. The Supreme Court held that the seizure order was not within the constitutional power of the President.

Framers did not intend for absolute authority over any area of governance to rest with any of the three branches. According to the court's opinion, the Framers expected that when "conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system."<sup>151</sup>

Next, moving from the Framers' intent to textualism, the opinion addressed the executive branch's claim that the Constitution conferred upon it absolute power in the arena of national security. Judge Harold Leventhal wrote that such a claim was not supported through textual analysis.<sup>152</sup> However, "most significant" to Judge Leventhal was "the fact that the Constitution is largely silent on the question of allocation of powers associated with foreign affairs and national security."<sup>153</sup> The opinion then invoked Justice Robert H. Jackson's much quoted passage from *Youngstown* that such powers are "within a 'zone of twilight' in which the President and Congress share authority or in which its distribution is uncertain."<sup>154</sup>

Thus, after also determining that it did not "accept the concept that Congress' investigatory power is absolute,"<sup>155</sup> the court attempted to balance the executive's interest in national security and Congress' interest in investigating the warrantless wiretapping program by using a "gradual approach."<sup>156</sup> However, while the court's balancing approach was somewhat analogous to the majority's opinion in *Greene*, it framed the case much closer to Clark's dissent, focusing on control of national security information.

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151. *AT&T*, 567 F.2d at 127.

152. *Id.* at 128.

153. *Id.*

154. *Id.* (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)). Jackson's full quotation reads:

When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law.

*Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

155. *AT&T*, 567 F.2d at 130.

156. *Id.* at 131.

Just a few months after its decision in *AT&T*, the D.C. Circuit was called upon in *Sherrill v. Knight*<sup>157</sup> to determine if the First Amendment rights of a journalist were violated by the White House's refusal to grant a press pass. While the case did not directly implicate national security information *per se*, it was decided as an access case, dealing with the ability of the executive branch of the government to curtail newsgathering based on concerns related to the safety of the President, and containing a detailed discussion of a constitutionally based right to know.

In 1966, when Robert Sherrill, the White House correspondent for *The Nation*, was denied a press pass based on the results of an investigation by the Secret Service, he filed for relief in federal district court, alleging that the denial of a press pass violated the First and Fifth Amendments to the Constitution.<sup>158</sup> When it reached the D.C. Court of Appeals, the circuit court found the case implicated the First and Fifth Amendments and the right of access.<sup>159</sup> First, however, the court dealt with the issue of justiciability<sup>160</sup> and the executive's constitutional power, soundly rejecting the government's attempt to frame the case in terms of separation of powers and its argument that the Constitution prohibited the judiciary from ruling on the case because access to the White House and the safety of the President were outside the power of the judiciary.<sup>161</sup>

Citing *Pell v. Procunier*<sup>162</sup> and dicta from *Zemel*<sup>163</sup> for the respective propositions that the press had no greater First Amendment right of access than the general public and the general public had no First Amendment right of access to the White

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157. 569 F.2d 124 (D.C. Cir. 1977).

158. See *Forcade v. Knight*, 416 F. Supp. 1025 (D.D.C. 1975). Thomas Forcade, a correspondent for the Alternate Press Syndicate who was also denied a White House press pass, was a second party to the complaint in the district court case. Although the judgment of the district court pertained to both Forcade and Sherrill, Forcade disclaimed further interest in the case after the parties appealed, but before the court of appeals ruled. *Sherrill*, 569 F.2d at 126 n.1.

159. *Sherrill*, 569 F. 2d at 128.

160. A justiciable case is one that is "capable of being disposed of judicially." BLACK'S LAW DICTIONARY 882 (8th ed. 2004).

161. *Sherrill*, 569 F. 2d at 128 n.14.

162. 417 U.S. 817, 833-34 (1974) ("The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally.").

163. *Zemel v. Rusk*, 381 U.S. 1, 16-17 (1965) ("For example, the prohibition of unauthorized entry into the White House diminishes the citizen's opportunities to gather information he might find relevant to his opinion of the way the country is being run, but that does not make entry into the White House a First Amendment right.").

House, the government argued that denial of a White House press pass would violate the First Amendment “only if it is based upon the content of the journalist’s speech or otherwise discriminates against a class of protected speech.”<sup>164</sup> While the court wrote that denying a press pass on content-based criteria would be problematic, it also concluded that there were additional First Amendment arguments to consider. Chief among these was “the protection afforded newsgathering under the first amendment guarantee of freedom of the press.”<sup>165</sup> Citing a host of Supreme Court decisions, the court concluded:

[T]he protection afforded newsgathering under the first amendment guarantee of freedom of the press, requires that this access not be denied arbitrarily or for less than compelling reasons. Not only newsmen and the publications for which they write, but also the public at large have an interest protected by the first amendment in assuring that restrictions on newsgathering be no more arduous than necessary, and that individual newsmen not be arbitrarily excluded from sources of information.<sup>166</sup>

However, although the court clearly identified the First Amendment issue in the case, its focus on the specific pragmatic concerns of the case led it to conclude that while denial of a press pass could violate the First and Fifth Amendments, neither amendment justified requiring “the articulation of detailed criteria upon which the granting or denial of White House press passes is to be based.”<sup>167</sup> Instead, the court ordered the Secret Service to “publish or otherwise make publicly known the actual standard employed in determining whether an otherwise eligible journalist will obtain a White House press pass.”<sup>168</sup> Additionally, the court wrote that it expected courts to “be appropriately deferential to the Secret Service’s determination of what justifies the inference that an individual constitutes a potential risk to the physical security of the President or his family.”<sup>169</sup>

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164. *Sherrill*, 569 F.2d at 129.

165. *Id.*

166. *Id.* at 129–30. The court cited *Branzburg v. Hayes*, 408 U.S. 665, 681, 707 (1972), and *Pell*, 417 U.S. at 829–35, for the proposition that the First Amendment protected newsgathering; *Southeastern Promotions v. Conrad*, 420 U.S. 546 (1975), and *Lovell v. Griffin*, 303 U.S. 444 (1938), as requiring that access for the purpose of newsgathering not be denied for “less than compelling reasons”; and *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 491–92 (1975), and *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), for the conclusion that the public had a right to receive information.

167. *Sherrill*, 569 F.2d at 128.

168. *Id.* at 130.

169. *Id.*

In 1991, the Southern District of New York considered the existence of a First Amendment right of access to a foreign arena in which American military forces were engaged in *Nation Magazine v. Department of Defense*.<sup>170</sup> The case involved a challenge to the DOD regulations governing press coverage of American military activities during periods of open hostilities. While the plaintiffs raised First Amendment right of access issues, the government put forth a variety of arguments involving justiciability and separation of powers, including standing, the political question doctrine and mootness.<sup>171</sup> In addition, before deciding these issues, the court stated that even in "the event the Court determines that at least some of the issues are not moot and that there is jurisdiction to hear the claims, a question remains whether the Court *should* exercise its power to address the controversy."<sup>172</sup>

Focusing on precedents, the court determined that a "long line of cases addressing the role of the judiciary in reviewing military decisions" had left the clear message that "[c]ivilian courts should 'hesitate long before entertaining a suit which asks the court to tamper with the . . . necessarily unique structure of the Military Establishment.'"<sup>173</sup> Yet, despite this strong language that seemed to favor the government's position that the case was outside judicial power, the court was unwilling to go so far as to accept the government's claim that *all* cases involving the military were outside the power of Article III courts.<sup>174</sup> Instead, the court found the cases cited by the government differed from the case at hand in that they had involved "direct challenges to the institutional functioning of the military in such areas as the relationship between personnel, discipline, and training."<sup>175</sup> Unlike that line of cases, the court ruled that the present case did not impact the executive's foreign relations powers or require the

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170. 762 F. Supp. 1558 (S.D.N.Y. 1991).

171. *Id.* at 1565.

172. *Id.* (emphasis added).

173. *Id.* at 1566-67 (quoting *Chappell v. Wallace*, 462 U.S. 296, 300 (1983)).

174. *Id.* at 1568 (concluding the plaintiffs' complaint alleged "claims that are judicially enforceable under the First and Fifth Amendments"). The court found the DOD's primary argument that "the political question doctrine bars an Article III court from adjudicating any claims that involve the United States military" unpersuasive. The court went on to state that "[u]nder this theory of separation of powers, a court would lack jurisdiction to hear any controversy that involved DOD, including any government actions that violated the rights of non-military personnel. This reasoning is inconsistent with large bodies of constitutional law." *Id.*

175. *Id.* at 1567.

court to move beyond its traditional area of expertise and, therefore, was justiciable.<sup>176</sup> On the issue of declaratory relief the court ruled that because the plaintiffs asserted that the existence of the DOD restrictions violated the First Amendment generally, and not simply as applied to operations in the Middle East, the court could hear the challenge.

Unfortunately for the media plaintiffs, that did not end the court's discussion. The court then wrote: "The question of the court's power to hear a case is, however, only the beginning of the inquiry. A separate and more difficult inquiry is whether it is *appropriate* for a Court to exercise that power."<sup>177</sup> Thus, although the court presented the case as dealing with a conflict between transparency and national security, the court also stated that it needed to consider what branch of government should strike the balance between these two competing interests:

At issue in this action are important First Amendment principles and the countervailing national security interests of this country. This case presents a novel question since the right of the American public to be informed about the functioning of government and the need to limit information availability for reasons of national security both have a secure place in this country's constitutional history. In short, this case involves the adjudication of important constitutional principles. The question, however, is not only which principles apply and the weighing of the principles, but also when and in what circumstances it is best to consider the questions.<sup>178</sup>

To determine if it *should* exercise its power, the court turned to a detailed discussion of First Amendment theory, specifically whether theories related to self-governance and the checking function of the press supported the establishment of a right to know.

Although the media organizations argued that they were not asking the court to establish a new constitutional right of access that required "affirmative assistance" from the government to provide information,<sup>179</sup> the court reasoned that the case involved

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176. *Id.*

177. *Id.* at 1570 (emphasis added).

178. *Id.* at 1571.

179. *Id.* ("The gravamen of plaintiffs' complaint is that, under the First Amendment, the press has a right to gather and report news that involves United States military operations and that DOD's pool regulations are an unconstitutional limitation on access to observe events as they occur. . . . In other words, plaintiffs claim that no affirmative assistance from the government

charting "new constitutional territory."<sup>180</sup> The court wrote that while the Supreme Court had considered cases involving the First Amendment and national security, none of those cases had directly addressed "the role and limits of news gathering under the First Amendment in a military context abroad," and therefore there was no direct precedent to rely upon.<sup>181</sup> Instead, the court turned to "case law on questions involving the access rights of the press and public" to answer the novel constitutional questions involving a right to access to military endeavors and whether press pools violated that right.<sup>182</sup>

Citing *United States v. Nixon*,<sup>183</sup> *Saxbe v. Washington Post*,<sup>184</sup> *Pell v. Procunier*,<sup>185</sup> *Houchins v. KQED*,<sup>186</sup> and *Greer v. Spock*,<sup>187</sup> the court concluded "there is no right of access of the press to fora which have traditionally been characterized as private or closed to the public, such as meetings involving the internal discussions of government officials,"<sup>188</sup> and limitations may be "placed on access to government controlled institutions."<sup>189</sup> Next, however, the opinion cited the judicial access cases *Richmond*<sup>190</sup> and *Globe*<sup>191</sup> as examples of the Supreme Court's support for a First Amendment-based right to know:

A fundamental theme in *Richmond* and *Globe* was the importance of an informed American citizenry. As the Court wrote, guaranteed access of the public to occurrences in a courtroom during a criminal trial assures "freedom of communication on matters relating to the functioning of government." Learning about, criticizing and evaluating government, the Supreme Court has rea-

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is being requested, only the freedom from interference to report on what is overtly happening in an allegedly open area.").

180. *Id.* at 1572.

181. *Id.* The court cited *Near v. Minnesota*, 283 U.S. 697, 716 (1931), *New York Times Co. v. United States*, 403 U.S. 713, 722-23 (1971), and *Snepp v. United States*, 444 U.S. 507, 514-15 (1980) as examples of the cases in which the Supreme Court had considered the balance between the First Amendment and national security.

182. *Nation Magazine*, 762 F. Supp. at 1571.

183. 418 U.S. 683 (1974).

184. 417 U.S. 843 (1974).

185. 417 U.S. 817 (1974).

186. 438 U.S. 1 (1978).

187. 424 U.S. 828 (1976).

188. *Nation Magazine*, 762 F. Supp. at 1571 (citing *Nixon*, 418 U.S. at 705 n.15).

189. *Id.* (citing *Houchins*, 438 U.S. at 16; *Greer*, 424 U.S. at 838; *Saxbe*, 417 U.S. at 850; *Pell*, 417 U.S. at 828).

190. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

191. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982).

soned, requires some "right to receive" information and ideas.<sup>192</sup>

In addition, the court suggested that in *Globe* the Court implied that access to other situations might also be included in the Amendment<sup>193</sup> and pointed out that Justice Stevens had written that the right to be informed about government operations was important "even when the government has suggested that national security concerns were implicated."<sup>194</sup> The court summarized:

Given the broad grounds invoked in these holdings, the affirmative right to gather news, ideas and information is certainly strengthened by these cases. By protecting the press, the flow of information to the public is preserved. As the Supreme Court has observed, "the First Amendment goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." Viewing these cases collectively, it is arguable that generally there is at least some minimal constitutional right to access.<sup>195</sup>

Having established the existence of some sort of right of access, the court speculated about how this would apply to the military. Although the court concluded that at least some right of access to the military might exist, it was uncertain because "military operations are not closely akin to a building such as a prison, nor to a park or a courtroom."<sup>196</sup> Ultimately, based on this uncertainty, the hypothetical nature of its discussion and the lack of concrete facts on which to apply precedent, the court refused to decide if there was a right of access. The Court wrote, "Pursuant to long-settled policy in the disposition of constitutional questions, courts should refrain from deciding issues presented in a highly abstract form, especially in instances where the Supreme Court has not articulated guiding standards."<sup>197</sup>

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192. *Nation Magazine*, 762 F. Supp. at 1572.

193. *Id.*

194. *Id.* (citing *New York Times Co. v. United States*, 403 U.S. 713, 728 (1971) (Stewart, J., concurring)).

195. *Id.* (quoting *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 783 (1978)). The court further cited *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972), for the proposition that "[w]ithout some protection for seeking out the news, freedom of the press could be eviscerated."

196. *Id.*

197. *Id.* (citing *Rescue Army Mun. Court of Los Angeles*, 331 U.S. 549, 575-85(1947)).

The court next considered whether the DOD's use of press pools gave preferential treatment to some members of the press. Again the court turned to Supreme Court precedent to support its discussion, this time focusing on the Court's public forum doctrine. First, the court discussed precedent that supported the plaintiffs' case, finding that because the government had decided to "open the door" to press coverage it had "created a place for expressive activity."<sup>198</sup> The Court wrote, "Regardless of whether the government is constitutionally required to open the battlefield to the press as representatives of the public, a question that this Court has declined to decide, once the government does so it is bound to do so in a non-discriminatory manner."<sup>199</sup> Citing *Sherrill*, the court ruled that government could not arbitrarily exclude some members of the press once it allowed others to cover the conflict.<sup>200</sup>

The court, however, then noted that the right to be free from discriminatory treatment was "not synonymous with a guaranteed right to gather news at all times and places or in any manner that may be desired"<sup>201</sup> and the press could be subjected to reasonable time, place and manner restrictions.<sup>202</sup> Thus, the court concluded that some restrictions might be appropriate at some point. After reaching this conclusion, however, the court declined to decide the issue. Instead, it concluded it was not faced with concrete enough facts to rule on the limitations on access.<sup>203</sup> Faced with two "significant and novel constitutional doctrines,"<sup>204</sup> and without clear direction from the Supreme Court or concrete facts to rule on, the court concluded that "based on all the circumstances of the case," the controversy was not "sufficiently concrete and focused to permit adjudication on the merits."<sup>205</sup>

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198. *Id.* at 1573 (citing *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 48 (1983), for the proposition that the government had created a limited public forum by establishing pools for coverage for the Persian Gulf conflict).

199. *Id.* (citing *Houchins v. KQED*, 438 U.S. 1, 16 (1978); *American Broad. Cos. v. Cuomo*, 570 F.2d 1080, 1083 (2d Cir. 1977)).

200. *Id.* ("Once a limited public forum has been created, the government is under an obligation to insure that 'access not be denied arbitrarily or for less than compelling reasons.'" (quoting *Sherrill v. Knight*, 569 F.2d 124, 129 (D.C. Cir. 1977))).

201. *Id.*

202. *Id.* (citing *Grayned v. Rockford*, 408 U.S. 104, 115 (1972)).

203. *Id.* at 1574-75.

204. *Id.* at 1575.

205. *Id.* at 1568.

While to this day the Supreme Court has still not provided any clear direction, the D.C. District Court has twice decided cases very similar to *Nation Magazine* with nearly identical results. In *Getty Images News Service Co. v. Department of Defense*<sup>206</sup> and *Flynt v. Rumsfeld*,<sup>207</sup> the court engaged in similar First Amendment discussions as the *Nation Magazine* court, relied on almost identical precedents and again focused on the lack of a concrete controversy. In *Getty Images*, a case involving access to the U.S. government's detention center at Guantánamo Bay, the D.C. District Court discussed access, but ultimately determined that Getty had failed to demonstrate that injunctive relief was needed.<sup>208</sup> In the case, Getty Images News Services sought a preliminary injunction to enjoin the DOD to provide Getty with equal access to the detention facilities at Guantánamo Bay, to require the DOD to "promulgate standards and procedures ensuring equal access," and to compel the DOD to create a press pool for access to Guantánamo.<sup>209</sup> Getty alleged that the DOD's actions violated the company's First Amendment right to equal access to Guantánamo and Fifth Amendment right to equal protection, and that the company's First and Fifth Amendment rights had been violated "because adequate regulatory standards had not been developed and applied."<sup>210</sup>

In considering Getty's claim, the court primarily relied upon *Sherrill* and *Nation Magazine* to reach its conclusions. The court used these two cases to support Getty's argument that once the DOD "opened Guantánamo Bay to certain members of the press, all members of the press became constitutionally entitled to equal access to the detention facilities there."<sup>211</sup> In addition, after a discussion of *Sherrill*, the court concluded that, although it was "reluctant to interfere" with military conduct,<sup>212</sup> the First and

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206. 193 F. Supp. 2d 112 (D.D.C. 2002).

207. 245 F. Supp. 2d 94 (D.D.C. 2003).

208. *Getty Images*, 193 F. Supp. 2d at 118–25.

209. *Id.* at 113–14. In addition, Getty also sought to enjoin the DOD from excluding it from participation in the National Media Pool or any ad hoc or regional pools created during Operation Enduring Freedom. However, by the time the case reached the district court, Getty was granted membership in the National Media Pool and the Afghanistan regional pool no longer existed. *See id.* at 14–16.

210. *Id.* at 114. In addition, the media company argued its due process rights under the Fifth Amendment were violated because the company's competitors "had allegedly been delegated the power to regulate Getty's access to pool coverage." *Id.*

211. *Id.* at 118.

212. *Id.* at 121. The court agreed with the government's arguments "that the Guantánamo Bay Naval Base [was] not a public forum and that consideration of Getty's First and Fifth Amendment claims must be undertaken through

Fifth Amendments required, "at a minimum, that before determining which media organizations receive the limited access available" there must be some reasonable criteria to guide the DOD decisions.<sup>213</sup> Quoting the *Sherrill* court's discussion of First Amendment protection for newsgathering,<sup>214</sup> the court determined that the First Amendment required the government to have solid reasoning behind its decisions and refrain from arbitrary or capricious decision making.<sup>215</sup>

Ultimately, however, the court ruled that it was not the appropriate time to grant Getty's motion for an injunction. Although the court wrote that it was persuaded that Getty had raised "a serious question" relating to its request for equal access and that the DOD "at some point in time" would have to establish and publish non-arbitrary criteria and a process to govern media access, the court would not grant Getty's injunction.<sup>216</sup> To support this ruling, the court balanced Getty's interests and likelihood of success against the public's interest in *not* granting access.<sup>217</sup> The court weighed the potential harm to the public interest that a disruption at Guantánamo Bay would cause against Getty's "speculative" First Amendment claims.<sup>218</sup> The court reasoned that "absent some concrete and irreparable diminution of First Amendment rights," it was "not possible to conclude that the public interest favors the injunctive relief Getty seeks."<sup>219</sup> In its conclusion, the district court focused on the speculative nature of both a First Amendment right of access and Getty's claims that it was being harmed to support the decision not to grant an injunction.<sup>220</sup> One year later, the court adopted a similar stance in *Flynt*.

Like *Nation Magazine*, *Flynt* involved a magazine's claim that DOD regulations violated the "qualified First Amendment right"

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the prism of the heightened deference due to military regulations and decision-making." *Id.* at 119.

213. *Id.* at 121.

214. *Id.* at 119 (quoting *Sherrill v. Knight*, 569 F.2d 124, 129-30 (D.C. Cir. 1977)).

215. *Id.* at 121.

216. *Id.* at 124.

217. *Id.* At no time did the court consider the public's interest in receiving information about the Guantánamo Bay detention facility, terrorists or terrorism trials.

218. *Id.* at 123-24.

219. *Id.* at 124. While the court found in favor of Getty on parts one and two of the test, it found that the public interest outweighed the speculative nature of Getty's claims. *Id.*

220. *Id.*

of media access to the battlefield.<sup>221</sup> While the court discussed the First Amendment implications of access, it focused instead on the hypothetical nature of the claim and the need to practice judicial restraint in such situations. In 2001, *Hustler Magazine* requested that one of its correspondents be allowed “to accompany and cover American ground forces in Afghanistan and wherever else such forces may be utilized in this campaign against terrorism.”<sup>222</sup> While the *Hustler* correspondent was placed on a waiting list of journalists seeking to embed with conventional combat troops, because all of the ground forces in Afghanistan at the time were Special Operations Forces, the correspondent was not allowed to accompany any soldiers on actual missions.<sup>223</sup> In what would become a central argument to the case, the DOD claimed that it was “awaiting approval to allow reporters to accompany special forces on missions.”<sup>224</sup>

In challenging the DOD’s regulations, *Hustler* made two distinct claims. First, the magazine challenged the DOD regulations as applied,<sup>225</sup> charging that the DOD violated *Hustler’s* First Amendment rights by “improperly denying a *Hustler* correspondent the right to accompany combat forces on the ground in Afghanistan.”<sup>226</sup> Second, the magazine brought a facial challenge.<sup>227</sup> The opinion first considered *Hustler’s* as-applied challenge. The court held that it had no jurisdiction to address the issue because the controversy was not ripe for review, nor did *Hustler* have standing. Although *Hustler* attempted to insert the First Amendment into the argument by contending that a ripe controversy existed because the parties disagreed as to whether there was “a First Amendment right of media access to the battlefield,”<sup>228</sup> the court wrote that the “mere existence of a legal disagreement about the scope of the First Amendment [did] not make that disagreement fit for judicial review.”<sup>229</sup> Instead,

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221. *Flynt v. Rumsfeld*, 245 F. Supp. 2d 94, 99 (D.D.C. 2003).

222. *Id.* at 97.

223. *Id.* at 97–98.

224. *Id.* at 99.

225. “A claim that a law or government policy, though constitutional on its face, is unconstitutional as applied, usually because of a discriminatory effect; a claim that a statute is unconstitutional on the facts of a particular case or in its application to a particular party.” BLACK’S LAW DICTIONARY 244 (8th ed. 2004).

226. *Flynt*, 245 F. Supp. 2d at 99.

227. “A claim that a statute is unconstitutional on its face—that is, that it always operates unconstitutionally.” BLACK’S LAW DICTIONARY 244 (8th ed. 2004).

228. *Flynt*, 245 F. Supp. 2d at 102.

229. *Id.*

because the DOD was still technically “awaiting permission” to allow journalists to travel with the only troops on the ground, the court held the issue had not been settled and was, therefore, not ripe for review. It wrote *Hustler’s* as-applied claims were “not fit for judicial decision at this juncture because defendants have not made a final decision with respect to plaintiffs’ request for access to combat ground forces in battle.”<sup>230</sup>

Next, considering *Hustler’s* facial challenge, although the court admitted that “there may be a limited or qualified right of media access to the battlefield”<sup>231</sup> based on the First Amendment, it declined to definitively decide the issue. Instead, the court turned to the issue of judicial power, writing that the case was more about the role of the courts in making decisions than it was about the First Amendment. The court held it could decide the case under the political question doctrine because *Hustler* was not making a claim that went to “the heart of the military’s ‘goals, directives and tactics’” by challenging the DOD’s regulations.<sup>232</sup> The court wrote:

In their facial challenge claims plaintiffs do not ask the Court to delve into tactical decisions made by defendants. They ask the Court only to consider whether a First Amendment right of media access to the battlefield exists—a right they themselves characterize as a ‘qualified right of access’ subject to reasonable Executive Branch regulations—and, if so, to direct defendants to enact guidelines that comport with such First Amendment protections.<sup>233</sup>

However, the court never truly addressed the existence of a First Amendment “qualified right of access.” Instead the court ruled that just because it had jurisdiction to hear the facial challenge, that conclusion did “not necessarily result . . . in adjudication of plaintiffs’ claims on the merits at this time.”<sup>234</sup> Quoting the admonition from *Getty Images* that “the absence of a concrete controversy is of particular concern in light of the important constitutional issues at stake and the national defense interests that might be implicated,”<sup>235</sup> as well as a lengthy passage from *Nation*

230. *Id.* at 101.

231. *Id.* at 108.

232. *Id.* at 106–07.

233. *Id.* at 107.

234. *Id.*

235. *Id.* at 109 (quoting *Getty Images News Servs. Corp. v. Dep’t of Defense*, 193 F. Supp. 2d 112, 113, 118 (D.D.C. 2002)).

*Magazine*,<sup>236</sup> the court concluded the “prudent course” was to “delay resolution of these constitutional issues until and unless plaintiffs are denied access after having pursued their request through normal military channels.”<sup>237</sup> The court therefore “declined to exercise its discretion” to consider the facial challenge.<sup>238</sup>

## V. CONCLUSION

There are a number of significant differences between access cases involving the judiciary and access cases involving national security, and comparing the cases leads to a number of interesting conclusions. First, it is clear that the Supreme Court has sent mixed signals to lower courts about the existence of a First Amendment based right of access. With the exception of a few early cases, the Court has framed access to judicial proceedings as a First Amendment issue that advances trust in the judicial system and the democratic process. As the *Nation Magazine* court noted, in cases that have considered a right of access to the judiciary, the Supreme Court has consistently articulated a broad right of access—a right that might not even be limited to the judiciary.<sup>239</sup> In addition, the opinions in these cases reference a wide range of sources for this right, including Framers’ intent, structural and functional analysis, and historical evidence. However, because the discussion of a broad right of access that extends beyond judicial proceedings and documents has never been fully articulated or endorsed by the Court, lower courts considering access to national security information or locations have had trouble determining when or if there is a right of access. For example, as noted, when faced with the question, the

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236. *Id.* (“In order to decide this case on the merits, it would be necessary to define the outer constitutional boundaries of access. Pursuant to long-settled policy in the disposition of constitutional questions, courts should refrain from deciding issues presented in a highly abstract form, especially in instances where the Supreme Court has not articulated guiding standards. . . . Since the principles at stake are important and require a delicate balancing, prudence dictates that we leave the definition of the exact parameters of press access to military operations abroad for a later date when a full record is available, in the unfortunate event that there is another military operation. Accordingly, the Court declines to exercise its power to grant plaintiffs’ request for declaratory relief on their right of access claim.” (quoting *Nation Magazine v. Dep’t of Defense*, 762 F. Supp. 1558, 1572 (S.D.N.Y. 1991) (citing *Rescue Army v. Municipal Court of L.A.*, 331 U.S. 549, 575–85 (1947))).

237. *Id.* at 110.

238. *Id.*

239. 762 F. Supp. at 1572.

*Nation Magazine* court discussed the different approaches and conflicting results in Supreme Court access cases.<sup>240</sup>

In addition, analysis of these cases indicates that confusion over the existence of the right to know is also the product of the judiciary's reluctance to intrude into an area where it does not have expertise or concludes it would be intruding on the constitutional authority of another branch of government. The national security cases clearly demonstrate the judiciary's extreme reluctance to become involved in another branch of government's affairs. Although courts considering access to national security locations or information have engaged in discussions of a First Amendment right of access, ultimately, most of the courts focused on other issues that allowed them to avoid deciding the cases based on a right of access. While some of the cases specifically presented the issues in terms of justiciability, mootness or the political question doctrine, others engaged in discussions of the need to balance the powers of the separate branches of government or decided the facts of the case were not developed enough to intercede on behalf of the press.

The importance of the courts' concern with their own power and role is highlighted by the fact that in the national security access cases discussions about separation of powers often overshadowed discussion of balancing government transparency with national security or the benefits transparency brings to the democratic process. Only three of the national security access opinions—the majority opinion as well as Justice White's dissent in *Egan*, and *Nation Magazine*—specifically presented the cases as dealing with the need to balance national security with the First Amendment and transparency concerns and decided the cases by focusing on the issue.<sup>241</sup> The *Nation Magazine* court was particularly clear that the case was about balancing the two issues. Although *Sherrill*,<sup>242</sup> *Getty Images*,<sup>243</sup> and *Flynt*<sup>244</sup> all discussed balancing transparency with another factor, the opinions relied on practical case specific considerations to reach their decisions and refused to break new constitutional ground on amorphous or shifting facts. No lower court was willing to advance a right of access based on abstract issues and hypothetical situations. Although they have been willing to consider extending a consti-

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240. *Id.*

241. See *Dep't of Navy v. Egan*, 484 U.S. 518, 527–28 (1988); *id.* at 534–38 (White, J., dissenting); *Nation Magazine*, 762 F. Supp. at 1571.

242. *Sherrill v. Knight*, 569 F. 2d 124 (D.C. Cir. 1977).

243. *Getty Images News Services Co. v. Dep't of Def.*, 193 F. Supp. 2d 112 (D.D.C. 2002).

244. *Flynt v. Rumsfeld*, 245 F. Supp. 2d 94 (D.D.C. 2003).

tutional right of access well beyond the courtroom, they have not seen fit to actually rule on whether such a right exists, instead focusing on other issues and waiting for the Supreme Court to clarify how far access extends.

While this approach was particularly evident in the lower court national security cases, it was also present in at least one Supreme Court case, *Warner Communications*,<sup>245</sup> in which the Court decided the question presented would best be answered outside of the judiciary. As noted, instead of confronting the executive or legislative branches, the Court declined to rule on the existence of a right of access, and instead held that the Presidential Recordings Act would ultimately control the release of the records.<sup>246</sup> In an argument that was very similar to the national security access cases, Justice Powell's majority opinion simply stated that the courts were not well equipped to handle the details of access to presidential records<sup>247</sup> and failed to address major access issues raised by the case.

Thus, when confronted with another branch of government, although many courts engaged in detailed discussions of the benefits of a First Amendment right of access, ultimately most courts found other ways to reach a conclusion. Although a few courts have voiced concerns or put restraints on the executive branch's ability to control national security information,<sup>248</sup> the general trend has been for courts to rule that they are not qualified to consider the cases dealing with national security.<sup>249</sup>

There are a number of explanations for courts' desire to not decide these cases. First, it is possible that this emphasis is related to legitimate constitutional questions and concerns. Several of the cases discussed above focused on which branch of government was given the power to control national security information by the Constitution or focused on the Framers' intent to determine who should have the power. For example, in

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245. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589 (1978).

246. *Id.* at 603.

247. *Id.* at 606.

248. See *Dep't of Navy v. Egan*, 484 U.S. 518, 534 (1988) (White, J., dissenting); *Greene v. McElroy*, 360 U.S. 474 (1959); *United States v. American Tel. & Tel. Co.*, 567 F.2d 121 (D.C. Cir. 1977).

249. See, e.g., *Hall v. U.S. Dep't of Labor, Admin. Review Bd.*, 476 F.3d 847 (10th Cir. 2007); *Bennett v. Chertoff*, 425 F.3d 999 (D.C. Cir. 2005); *Hill v. White*, 321 F.3d 1334 (11th Cir. 2003); *Reinbold v. Evers*, 187 F.3d 348 (4th Cir. 1999); *Makky v. Chertoff*, 489 F. Supp. 2d 421 (D.N.J. 2007); *Nickelson v. United States*, 284 F. Supp. 2d 387 (E.D. Va. 2003); *Cobb v. Danzig*, 190 F.R.D. 564 (S.D. Cal. 1999); *Edwards v. Widnall*, 17 F. Supp. 2d 1038 (D. Minn. 1998); *Stehney v. Perry*, 907 F. Supp. 806 (D.N.J. 1995). *But see* *Ranger v. Tenet*, 274 F. Supp. 2d 1 (D.D.C. 2003).

*Egan*, Blackmun wrote that the authority to protect national security information flowed directly from the Constitution and fell on the President "as head of the Executive Branch and as Commander in Chief."<sup>250</sup> Second, it could be related to practical concerns with the ability and/or expertise of the courts to deal with national security information. Several courts have stated their concerns with the judiciary's inability to know what information might be dangerous to national security or the inability of courts to properly control and house national security information.<sup>251</sup>

Finally, it is possible that it is related to inter-institutional constraints placed on the judiciary. Scholars who advance the "strategic account" of judicial decision-making have argued that judges are strategic actors who must consider the preferences of other actors and institutions and the institutional and historical context in which they act.<sup>252</sup> The judiciary is but one part of our governmental structure that must take into account the desires and powers of the other branches of government. While the Constitution set out the powers of each branch, scholars have noted that this was only the beginning of a long process by which political institutions take shape.<sup>253</sup> Rather than being static, the powers of our political institutions are defined through "sequences of events . . . either unanticipated by the framers or unspecified in the [Constitution]."<sup>254</sup> Under this analysis, it is clear that in national security access cases, the courts are being mindful of the desires and powers of other political institutions.

Because they deal with the powers of the other branches of government, the national security access opinions become especially important to consider when discussing access to terrorism trials. In the judicial access cases, concerns with intruding upon another branch of government were, of course, not present. Because the justices were in effect creating rules for their own house, the Court had leeway to rely upon structural and functional arguments to create a system of access and dissemination without worrying about overextending their power. After the September 11, 2001, terrorist attacks, however, the U.S. government has claimed a need to conduct numerous judicial proceedings in secret, based on national security concerns. Therefore, because these cases will combine judicial access and national

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250. *Dep't of Navy v. Egan*, 484 U.S. 518, 527 (1988).

251. *See, e.g., Alfred A. Knopf, Inc. v. Colby*, 509 F.2d 1362, 1369-70 (4th Cir. 1975).

252. *See, e.g., EPSTEIN & KNIGHT, supra* note 42, at 10-18.

253. *Knight & Epstein, supra* note 42, at 88.

254. *Id.*

security access cases, it is helpful to analyze access to terrorism trials under the conceptual framework offered by social architecture theory in order to ensure the values and architecture advanced by the judicial access cases continue to be reinforced, even when dealing with national security information.

As Daniel Solove wrote, all law should be used to establish an “architecture of power” that maintains the appropriate balance of power in relationships.<sup>255</sup> Discussing the need for social architecture in privacy law, Solove wrote that too often the law only works at the surface of a problem, “dealing with the overt abuses and injuries that may arise in specific instances. But thus far the law does not do enough to redefine the underlying relationships that cause these symptoms.”<sup>256</sup> Similarly, although many of the national security cases outlined above are clear examples of judges discussing power relationships, they are too frequently decided on issues related to specific circumstances of the cases rather than on architecture.

When judges, politicians and other government officials consider cases or public policy dealing with access to terrorism trials, it is important to remember the nation’s original social architecture, as established by the Constitution and the First Amendment. As noted in several cases discussed above, the Framers of the Constitution were acutely aware of the dangers of the accumulation of power in the same hands.<sup>257</sup> For example, referring to an architecture of power that went beyond a focus on the individual complaint, the D.C. Circuit wrote in *ATT*<sup>258</sup> that the Framers expected that when “conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system.”<sup>259</sup> The court further admonished that “each branch should take cognizance of an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation” in order to avoid “the mischief of polarization.”<sup>260</sup>

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255. Solove, *supra* note 19, at 1087.

256. DANIEL J. SOLOVE, *THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE INFORMATION AGE 100* (2004).

257. *See, e.g.*, *THE FEDERALIST* NO. 47, at 239 (James Madison) (Lawrence Goldman ed., 2008) (writing the accumulation of power “in the same hands . . . may justly be pronounced the very definition of tyranny”).

258. *United States v. Am. Tel. & Tel. Co.*, 567 F.2d 121 (D.C. Cir. 1977).

259. *Id.* at 127.

260. *Id.*

In addition, when judges and policy makers move beyond separation of powers concerns to focus on balancing national security and transparency or, more fundamentally, the relationship between the government, the press and the people, they can still focus on architecture. It is important to remember the Framers were heavily influenced by the writings of John Locke, a seventeenth century Enlightenment philosopher who proposed a government based on the consent of the governed in his book the *Second Treatise of Government*.<sup>261</sup> Locke was concerned with what form a legitimate government should take and how to establish the conditions necessary for peace and security. Locke focused on the restriction of state power to create private spheres of civil liberty.<sup>262</sup> Locke's understanding of the social contract is based on the pre-existing rights of the individual, which are retained even when the individual enters into the collective. To Locke, "because government existed solely based on the consent of the governed, the government could not take away pre-existing rights, such as the right to free expression."<sup>263</sup> Historians have argued that to Locke, a free and open press was the best way to guarantee citizens' protection from government tyranny that may impinge on these natural rights,<sup>264</sup> government should be judged by the governed through the free exchange of ideas,<sup>265</sup> and citizens need as much information about their government as possible in order to function in a democracy.<sup>266</sup> In terms of social architecture theory, Locke "proposed a social architecture in which power ultimately belonged to citizens, not those who governed them."<sup>267</sup>

Therefore, judges and other policy makers must keep in mind the balance of power between the branches and the architecture created by the First Amendment even when considering cases under the backdrop of events like the terrorist attacks of September 11. While it is true that in Lockean philosophy government's central purpose is to protect each individual's rights against invasion *and* to protect "the entire society from having the rights of its members robbed from them by another nation's

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261. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* (Thomas P. Peardon, ed., Bobbs-Merrill Co. 1975) (1690).

262. *See, e.g., id.* at 32 (writing "the end of law is not to abolish or restrain, but to preserve and enlarge freedom").

263. Silver, *supra* note 33, at 172-73.

264. FREDRICK SEATON SIEBERT, *FREEDOM OF THE PRESS IN ENGLAND 1476-1776*, at 261 (1965).

265. DAVID A. COPELAND, *THE IDEA OF A FREE PRESS* 92 (2006).

266. *Id.* at 92-93.

267. Packer, *supra* note 32, at 401.

war-launching invasion,"<sup>268</sup> these two values must *always* coexist. Advocating for an architecture of power that embraces these notions goes beyond arguing that courts should recognize the individual rights of the plaintiffs in access to terrorism trial cases. It advocates decisions that empower both the courts and society in a broad and meaningful way.

There are several ways for judges and policy makers to reinforce the architecture established by the Constitution and First Amendment, as well as uphold the structure created by the judicial access cases, while also ensuring that national security information is protected during trials involving terrorist suspects. First, judges should be mindful of the Supreme Court's discussion of the long history and benefits of access to court proceedings and documents. Opening criminal trials to the public contributes to fairness, reliability and trust in the judicial system<sup>269</sup> and a right of access is necessary to protect the free flow of information about government in order to ensure the proper functioning of a democratic society.<sup>270</sup> In addition, open trials have a "therapeutic value" for the community,<sup>271</sup> a value that is especially important in terrorism cases given the effect of the terrorist attacks of September 11 on the American public. Furthermore, by actively deciding when to grant access—as courts have traditionally done in the judiciary cases—rather than deferring to other branches of government—as courts have done in the national security access cases—the judiciary will remain an independent, co-equal branch of government.

Finally, an architecture of access is especially important in cases dealing with terrorism trials because access to the judiciary by the press serves an especially important function in these cases. Because national security is important to every person in the United States, yet trials involving terrorism are located geographically distant from so much of the population, providing access to the press so that they may serve as "surrogates for the public"<sup>272</sup> is vital. As one scholar wrote:

Cases involving national security necessarily deal with information that is of broad public interest to people

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268. Thomas B. McAfee, *Restoring the Lost World of Classical Legal Thought: The Presumption in Favor of Liberty Over Law and the Court Over the Constitution*, 75 U. CIN. L. REV. 1499, 1507 (2007).

269. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980).

270. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604–05 (1982).

271. *Richmond*, 448 U.S. at 570–71 (1980) (writing that open criminal trials provide "an outlet for community concerns, hostility and emotion").

272. *Id.* at 572–73.

outside of the geographic region in which the proceeding is taking place. Thus, as the interest in the case increases, the ability of interested individuals to monitor the proceedings decreases. Thus, . . . access . . . serves an even more important purpose and should be subject to an even more rigorous analysis.<sup>273</sup>

Additionally, it is important to note that the architecture of presumptive access created by the Supreme Court is not without limits. The Court has determined that although there is a First Amendment right of access to criminal trials, such a right can be overcome by an overriding or compelling interest, so long as that right is narrowly tailored, that is, as brief as possible to serve the interest. In *Press-Enterprise I*, the Court wrote:

The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.<sup>274</sup>

While such an architecture would allow for the closing of terrorism trials in cases that truly warrant it for a narrow amount of time when the court specifically articulates why the closure is necessary, it would certainly not allow for the arbitrary closure of courtrooms or the removal of an entire case from a public docket.<sup>275</sup>

However, although this Article calls for the judiciary to take a greater role in providing access to terrorism trials, it is important to remember that constitutional doctrine provides only one way in which constitutional principles—and thus social architecture—can be advanced. As Professor Jack M. Balkin noted, “Sometimes [First Amendment] values are best enforced . . . by legislatures, administrative agencies, and by courts interpreting

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273. Michael P. Goodwin, *A National Security Puzzle: Mosaic Theory and the First Amendment Right of Access in the Federal Courts*, 32 HASTINGS COMM. & ENT. L.J. 179, 201 (2010).

274. *Press-Enter. Co. v. Riverside County Superior Court*, 464 U.S. 501, 510 (1984).

275. See, e.g., *M.K.B. v. Warden*, 540 U.S. 1213 (2004). After September 11, Mohamed Kamel Bellaouel, an Algerian man married to a U.S. citizen, was detained in Miami, Florida, for overstaying his student visa. Bellaouel was held for five months, during which time he was transferred to Virginia to testify at the trial of September 11 conspirator Zacarias Moussaoui. See Meliah Thomas, *The First Amendment Right of Access to Docket Sheets*, 94 CALIF. L. REV. 1537 (2006), for a more detailed discussion of the case.

statutes and regulations.<sup>276</sup> Statutory law—such as the Classified Information Procedures Act (CIPA)<sup>277</sup>—can also work to reinforce a social architecture of access and accountability. Because CIPA, which governs the use of classified information when such information is used in federal prosecutions, allows judges the ability to control national security information, court closures and blocking access to trial is not needed. When classified information must be used in a criminal proceeding, CIPA provides for *in camera* review by the presiding judge to determine if the information is relevant to the proceeding<sup>278</sup> and gives the judge tools for dealing with the classified information. For example, the judge may order the government to delete certain portions of the information, present an unclassified summary of the information, or summarize what the classified information might tend to prove.<sup>279</sup>

While the statute itself has no bearing on public access, it does provide the judiciary with a valuable tool that might alleviate concerns that the judiciary is not properly equipped to deal with national security information. This in turn allows the courts to maintain the appropriate balance of powers with the other branches of government—an important goal of social architecture—without having to worry about dangers to national security. Together, the ability to close trials for a specific, narrowly tailored reason and CIPA, ensure national security information is safe during terrorism trials. A 2008 study of terrorism prosecutions based on publicly available information concluded that no security breach has occurred during a terrorism trial because of a court's failure to close a docket or judicial proceeding and there is no evidence of a leak in a case in which CIPA has been invoked.<sup>280</sup>

Additionally, public policy—such as the Pentagon's new guidelines for reporters covering the detention and trials of terrorism suspects at Guantánamo Bay, Cuba—should embrace the

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276. Balkin, *supra* note 30, at 941.

277. 18 U.S.C. app. 3 §§ 1–16 (2006).

278. *Id.* § 6(a), (d).

279. *Id.* § 4.

280. See JAMES J. BENJAMIN, JR. & RICHARD P. ZABEL, HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN FEDERAL COURTS 88 (2008). <http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf>. While it is possible that classified information might be able to prove otherwise, this provides another example of why transparency can benefit the government. If there are examples of how the mishandling of national security information by the judiciary has led to breaches of national security, this information does nothing to inform the debate of access to terrorism trials if this information itself is classified and unavailable to the public.

notion that the press is a vital component of the democratic process. As noted, in September 2010, in response to complaints from media organizations, the DOD created new “Media Ground Rules” for Guantánamo Bay. In addition to other provisions, the ground rules narrowed the definition of “protected information,”<sup>281</sup> stated journalists would not be in violation of the rules for republishing protected information where that information was “legitimately obtained” in the course of independent newsgathering<sup>282</sup> and stated the “Defense Department [would] facilitate media access to military commissions to the maximum extent possible, in an effort to encourage open reporting and promote transparency.”<sup>283</sup> While there were still a number of issues to be worked out, media organizations expressed the belief that the new guidelines were a good faith effort to “address the problems that have prevented reporting from Guantánamo to be as complete and accurate as it ought to be.”<sup>284</sup>

In sum, by focusing on architecture in judicial decisions, statutory law and public policy, the government can ensure an architecture of power that promotes core democratic values and the proper sharing of both power and information. While being mindful of the appropriate balance of power is important in all cases dealing with national security, it is especially important in cases dealing with access to national security information. As Professor Cathy Packer wrote, disputes about access to information are about “the fundamental relationship among the government, the media and the public” because “[i]nformation is power, and the proper sharing of this power source is critical to the proper operation of a democratic government.”<sup>285</sup>

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281. GUANTÁNAMO MEDIA GROUND RULES, *supra* note 18, at 4. Protected information includes classified information, information “which could reasonably be expected to cause damage to national security,” and information “subject to a properly-issued protective order.” *Id.*

282. *Id.*

283. *Id.* at 6.

284. Lane, *supra* note 18, at 1 (quoting comments from John Walcott, the Washington bureau chief of McClatchy, the third largest newspaper company in the United States).

285. Packer, *supra* note 31, at 32–33.

## U.S. Supreme Court

**Toledo Newspaper Co. v. United States, 247 U.S. 402 (1918)**

**Toledo Newspaper Co. v. United States**

**No. 371**

**Argued March 7, 8, 1918**

**Decided June 10, 1918**

**247 U.S. 402**

### *Syllabus*

A summary conviction for criminal contempt is not within the jurisdiction of this Court by writ of error, but reviewable by certiorari.

Judicial Code § 268 (Act of March 2, 1831), is merely declaratory of the inherent power of the federal courts to punish summarily for contempt, and, in providing that the power

"shall not be construed to extend to any cases except the misbehavior of any person in their presence or so near thereto as to obstruct the administration of justice,"

does no more than express a limitation imposed by the Constitution. The power, as in the case of the legislature (*Marshall v. Gordon*, [243 U. S. 521](#)) is essentially one of self-preservation.

The test of the power is in the character of the acts in question: when their direct tendency is to prevent or obstruct the free and unprejudiced exercise of the judicial power, they are subject to be restrained through summary contempt proceedings.

Newspaper publications, concerning injunction proceedings pending in the district court and tending in the circumstances to create the impression that a particular decision would evoke public suspicion of the judge's integrity or fairness and bring him into public odium and would be met by public resistance, and tending in the circumstances to provoke such resistance in fact, *held* contemptuous, rendering the company owning the paper and its editor subject to summary conviction and punishment.

Such wrongful publications are not within the "freedom of the press," nor does the Act of 1831, *supra*, Jud. Code § 268, intend to sanction them.

As it is the reasonable tendency of such publications that determines their contemptuous character, it is not material that they were not circulated in the courtroom or seen by the judge, or that they did not influence his mind.

In determining whether there was any evidence to justify attributing such a tendency to the publications in question, this Court considers the evidentiary facts found by the district court only so far as to

determine whether they have any reasonable tendency to sustain the general conclusions of fact based upon them by that court and the circuit court of appeals.

In a summary proceeding for criminal contempt, *semble* that a single penalty based upon a conviction under all of several distinct charges in the information cannot be upheld unless all of the charges are sustained by the facts.

But where the circuit court of appeals, upon concluding that the conviction was justified under one count and the facts relative thereto, affirmed the district court without considering other counts upon which the punishment was also based, this Court examined the findings as to all the counts, and, holding them sufficient, affirmed the judgment.

237 F. 986, affirmed.

The case is stated in the opinion.

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1962

## Contempt by Publication and the First Amendment

John W. Oliver

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## CONTEMPT BY PUBLICATION AND THE FIRST AMENDMENT\*

JOHN W. OLIVER\*\*

The legal problem presented by a discussion of contempt by publication and the first amendment is the conflict between constitutionally guaranteed freedom of the press on one side and constitutionally guaranteed impartial trial by jury on the other; also involved is the concern of the judiciary over the maintenance of public respect for the law and our system of administering justice. Perhaps it is obvious at once that the conflict is not the immediate result of the simultaneous operation of these principles in our society, but rather the sometimes overzealous acts of judges and newspapermen done under their guise. Thus there are those who decry "trial by newspaper," the fate of a criminal defendant being decided by a jury whose minds have been conditioned by a barrage of pictures, confessions, purported testimony, theories of the case and discussion in the newspapers prior to the trial. Equally deplored is uninformed criticism of judges and decisions which tends to undermine public confidence in the courts and their administration of justice.<sup>1</sup>

Judicial reaction to these alleged abuses of freedom of the press for many years was a proceeding known as constructive contempt of court whereby the persons responsible for the offending publications were brought before the court and fined or jailed without a jury trial. Since the same judge who objected to the publication determined the guilt or innocence of its perpetrators, serious objections to the constitutionality of this practice were raised. Furthermore, journalists were put in the unenviable position of predicting at their peril what they could print without being cited for contempt of court.

Frequently newspapermen ask why there are contempt citations in some sensational cases and not in others? And, how such a proceeding is justified

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\*The substance of this article was the subject of a speech at the Fourth Annual Freedom of Information Conference held in Columbia, Missouri, on November 2, 1961, delivered before the author was appointed to the Bench.

\*\*Judge, United States District Court for the Western District of Missouri; A.B., University of Missouri, 1934; LL.B., 1936.

1. See generally SULLIVAN, *TRIAL BY NEWSPAPER* (1961).

in view of the constitutional guarantee of freedom of the press? The purpose of this paper is to examine and survey the law relating to contempt of court by publication.

To begin with, when one asks why there are contempt citations in some sensational cases and not in others, he assumes, validly or invalidly, that a court trying a particular sensational case does have power to issue a contempt citation against a particular newspaper. And, in a similar fashion, the question of how the exercise of contempt power can be justified in view of the constitutional guarantee of freedom of the press assumes, validly or invalidly, that a court may constitutionally exercise contempt power over newspaper publications that can be reconciled with the first amendment's guarantee of freedom of the press. The ensuing discussion will deal with the validity of these assumptions.

It is understandable that invalid assumptions are made concerning the courts' power in this area, for, since 1742, judges have been putting newspapermen in jail with somewhat monotonous regularity. And, an examination of the law of England and that of most jurisdictions in the United States, both state and federal, before World War II, shows that the adjudicated cases sustained these assumptions as being valid.<sup>2</sup>

The law did stand in favor of the exercise of contempt power by courts over newspapermen for approximately two hundred years. However in 1941, the Supreme Court of the United States made a fundamental and basic change in the law of contempt in this country by its decision in the case of *Bridges v. California*,<sup>3</sup> the significance of which to this day has not been fully comprehended by either the courts or newspapermen.

Prior to the *Bridges* decision, in spite of statutes passed in the first half of the nineteenth century by Congress and the vast majority of state legislatures which purported to limit the contempt power of courts, a newspaper never knew how far it could go in commenting on a particular case. This was true whether that case was actually pending or whether it had ended; one could only guess what printed words might fire a particular judge into action. However, it was apparent that if a particular judge in the vast majority of American jurisdictions became offended by an article or a cartoon published in a newspaper, he had the power to bring the publisher of the newspaper into court and to fine him or order him sent

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2. For a compilation, by jurisdiction, of cases involving contempts by publication, see SULLIVAN, *CONTEMPTS BY PUBLICATION* 189-98 (2d ed. 1940).

3. 314 U.S. 252 (1941), together with *Times-Mirror Co. v. Superior Court*.

to jail for contempt. The author of the article and the cartoonist were, of course, similarly exposed. So far as the English law is concerned this is true today if the newspaper comment relates to a pending case.

Before 1941, any defense that newspapermen were only exercising the freedom of the press guaranteed them by the first amendment was generally overruled, if noticed at all, by language to the effect that "freedom of the press is subordinate to that of the independence of the judiciary" and that "it is the paramount obligation of courts to protect liberty of the press only when that liberty is not abused."

#### WHAT IS CONTEMPT OF COURT?

The term "contempt by publication" generally concerns the power of a judge to fine or put a newspaperman in jail because of something published in a newspaper. The trial of whether or not the particular publication is contemptuous is before the judge. Although it is a quasi-criminal trial, the constitutional guarantee of a jury trial does not extend to contempt cases. The judge determines both the law and the facts in a case of contempt of court.

Contempt by publication is only one facet of the power courts have to punish for acts which are offensive to them. In order to understand more fully contempt by publication, it is necessary to place it in the context of the larger concept of "contempt of court."

Sir John Fox, in his authoritative work, *The History of Contempt of Court*,<sup>4</sup> stated that "the rules for preserving discipline essential to the administration of justice, came into existence with the law itself, and Contempt of Court (*contemptus curiae*) has been a recognized phrase in English law from the twelfth century to the present time."<sup>5</sup>

The first distinction to be made is between "civil contempt" and "criminal contempt." A civil contempt involves generally the disobedience of a party to a case of an express order of the court entered in that particular case. It is obvious that the law could not operate without exactly this type of power.

Criminal contempt, to be sharply distinguished from civil contempt, is traditionally defined as an act which "strikes at the discipline and

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4. FOX, *THE HISTORY OF CONTEMPT OF COURT* (1927).

5. *Id.* at 44.

efficiency of judicial authority."<sup>6</sup> Criminal contempt must be further subdivided into contempts committed in the presence of the court, *in facie curiae*, and those which are committed out of the presence of the court. An early English case<sup>7</sup> relates how the unfortunate contemnor tossed "un brickbat a le dit justice que narrowly mist." That act was obviously in the presence of the court and such an act is called a direct criminal contempt. Again it is apparent that a judge must have and exercise power over what happens in his presence in his own courtroom.

Criminal contempts which are committed out of the presence of the court are sometimes denoted "indirect" or "constructive" contempts. Contempt by publication falls in this last category, for newspapers are obviously published out of the presence of the court.

When a court entertains a contempt proceeding, it is said to exercise "summary jurisdiction." This means that it not only determines the law, but it also, and most importantly, decides the facts without the aid and assistance of a jury. When the judge who was "narrowly mist" by the brickbat thrown at him in open court sentenced the thrower to jail for contempt of court, he simultaneously performed the functions of prosecutor, judge and jury. And when a judge convicts a newspaper of an indirect contempt by publication case, he operates in the same manner. One does not have to elaborate on the fact that a newspaperman would more likely be convicted by the judge whom he insulted than he would by a jury who might well agree with what the newspaperman had to say about the judge.

#### DEVELOPMENT OF THE LAW OF CONTEMPT

The power that courts have exercised over newspapers, like much of our American law, is of English origin. Lord Hardwicke in 1742, in the case of *Roach v. Garvan*,<sup>8</sup> sent the printer of the *St. James's Evening Post* to prison for publishing an article about witnesses in a pending case. *Roach v. Garvan* remains the law of England today. Said Lord Hardwicke in 1742:

Nothing is more incumbent upon courts of justice, than to preserve their proceedings from being misrepresented . . . .

There are three different sorts of contempt. One kind of contempt is, scandalizing the court itself.

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6. 36 HARV. L. REV. 617, 618 (1923).

7. Anonymous, Dyer 188 b. (1631).

8. 2 Atk. 469, 26 Eng. Rep. 683 (1742), variously cited as the *St. James's Evening Post* case.

There may be likewise a contempt of this court, in abusing parties who are concerned in causes here.

There may be also a contempt of this court, in prejudicing mankind against persons before the cause is heard.<sup>9</sup>

*Roach v. Garvan*, while it did put a newspaperman in jail, really did not establish the summary power of a judge to imprison a newspaperman for contempt by publication. The modern law on the subject springs from the case of *The King v. Almon*.<sup>10</sup> Chief Justice Wilmot stated in *Almon* that the practice of judges exercising summary jurisdiction in contempt cases was established by "immemorial usage" and that it was justified by the "necessity" of keeping a Blaze of Glory around the King's judicial ministers.

American law on the subject followed that of England, at least until the 1920's. By the end of the 1940's, however, a complete revolution in the American law of contempt had taken place. A ready explanation for the rejection of the English philosophy might be found in the first amendment of the Constitution, which has no English counterpart.

That portion of the first amendment which is pertinent to this discussion provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." All federal courts, except the Supreme Court, must be created by congressional action. It logically follows therefore that Congress could not create a court which could have power to abridge freedom of speech or of the press without violation of the first amendment. Congress did, on March 2, 1831, pass an act which provided that:

[Federal] courts shall have power . . . to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided*, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice . . .<sup>11</sup>

In 1835, the General Assembly of the State of Missouri passed a similar act, typical of those being passed by other states about the same time, which provided that as to Missouri courts:

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9. *Id.* at 469-71, 26 Eng. Rep. at 683-84.

10. *The King v. Almon*, WILMOT, NOTES AND OPINIONS OF JUDGMENTS 243 (1802).

11. Act of March 2, 1831, ch. 98, 4 Stat. 487.

Every court of record shall have power to punish, as for criminal contempt, persons guilty of any of the following acts, and no others:

*First*, Disorderly, contemptuous or insolent behavior, committed during its sitting, in immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority . . . .<sup>12</sup>

Despite the clear language of these statutes and the command of the first amendment, for nearly one hundred years American courts meted out punishment for offensive newspaper articles and cartoons published out of their presence. In fact it was not until 1941 that the first case involving a newspaper's assertion of its rights under the first amendment in a contempt proceeding reached the Supreme Court of the United States and a clear look was taken at the question of why statutes of this type had been passed and what they really meant.

#### MISSOURI AND FEDERAL CONTEMPT BY PUBLICATION CASES DECIDED BEFORE 1925

*State ex inf. Crow v. Shepherd*,<sup>13</sup> a 1903 Missouri case, is typical of the cases that can be found in other states. J. M. Shepherd was the publisher of the Warrensburg, Missouri, *Standard Herald*. In June of 1903, Mr. Shepherd began an editorial with the following language:

"When a citizen of Missouri stops long enough to think of the condition of affairs in this State, it is enough to chill his blood. A grand jury in Cole county has just found indictments against four members of the highest lawmaking body in the State, and the St. Louis grand jury has heard evidence within the past few months that, if it had the necessary jurisdiction, would have indicted many other members of the State Senate. . . . They also see the Chief Executive sitting passively at his office in the statehouse, not making a move to bring to justice the men who have been proven guilty of boodling in the Missouri Legislature by the St. Louis grand jury, but over whom the authorities of that city have no jurisdiction. . . ."<sup>14</sup>

12. Courts § 57, at 160, RSMo 1835.

13. 177 Mo. 205, 76 S.W. 79 (1903) (en banc). For an extended discussion of this case, see THOMAS, *THE LAW OF CONSTRUCTIVE CONTEMPT* (1904).

14. Quoted from the court's opinion, *id.* at 209, 76 S.W. at 79-80.

After thus covering the legislative and executive branches of the government of Missouri, Mr. Shepherd turned to the Missouri Supreme Court and stated:

"And now, as the capsheaf of all this corruption in high places, the Supreme Court has at the whipcrack of the Missouri Pacific railroad, sold its soul to the corporations . . . Learned men of the law say that Rube Oglesby had the best damage suit against a corporation ever taken to the Supreme Court. This very tribunal . . . rendered a decision sustaining the judgment of the lower court, which decision was concurred in by six of the seven members of the court. This is usually the end of such cases . . . But not so in the Oglesby case. . . ."<sup>15</sup>

Mr. Shepherd then detailed how, in his judgment, the Democratic Party, at the behest of the Missouri Pacific's "political department" had "hoisted" railroad attorneys onto the Supreme Court so that, to return to Mr. Shepherd's words, as quoted by the court:

"The railroad, backed by four judges on the bench, allowed the case to come up for final hearing, and Monday the decision was handed down, reversed and not remanded for retrial. The victory of the railroad has been complete, and the corruption of the Supreme Court has been thorough. It has reversed and stultified itself in this case until no sane man can have any other opinion but that the judges who concurred in the opinion dismissing the Oglesby case have been bought in the interest of the railroad. . . . The corporations have long owned the Legislature, now they own the Supreme Court, and the citizen who applies to either for justice against the corporation gets nothing. . . ."<sup>16</sup>

An information was filed against Mr. Shepherd in which he was charged with defaming, degrading, and insulting the Supreme Court, and accusing its members of "corruption and partiality in the discharge of their official duties." It is an understatement to say that the language used in the editorial is somewhat rough. But the legal question is whether a man is to be found guilty of contempt of court by the very judges about whom he wrote. The Supreme Court of Missouri emphatically answered that question in the affirmative and fined Mr. Shepherd 500 dollars and ordered him "to stand committed until the same was paid." He paid.

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15. *Id.* at 209, 76 S.W. at 80.

16. *Id.* at 210, 76 S.W. at 80.

Said the court:

The books are full of cases, both English and American, where other courts have been similarly scandalized, and have punished the villifiers as for a contempt of court. . . .

The power to punish for contempt is as old as the law itself, and has been exercised so often that it would take a volume to refer to the cases.<sup>17</sup>

The books to which the court turned to sustain its legal theories, however, were English, and not American. In the reports of the *Shepherd* case is found mention of Lord Hardwicke,<sup>18</sup> who spoke about "scandalizing the court" in 1742; and the *Almon* case was also cited as authority.<sup>19</sup>

The constitutional question concerning freedom of the press was disposed of with the short statement:

Newspapers and citizens have the same rights to tell the truth about any body or any institution. Neither has any right to scandalize any one or any institution. . . .

The liberty of the press means that any one can publish anything he pleases, but he is liable for the abuse of this liberty. If he does this by scandalizing the courts of his country, he is liable to be punished for contempt.<sup>20</sup>

To settle the question completely, the court ruled that the Missouri statute requiring that contempts be committed in the "immediate view and presence" of the court was totally unconstitutional because it violated the inherent power of the judicial branch of the government.

Newspapers were not faring any better in the Supreme Court of the United States. *Patterson v. Colorado ex rel. Attorney General*<sup>21</sup> is a case in point. A newspaper in Colorado published news articles, editorials and a cartoon suggesting that the Supreme Court of Colorado was aiding and abetting the Republican Party "to seat various Republican candidates, including the governor of the State, in place of Democrats who had been elected, and that two of the judges of the court got their seats as a part of the scheme."<sup>22</sup> It was Mr. Justice Holmes who held that:

When a case is finished, courts are subject to the same criticism as other people, but the propriety and necessity of preventing interfer-

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17. *Id.* at 218, 76 S.W. at 82-83.

18. *Id.* at 229, 76 S.W. at 86.

19. *Id.* at 232, 76 S.W. at 87.

20. *Id.* at 244, 253, 76 S.W. at 91, 94.

21. 205 U.S. 454 (1907).

22. *Id.* at 459.

ence with the course of justice by premature statement, argument or intimidation hardly can be denied.<sup>23</sup>

In another Missouri case decided in 1913, a trial judge in Kansas City fined and committed William Rockhill Nelson of the *Kansas City Star* to jail for contempt of court.<sup>24</sup> A newspaper article regarding a sixty dollar attorney's fee in a divorce case was the cause of the citation. This case was unusual in that the day before the trial was to commence, the trial judge before any evidence was presented, "proceeded to and did write an opinion therein, finding, from the citation and return, the facts of the case, and determined that the petitioner (Nelson) was guilty of contempt."<sup>25</sup>

The fact that Mr. Nelson's case obviously had been decided before it was ever tried was too much for the Supreme Court of Missouri. The primary authority relied upon the reverse, however, seemed to be The Bible. The court stated: "This conduct of the [trial] court was a plain violation of the following fundamental rule of right, viz.: 'He that answereth a matter before he heareth it, it is folly and shame unto him.' [Proverbs, 18:13.]"<sup>26</sup>

And again: "This is the best form of government given to man upon earth; but thank God we are promised a better one in the world to come, where everyone, great and small, shall be judged out of the book of life, 'according to their works.' [Revelation chap. 20, verse 12.]"<sup>27</sup>

It is perfectly clear from the rest of its opinion where the Supreme Court of Missouri really wanted William Rockhill Nelson to go in the next world, but so far as this one was concerned, it held Mr. Nelson did not have to go to jail. The case is important only to illustrate that so far as power was concerned, the law of Missouri remained as it had been stated in the earlier *Shepherd* case.

Another five years passed. In 1917, the Supreme Court of the United States decided *Toledo Newspaper Co. v. United States*.<sup>28</sup> The *Toledo News-Bee* took what it considered the "people's" side in a street railroad receivership involving the three cent fare. A cartoon also figured in the case. The streetcar company was represented "as a moribund man in bed with his friends at the bedside and one of them saying, 'Guess we'd better call in

23. *Id.* at 463.

24. *Ex parte* Nelson, 251 Mo. 63, 157 S.W. 794 (1913) (en banc).

25. *Id.* at 100, 157 S.W. at 807.

26. *Id.* at 103, 157 S.W. at 808.

27. *Id.* at 104, 157 S.W. at 808.

28. 247 U.S. 402 (1918).

Doc Killits.' "Killits" was not a doctor; he was the federal judge. And, after waiting nearly six months, he determined that the administration of justice in his court had been adversely affected, so he fined the newspaper for contempt by publication. The Supreme Court of the United States affirmed.

This case is important because the dissent of Mr. Justice Holmes, concurred in by Mr. Justice Brandeis, was eventually to become the law of the land. That dissent, however, was not based on the first amendment. It was based on the idea that a newspaper simply was not published "in the presence of the court or so near thereto" as to obstruct the administration of justice within the meaning of the 1831 federal statute.

*Craig v. Hecht*,<sup>29</sup> is the last case of this particular group to which attention is to be called. It was decided in 1923, and represents the high water mark of the assertion of contempt power by the federal courts. Charles Craig, Comptroller of New York City, wrote and published an uncomplimentary letter concerning Federal Judge Mayer. Some fifteen months after the offense, Mr. Craig was sentenced to jail for sixty days for contempt.

A majority of the United States Supreme Court held that Mr. Craig's conviction could not be reviewed on the merits, but even so, the Court sustained Judge Mayer's power to throw Craig into jail. Justices Holmes and Brandeis again dissented. While Mr. Justice Holmes did not mention the first amendment, it is clear that he was thinking about freedom of speech when he sharply stated that: "Unless a judge while sitting can lay hold of anyone who ventures to publish anything that tends to make him unpopular or to belittle him I cannot see what power Judge Mayer had to touch Mr. Craig. . . . A man cannot [thus] be summarily laid by the heels . . . ."<sup>30</sup>

#### FOUNDATIONS OF THE PRESENT DAY LAW OF CONTEMPT IN AMERICA

It has thus far been noted that a court must determine two legal questions against a newspaperman before that person can be "summarily laid by his heels" for contempt by publication. First, a court must, and up to this point did, find some way around the federal and state statutes that require contempts to take place "in the presence of the court or so

29. 263 U.S. 255 (1923).

30. *Id.* at 281.

near thereto as to obstruct the administration of justice." Second, and by far the most important, a court must, and up to this point did, determine that putting a newspaper publisher in jail for contempt by publication somehow does not abridge the first amendment.

A reconsideration came in connection with the statutory question before much real attention was paid to the first amendment question. The person who was primarily responsible for this reconsideration was a British lawyer by the name of Sir John Fox.

His book, *The History of Contempt of Court*,<sup>31</sup> published in 1927, demonstrated conclusively that Mr. Justice Wilmot in the *Almon* case simply was wrong when he asserted that courts had exercised contempt power over out-of-court publications by "immemorial usage." He also demonstrated that Mr. Justice Wilmot had, in 1765, done about the same thing that the judge in the William Rockhill Nelson case was later to do in 1913, namely, written his opinion in advance of any actual trial. But Justice Wilmot ended up in an even more embarrassing position than did our Missouri judge. In the case of Wilmot, the case for which he had prepared his opinion was actually dismissed and never tried. The pre-prepared opinion in the untried case of *The King v. Almon* was found by Judge Wilmot's son and was published in a book entitled *Notes and Opinions of Judgments*<sup>32</sup> in the year 1802, some thirty-seven years after the case was to have been tried. *Almon*, therefore, becomes a most interesting authority upon which to base power to throw newspapermen in jail.

But Sir John Fox went even deeper. He also demonstrated beyond question that Lord Hardwicke's decision in *Roach v. Garvan*<sup>33</sup> was the single case that was out of step with all the other early English cases, and that the accepted rule of decision in the 1740's in England was that a publisher responsible for an out of court contempt was entitled to a trial by jury and was not subject to the summary power of a judge.

In the last chapter of his book, Sir John dealt briefly with the effect of the *Almon* case on American law. The dry British concluding words of his book were as follows:

If the conclusion submitted by the present writer is correct . . . if the doctrine definitely laid down by Mr. Justice Wilmot in *Almon's Case*, confirmed by Mr. Justice Blackstone, and, in

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31. Fox, *op. cit. supra* note 4.

32. WILMOT, *op. cit. supra* note 10.

33. *Supra* note 8.

effect, declared by Lord Hardwicke in *Roach v. Garvan*, is founded on a fallacy . . . the result may be that where, as in the United States . . . the decisions asserting the power of the Court to punish certain classes of contempt by summary procedure will need re-consideration. The [American] Courts have discarded the statutes and founded themselves on the English decisions, whereas the law turns out to be, not what the decisions indicate, but what the American statutes have declared it to be.<sup>34</sup>

Walter Nelles, an American lawyer, having become interested in the subject while reviewing Fox's book, went to work on his own to do the same sort of historical research of the law in the United States that Sir John had done in connection with the law of England. Nelles' research, conducted in collaboration with Carol Weiss King, appeared in two law review articles published by *Columbia Law Review* in April and May of 1928.<sup>35</sup> Their historical research brought to light the precise history of the nineteenth century statutes limiting the summary contempt power of state court judges. That research dusted off for modern eyes an extremely interesting bit of early Missouri history that had provided the actual background for the enactment of the 1831 federal statute that attempted to limit the power of a federal judge to punish for contempt of court. The scene therefore must shift to St. Louis in the 1820's and the story of Judge Peck and Luke Lawless.<sup>36</sup>

Because Missouri was carved out of the Louisiana Purchase, the owner of an individual tract of land had to trace his title to a French or Spanish grant. Land speculators obtained forged "grants" from retired French and Spanish officials and litigation was rampant as to the validity of the various claims. United States Senator David Barton, who in 1820 was much more popular than Senator Thomas Hart Benton, happened to represent professionally the confirmed land grants. Senator Benton represented the opposing group of litigants. Benton, after his election to the United States Senate asked Luke Lawless, a St. Louis lawyer, to take over his clients.

Senator Barton had sponsored the appointment of Judge J. B. C. Peck to the Federal District Court of Missouri. Lawless' test case came on for trial in 1824 and 1825. After a stormy trial, even for that day, Judge Peck ruled against Lawless' clients and published his opinion on March 30, 1826.

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34. Fox, *op. cit. supra* note 4, at 252.

35. Nelles & King, *Contempt by Publication in the United States*, 28 COLUM. L. REV. 401, 525 (1928).

36. *Id.* at 423.

Lawless, over the signature of "A Citizen" published in a rival newspaper a "concise statement of some of the principal errors" that he thought Judge Peck had made. Judge Peck reacted as some federal judges in those days could be expected to react and promptly held Lawless in contempt of court, sentenced him to one day's imprisonment, and uniquely enough, ordered that Lawless be suspended from practice for eighteen months.

Lawless, evidently figuring that if a judge could get rid of a lawyer, that perhaps a lawyer might get rid of a judge, filed a memorial with the United States Congress requesting that Judge Peck be impeached. The House eventually voted 123 to 49 to present impeachment articles against Judge Peck. After a protracted trial before the Senate, Judge Peck's impeachment failed by only one vote in the Senate.<sup>37</sup>

The most important result of the trial was the immediate passage of the 1831 federal statute which obviously was designed to prevent any other federal judge from exercising the sort of jurisdiction over out of court contempts by publication as had been exercised by Judge Peck.

The British have never given up their control of the press in the realm of contempt by publication. But within thirteen years of its printing, the United States Supreme Court relied upon the historical work of Nelles and King expressly to overrule *Toledo Newspaper Co. v. United States*.<sup>38</sup>

As the foundation had thus been laid for a re-examination of the statutory question, movement was also taking place on the first amendment front.

The fourteenth amendment to the United States Constitution forbids the taking of "life, liberty, or property" without "due process of law" by state action. It is now clear from a constitutional law viewpoint that at least some of the guarantees of the Bill of Rights, including without question the first amendment's guarantee of freedom of speech and press, are protected against state legislative and judicial action by the "due process of law" clause of the fourteenth amendment.

In 1919, in *Schenck v. United States*,<sup>39</sup> the "clear and present danger" test of free speech was evolved by Mr. Justice Holmes. In sustaining federal convictions against the defense of the first amendment guarantee of free speech that case stated:

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37. STANSBURY, REPORT OF THE TRIAL OF JAMES H. PECK (1833).

38. *Supra* note 28.

39. 249 U.S. 47 (1919).

The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.<sup>40</sup>

However, American judicial acceptance of the English contempt by publication doctrine, reinforced by the express refusal of the United States Supreme Court to recognize the very real limitations imposed by the 1831 federal statute, by the similar state statutes, and by the first amendment was yet to be rejected. It was not until 1941 that the case of *Nye v. United States*<sup>41</sup> expressly overruled *Toledo Newspaper Co. v. United States*,<sup>42</sup> decided in 1917. This meant that so far as the federal courts were concerned, their power to punish out of court contempts by publication had come to an abrupt end. The long forgotten history of Judge Peck's impeachment trial, brought to light by Nelles and King, formed the basis of the Supreme Court's adjudication. After detailing that history, the court acknowledged that: "[T]he history of that episode makes abundantly clear that it served as the occasion for a drastic delimitation by Congress of the broad undefined power of the inferior federal courts . . . ."<sup>43</sup>

The Court then turned to the construction of that portion of the act of 1831 which required that the contempt be committed "in the presence of the court or so near thereto as to obstruct the administration of justice." The court decided that: "It is not sufficient that the misbehavior charged has some direct relation to the work of the court. 'Near' in this context, juxtaposed to 'presence,' suggests physical proximity not relevancy."<sup>44</sup>

Sir John Fox's recommendation for a reconsideration of the American law was accepted in a second case decided in 1941. That case, *State ex rel. Pulitzer Publishing Co. v. Coleman*,<sup>45</sup> popularly known as the "Post-Dispatch" case, was decided by the Supreme Court of Missouri in June of 1941. Portions of Editor Coghlan's editorial were quoted by the court:

"A Burlesque on Justice

"THE AMAZING CASE OF PUTTY NOSE, a legal skit, in one very short act, presented under the auspices of the State of Missouri

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40. *Id.* at 52.

41. 313 U.S. 33 (1941).

42. *Toledo Newspaper Co. v. United States*, *supra* note 28.

43. 313 U.S. at 45.

44. 313 U.S. at 49.

45. 347 Mo. 1238, 152 S.W.2d 640 (1941) (en banc).

. . . with the following cast: Putty Nose . . . Putty Nose's First Lawyer . . . Putty Nose's Second Lawyer . . . Circuit Attorney . . . Assistant Circuit Attorney . . . His Honor, the Judge . . . Noise (off stage) . . . .

An utterly unconvincing performance was given . . . . Presumably it was a serious presentation, but those hardy spectators who gathered in the hope that drama of some proportions would unfold saw what fell little short of a burlesque on justice.<sup>46</sup>

To make sure that he would come through loud and clear, Mr. Coghlan wrote a follow up editorial the next day. And, the *Post-Dispatch* published a "Rat Alley" cartoon by Fitzpatrick. With great forthrightness, the Missouri Supreme Court in reliance upon the work of Sir John Fox and Nelles and King held:

In the case of *State ex inf. Crow v. Shepherd*, supra, we said that such publication did constitute contempt. . . . The elaborate argument in the *Shepherd* case to prove that a publication scandalizing the court was punishable as contempt is based upon a misunderstanding of legal history. The English authorities . . . start with an opinion prepared by Mr. Justice Wilmot in *Rex v. Almon* . . . . It contained an elaborate argument to prove that a publication of this character was punishable as contempt. . . . Later English cases followed and applied the rule as we did in the *Shepherd* case. More exhaustive historical research in recent years has proved that Wilmot was wrong and that the power he claimed had never been exercised by the common-law courts, but only in a few instances by the court of Star Chamber . . . .<sup>47</sup>

The victory, however, was far from complete on the freedom of speech question. But the Supreme Court of Missouri's ruling on that question is relatively unimportant because the Supreme Court of the United States was to make its binding determination in regard to the first amendment in a matter of months. *Bridges v. California*,<sup>48</sup> together with *Times-Mirror Co. v. Superior Court*, was first argued in the Supreme Court in October 1940, and after reargument in October 1941, was decided on December 8, 1941.

All former United States Supreme Court decisions, and for that matter, all former decisions of the various state courts relating to contempt by publication were overruled by *Bridges*. That ruling was based on the basic

46. *Id.* at 1250, 152 S.W.2d at 642.

47. *Id.* at 1257-58, 152 S.W.2d at 647.

48. *Supra* note 3. The *Times-Mirror* and *Bridges* litigations were consolidated for consideration by the United States Supreme Court.

re-examination given the first amendment in the case. *Bridges*, being based on constitutional grounds, is the law throughout the country today.

### BRIDGES V. CALIFORNIA, ITS PROGENY, AND ITS EFFECT

The *Times-Mirror* of Los Angeles published an editorial under the title, "Probation for Gorillas?" The editorial suggested, in the then pending case, that: "Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes. This community needs the example of their assignment to the jute mill."<sup>49</sup>

In another pending case involving two labor unions, in one of which Harry Bridges was an officer, Mr. Bridges sent a public telegram to the Secretary of Labor in which he referred to the judge's decision as being "outrageous" and that his union "did not intend to allow state courts to override the majority vote of members . . . and to override the National Labor Relations Board."<sup>50</sup>

The California trial court held both the *Times-Mirror* and Harry Bridges in contempt for their publications. The Supreme Court of California affirmed the convictions on the theory that those publications had a "reasonable tendency" to interfere with the orderly administration of justice.<sup>51</sup> That court also held that freedom of expression was subordinate to judicial decorum.

The Supreme Court of the United States reversed. It held that the exercise of summary contempt power by a state court to punish out of court publications concerning even pending cases was forbidden by the first amendment, excepting only the situation in which a particular publication created such a likelihood of bringing about substantive evil as to deprive the publisher of the constitutional protection of freedom of the press. This means that for all practical purposes the court adopted the theory and the language of the "clear and present danger" test originally announced by Mr. Justice Holmes in *Schenck v. United States*<sup>52</sup> as the rule of decision to be applied in all contempt by publication cases.

The Court noted that it had "not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger

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49. 314 U.S. at 272.

50. 314 U.S. at 276.

51. *Bridges v. Superior Court*, 14 Cal. 2d 464, 94 P.2d 983 (1939) (en banc), *Times-Mirror Co. v. Superior Court*, 15 Cal. 2d 99, 98 P.2d 1029 (1940) (en banc).

52. *Supra* note 39.

may be and yet be deemed present.’”<sup>53</sup> But this recognition of the relative, as distinguished from the absolute, does not mean that adjudications cannot be made, because, as the court pointed out: “[T]he ‘clear and present danger’ language of the *Schenck* case has afforded practical guidance in a great variety of cases in which the scope of constitutional protections of freedom of expression was in issue.”<sup>54</sup> In summary, the court held that:

[T]he only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society.<sup>55</sup>

It should be realized, however, that the Court went on to point out that the shift of the balance of power from judges to newspapermen was historically something of a choice of evils. Thomas Jefferson, the greatest of our champions of liberty, was quoted by the Court as follows: “I deplore . . . the putrid state into which our newspapers have passed, and the malignity, the vulgarity, and mendacious spirit of those who write them. . . . These ordures are rapidly depraving the public taste.”<sup>56</sup> Jefferson is also often quoted in his letter to Edward Carrington of January 16, 1787, where he states: “[W]ere it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter.”<sup>57</sup> But as the Court observed, Jefferson did not defend freedom of the press because he admired the way the press was discharging its responsibilities. His defense was predicated on the optimistic idea, as he expressed it in a portion of the Carrington letter that is seldom quoted, that because

the basis of our governments being the opinion of the people . . . the way to prevent irregular interpositions of the people is to give them full information of their affairs thro’ the channel of the public papers, and to contrive that those papers should penetrate the whole mass of the people.<sup>58</sup>

Jefferson was merely hopeful, not happy, with the way the press of his day discharged its responsibilities.

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53. 314 U.S. at 261.

54. 314 U.S. at 262.

55. 314 U.S. at 265.

56. 314 U.S. at 270 n. 16.

57. Letter from Thomas Jefferson to Edward Carrington, Jan. 16, 1787, in 11 THE PAPERS OF THOMAS JEFFERSON 48, 49 (Boyd ed. 1955).

58. *Ibid.*

The Court, not without significance, pointed out that: "Legal trials are not like elections, to be won through the use of the meeting-hall, the radio, and the newspaper."<sup>59</sup>

The principal matter determined was that the Court refused to accept "the assumption that . . . it is necessary for judges to have a contempt power by which they can close all channels of public expression to all matters which touch upon pending cases."<sup>60</sup> On the facts, the Court held that the editorial and the telegram did not present a clear and present danger to the administration of justice.

Mr. Justice Frankfurter, writing in dissent, felt that:

Our whole history repels the view that it is an exercise of one of the civil liberties secured by the Bill of Rights . . . for a powerful metropolitan newspaper to attempt to overawe a judge in a matter immediately pending before him.<sup>61</sup>

What really concerned Mr. Justice Frankfurter was that the majority's opinion might be construed as holding "that trial by newspaper has constitutional sanctity." He not only stated the English rule prohibiting any comment on a pending case, he quoted from *Rex v. Clarke*<sup>62</sup> to show what British justice thought about trial by newspaper: "Probably the proper punishment . . . will be imprisonment in cases of this kind."<sup>63</sup>

The underlying problem of constitutional conflict between "trial by newspaper" and an individual's right to a fair trial unprejudiced by newspaper comment came to the surface in *Pennekamp v. Florida*,<sup>64</sup> decided five years after *Bridges*. As in the *Post-Dispatch* case, two editorials and a cartoon were involved. The newspaper complained that a defense motion had been sustained "so fast the people didn't get in a peep." Another editorial criticized a trial judge because he had refused to close down the Tepee Club, identified in the record as a bookie joint. Similar complaints were made concerning still another judge's ruling in regard to eight indictments of rape that had been improperly drawn by a grand jury composed of laymen. It was fully established at the contempt trial that the newspaper had failed to report that the rape indictments had been quashed on the recommendation and with the approval of the Assistant State Attorney,

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59. 314 U.S. at 271.

60. *Ibid.*

61. 314 U.S. at 279 (dissenting opinion).

62. 103 L.T.R. (n.s.) 636 (K.B. 1910).

63. *Id.* at 640.

64. 328 U.S. 331 (1946).

and that the defendants had been re-indicted the next day. The cartoon somewhat unimaginatively caricatured a judge tossing papers marked "Defendant Dismissed" to a thug while a futile individual labeled "Public Interest" vainly protested.

The Supreme Court of Florida upheld the contempt convictions of the trial court.<sup>65</sup> The Supreme Court of the United States reversed. It held that the first amendment protected such obviously irresponsible out of court comment on pending cases. The following sentences quoted from the opinion will sufficiently reveal the rationale of the decision:

*Bridges v. California* fixed reasonably well-marked limits around the power of courts to punish newspapers and others for comments upon or criticism of pending litigation. . . . A theoretical determinant of the limit for open discussion was adopted from experience with other adjustments of the conflict between freedom of expression and maintenance of order. This was the clear and present danger rule. . . .

[I]t is clear that the full truth in regard to the quashing of the indictments was not published. . . . We agree that the editorials did not state objectively the attitude of the judges. We accept the statement of the Supreme Court that under Florida law, "There was no judgment that could have been entered in any of them except the one that was entered."

We must, therefore, weigh the right of free speech . . . against the danger of the coercion and intimidation of courts in the factual situation presented by this record. . . .

We are not willing to say under the circumstances of this case that these editorials are a clear and present danger to the fair administration of justice in Florida.<sup>66</sup>

Mr. Justice Reed wrote the majority opinion for the full Court. Three other judges, however, wrote concurring opinions. And in each of those concurring opinions the problem of free press versus fair trial was fully developed. The majority opinion noted that after the decision in *Bridges* "it was expected that . . . a decent self-restraint on the part of the press . . . would emerge which would guarantee the courts against interference . . . ."<sup>67</sup> The concurring opinions demonstrate rather clearly that the judges who wrote those opinions were not impressed with the sense of responsibility

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65. *Pennekamp v. Florida*, 156 Fla. 227, 22 So. 2d 875 (1945) (en banc).

66. 328 U.S. at 334, 344, 346, 348.

67. 328 U.S. at 334.

that the press was in fact demonstrating. Mr. Justice Frankfurter, for example, stated:

A free press is vital to a democratic society because its freedom gives it power. Power in a democracy implies a responsibility in its exercise. . . . In plain English, freedom carries with it responsibility even for the press; freedom of the press is not a freedom from responsibility for its exercise. . . .

"Trial by newspaper," like all catch phrases, may be loosely used but it summarizes an evil influence upon the administration of criminal justice in this country. Its absence in England, at least its narrow confinement there, furnishes an illuminating commentary. It will hardly be claimed that the press is less free in England than in the United States. Nor will any informed person deny that the administration of criminal justice is more effective there than here. . . . There are those who will resent such a statement as praise of another country and dispraise of one's own. What it really means is that one covets for his own country a quality of public conduct not surpassed elsewhere. . . .

In securing freedom of speech, the Constitution hardly meant to create the right to influence judges or juries. That is no more freedom of speech than stuffing a ballot box is an exercise of the right to vote.<sup>68</sup>

### CONCLUSION

Since 1941, there has been a complete revolution in the American law of contempt. Like all revolutions, we are now faced with some new problems, of which a major one is the constitutional balance between the exercise of freedom of the press and the right for one to have a fair trial free from outside pressure of trial by newspaper. That question and the complicated considerations that affect the problem are not going to go away.

Judge Holtzoff, when opening a panel discussion in 1955 entitled "Fair Trial and Freedom of the Press,"<sup>69</sup> almost understated the question when he suggested that "the relation between the right to a fair trial and the right to freedom of the press, gives rise to difficult problems. . . ." He came much closer to the mark when he said:

Fundamentally the problem grows out of the fact that the various privileges guaranteed by the Bill of Rights are not entirely unrelated, unqualified, or unlimited. They do not operate in a

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68. 328 U.S. at 355-56, 359-66.

69. Reported in 19 F.R.D. 16 (June 11, 1955).

vacuum. They frequently impinge and encroach on one another. It becomes necessary, therefore, to find and steer a true course, and to maintain a balance that would accord to each of these rights its due, and yet would not adversely affect any other.<sup>70</sup>

The issue of fair trial versus free speech, of course, is an extremely complicated matter that will ultimately be determined by the Supreme Court of the United States as a matter of constitutional law. That court has already made some rather definitive declarations on the subject. And it has rendered a few decisions that get close to at least part of the general question. In this respect, attention is called to such cases as *Shepherd v. Florida*,<sup>71</sup> to Mr. Justice Frankfurter's opinion on the denial of certiorari in *Maryland v. Baltimore Radio Show, Inc.*,<sup>72</sup> and to *Irvin v. Dowd*,<sup>73</sup> and to the cases cited in those opinions to illustrate the growing body of authority in the Supreme Court of the United States that has determined that a defendant may be, and was in fact, denied a fair trial and therefore due process of law by the abusive exercise of freedom of the press. In his concurring opinion in the *Irvin* case, Mr. Justice Frankfurter not only asked one of the basic questions involved, he also answered it. The question was:

How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their minds were saturated by press and radio for months preceding by matter designed to establish the guilt of the accused?<sup>74</sup>

And the answer given was:

A conviction so secured obviously constitutes a denial of due process of law in its most rudimentary conception. . . .

[A]gain and again, such disregard of fundamental fairness is so flagrant that the Court is compelled, as it was only a week ago, to reverse a conviction in which prejudicial newspaper intrusion has poisoned the outcome.<sup>75</sup>

There may be just a rumble of distant thunder in Mr. Justice Frankfurter's two closing sentences:

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70. *Id.* at 17.

71. 341 U.S. 50 (1951).

72. 338 U.S. 912 (1950).

73. 366 U.S. 717 (1961).

74. *Id.* at 729-30.

75. *Ibid.*

This Court has not yet decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional system—freedom of the press, properly conceived. The Court has not yet decided that, while convictions must be reversed and miscarriages of justice result because the minds of jurors or potential jurors were poisoned, the poisoner is constitutionally protected in plying his trade.<sup>76</sup>

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76. *Ibid.*

**LAW COMMISSION OF INDIA**

**200<sup>TH</sup> REPORT**

**ON**

**TRIAL BY MEDIA**

**FREE SPEECH AND FAIR TRIAL UNDER  
CRIMINAL PROCEDURE CODE, 1973**

**AUGUST 2006**

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F.No.6(3)/124/2006-LC(LS)31<sup>st</sup> August, 2006

Dear

I have great pleasure in presenting to you the 200<sup>th</sup> Report of the Law Commission on “Trial by Media: Free Speech Vs. Fair Trial Under Criminal Procedure (Amendments to the Contempt of Court Act, 1971)”. The subject was taken up suo motu having regard to the extensive prejudicial coverage of crime and information about suspects and accused, both in the print and electronic media. There is today a feeling that in view of the extensive use of the television and cable services, the whole pattern of publication of news has changed and several such publications are likely to have prejudicial impact on the suspects, accused, witnesses and even Judges and in general, on the administration of justice. According to our law, a suspect/accused is entitled to a fair procedure and is presumed to be innocent till proved guilty in a Court of law. None can be allowed to prejudge or prejudice his case by the time it goes to trial.

Art. 19(1)(a) of the Constitution of India guarantees freedom of speech and expression and Art. 19(2) permits reasonable restrictions to be imposed by statute for the purposes of various matters including ‘Contempt of Court’. Art. 19(2) does not refer to ‘administration of justice’ but interference of the administration of justice is clearly referred to in the definition of ‘criminal contempt’ in sec. 2 of the Contempt of Courts Act, 1971 and in sec. 3 thereof as amounting to contempt. Therefore, publications which interfere or tend to interfere with the administration of justice amount to criminal contempt under that Act and if in order to

preclude such interference, the provisions of that Act impose reasonable restrictions on freedom of speech, such restrictions would be valid.

At present, under sec. 3(2) of the Contempt of Courts Act, 1971 read with the Explanation below it, full immunity is granted to publications even if they prejudicially interfere with the course of justice in a criminal case, if by the date of publication, a chargesheet or challan is not filed or if summons or warrant are not issued. Such publications would be contempt only if a criminal proceeding is actually pending i.e. if chargesheet or challan is filed or summons or warrant are issued by the Court by the date of publication. Question is whether this can be allowed to remain so under our Constitution or whether publications relating to suspects or accused from the date of their arrest should be regulated?

Supreme Court and House of Lords accept that prejudicial publications may affect Judges subconsciously:

The Supreme Court and the House of Lords have, as pointed out in Chapter III of our Report, observed that publications which are prejudicial to a suspect or accused may affect Judges also subconsciously. This can be at the stage of granting or refusing bail or at the trial.

Supreme Court holds prejudicial publication after ‘arrest’ can be criminal contempt:

Under the Contempt of Courts Acts of 1926 and 1952, unlike the Act of 1971, there was no specific definition of ‘civil’ or ‘criminal’ contempt. Further before 1971, the common law principles were applied to treat prejudicial publications made even before the ‘arrest’ of a person as contempt. In fact, some Courts were treating as ‘criminal contempt’, prejudicial publications even if they were made after the filing of a First Information Report (FIR). But the Supreme Court, in Surendra Mohanty v. State of Orissa (Crl. App. 107/56 dt. 23.1.1961) however, held that filing of an FIR could not be the starting point of pendency of a criminal case. Because of that judgment, a prejudicial publication made after the filing of the FIR gained immunity from law of contempt. But in 1969, the Supreme Court held in A.K. Gopalan v. Noordeen 1969 (2) SCC 734 (15<sup>th</sup> Sept., 1969) that a publication made after ‘arrest’ of a person could be contempt if it was prejudicial to the suspect or accused. This continues to be the law as of today so far as Art. 19(1)(a), 19(2) and Art. 21 are concerned.

Sanyal Committee's (1963) proposal accepting 'arrest' as starting point dropped by Joint Committee:

In the meantime from 1963, efforts were made to make a new law of contempt. The Sanyal Committee (1963) which was appointed for this purpose, while observing that our country is very vast and publications made at one place do not reach other places, however, recommended that so far as criminal matters are concerned, the date of "arrest" is crucial, and that should be treated as the starting point of 'pendency' of a criminal proceeding. It conceded that filing of an FIR could not be the starting point. The Sanyal Committee prepared a Bill, 1963 stating that prejudicial publications could be criminal contempt if criminal proceedings were 'imminent'. But thereafter, nothing happened for six years.

The Bill of 1963 prepared by the Sanyal Committee was reviewed by a Joint Committee of Parliament (1969-70) (Bhargava Committee) and after some brief discussion, the Joint Committee decided to drop reference to 'imminent' proceedings. This was done for two reasons (1) that the word 'imminent' was vague and (2) such a vague expression may unduly restrict the freedom of speech if the law applied to 'imminent' criminal proceedings. The recommendations of the Joint Committee resulted in the 1971 Act which omitted all references to 'imminent' proceedings or to 'arrest' as the starting point of pendency of a criminal proceeding.

Joint Committee's reasons are flawed:

The attention of the Joint Committee was not drawn to the decision of the Supreme Court in A.K. Gopalan v. Noordeen (1969 (2) SCC 734) dated 15<sup>th</sup> September, 1969 when it gave its Report on 23<sup>rd</sup> February, 1970. Once the Supreme Court judgment fixed the date of 'arrest' as the starting point for treating a criminal proceeding as pending, there remained no vagueness in the law. In that case, the Supreme Court has also balanced the rights of the suspect and accused on the one hand and the rights of the media for publication. In fact, in A.K. Gopalan's case, the editor of the Newspaper and others who made prejudicial publication after arrest were convicted for contempt, while Mr. A.K. Gopalan who made the statement after FIR but before arrest was exonerated by the Supreme Court.

Apart from the declaration of law and fair balancing of the competing rights as above by the Supreme Court in A.K. Gopalan v. Noordeen (1969), the date of arrest is the starting point under the UK Contempt of Court Act,

1981 and the Bill of 2003 prepared by the New South Wales Law Commission. Case law in Scotland, Ireland, Australia or the Law Commission Reports of those countries have also declared that if a person is arrested or if criminal proceedings are imminent, prejudicial publications will be criminal contempt. The leading judgment in Hall v. Associated Newspaper, 1978 SLT 241 (Scotland) has been followed in other jurisdictions and is the basis of the provision in the UK Act of 1981 for fixing ‘arrest’ as the starting point of pendency of a criminal case.

The 24 hour rule:

According to Hall, once a person is arrested, he comes within the ‘care’ and protection of the Court as he has to be produced in Court in 24 hours. In India, this is a guarantee under Art. 22(2) of the Constitution. The reason for fixing arrest as the starting point is that, if a publication is made after arrest referring to the person’s character, previous conviction or confessions etc., the person’s case will be prejudiced even in bail proceedings when issues arise as to whether bail is to be granted or refused, or as to what conditions are to be imposed and whether there should be police remand or judicial remand. Such publications may also affect the trial when it takes place later. Basing on this, in England and other countries, “arrest” and “imminent” proceedings are treated as sufficient and are not treated as vague. In this context, we have referred to the comparative law in several countries where the Constitutions guarantees protection to freedom of speech as also the liberty of suspects or accused.

Another important point here is that, in the year 1978, the Supreme Court in Maneka Gandhi v. Union of India, AIR 1978 SC 597 has altered the law as it stood before 1978 to say that so far as liberty referred to in Art. 21 is concerned, ‘procedure established by law’ in Art. 21 must be a fair, just and reasonable procedure. This was not the law in 1970 when the Joint Committee gave its report nor when the 1971 Act was enacted.

Hence, the Joint Committee’s observations and its omitting the word ‘imminent’ and its not treating ‘arrest’ as starting point, do not appear to be constitutionally valid.

Starting point of pendency should be ‘arrest’ and not filing of chargesheet:  
Explanation to sec. 3 to be amended:

In view of the changes in the constitutional law of our country as declared by the Supreme Court in A.K. Gopalan v. Noordeen (1969 (2) SCC 734) in so far as Art. 19(1)(a) and Art. 21 are concerned and Maneka Gandhi case (AIR 1978 SC 597) in so far as Art. 21 is concerned, the two reasons given by the Joint Committee in 1970 for omitting the word ‘imminent’ and for not treating ‘arrest’ as the starting point, are no longer tenable. Sec. 3(2) of the Act and Explanation below sec. 3 as of now, treat a criminal proceeding as pending only if a chargesheet or challan is filed or if summons or warrant is issued and the time of ‘arrest’. This has to be rectified by adding a clause ‘arrest’ in the Explanation below sec. 3 as being the starting point to reckon ‘pendency’ of a criminal proceeding as in the UK Act of 1981 and as proposed by other Law Reform Commission proposals in other countries. Further, when such an amendment is made, it is not as if that no publications are permitted after arrest. Only those which are prejudicial publications are not permitted. In addition, publications made without knowledge of arrest, or filing challan or without knowledge of summons or warrant, remain protected.

In this Report, we have also exhaustively discussed the Sunday Times judgment of the European Court 1979 (2) EHRR 245 which related to prior restraint of publications relating to a “civil” case and there the restraint was absolute and not temporary. That case is not a precedent in the present context.

The above amendment as to ‘arrest’ as being starting point is proposed by using the word ‘active’ criminal proceeding in sec. 3, rather than ‘pending criminal proceeding’ and inserting the word ‘arrest’ in the Explanation below sec. 3.

High Court to be approached directly than by reference from subordinate Court:

Again, as at present, if there is criminal contempt of subordinate Courts, the subordinate Courts have to make a reference to the High Court. This procedure applies to scandalizing the Judges (sec. 2(c)(i)) as also to publications interfering with administration of justice under sec. 2(c)(ii) and (iii). So far as contempt of prejudicial publications is concerned, a procedure of reference by the subordinate Court to the High Court is cumbersome and time consuming. We have, therefore, proposed sec. 10A

that so far as criminal contempt of subordinate Courts under sec. 2(c)(ii) and (iii) by way of publication is concerned, there is no need for a reference by the subordinate Courts, but that the High Court could be approached directly without consent of the Advocate General. This is provided in sec. 10A of the Bill.

High Court to be empowered to pass 'postponement' orders on the lines of sec. 4(2) of the UK Act, 1981:

In addition, there is need to empower the Courts to pass 'postponement' orders as to publication. While Courts have held that conditions for passing orders of prior restraint should be permitted only under stringent conditions, it is, however, accepted that temporary postponement of publication can be passed. This is accepted in several jurisdictions across the world. For passing of 'postponement orders', the UK Act of 1981 requires special proof of 'serious risk of prejudice' to be shown. We have proposed clearer words that 'real risk of serious prejudice' has to be proved before any 'postponement' orders are issued. We have proposed this in sec. 14A. Any breach of a postponement order will be contempt under sec. 14B. Such a procedure exists in UK too.

Enumeration of publications in the media which could be prejudicial stated in Ch. IX of the Report:

The Report also mentions in Chapter IX what publications can be prejudicial if made after a person is arrested. It is recognized in several countries and also in India that publications which refer to character, previous convictions, confessions could be criminal contempt. Publishing photographs may hinder proper identification in an identification parade. There are various other aspects such as judging the guilt or innocence of the accused or discrediting witnesses etc. which could be contempt. We have referred to these aspects as a matter of information to the media. We have also discussed the recent phenomenon of media interviewing potential witnesses and about publicity that is given by police and about investigative journalism.

We have also annexed a Draft Bill.

Journalists to be trained in certain aspects of law:

We have also recommended that journalists need to be trained in certain aspects of law relating to freedom of speech in Art. 9(1)(a) and the restrictions which are permissible under Art. 19(2) of the Constitution, human rights, law of defamation and contempt. We have also suggested that these subjects be included in the syllabus for journalism and special diploma or degree courses on journalism and law be started.

The Report is important and is also exhaustive on the issues which today are crucial in our country so far as criminal justice is concerned and we are of the view that, as at present, there is considerable interference with the due administration of criminal justice and this will have to be remedied by Parliament.

Yours sincerely,

(M. Jagannadha Rao)

Shri H.R. Bhardwaj

Union Minister for Law and Justice  
Government of India  
Shastri Bhawan  
New Delhi.

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## **Chapter I**

### **Introductory**

The subject of 'Trial by Media' is discussed by civil rights activists, constitutional lawyers, judges and academics almost everyday in recent times. With the coming into being of the television and cable-channels, the amount of publicity which any crime or suspect or accused gets in the media has reached alarming proportions. Innocents may be condemned for no reason or those who are guilty may not get a fair trial or may get a higher sentence after trial than they deserved. There appears to be very little restraint in the media in so far as the administration of criminal justice is concerned.

We are aware that in a democratic country like ours, freedom of expression is an important right but such a right is not absolute in as much as the Constitution itself, while it grants the freedom under Article 19(1)(a), permitted the legislature to impose reasonable restriction on the right, in the interests of various matters, one of which is the fair administration of justice as protected by the Contempt of Courts Act, 1971.

If media exercises an unrestricted or rather unregulated freedom in publishing information about a criminal case and prejudices the mind of the

public and those who are to adjudicate on the guilt of the accused and if it projects a suspect or an accused as if he has already been adjudged guilty well before the trial in court, there can be serious prejudice to the accused. In fact, even if ultimately the person is acquitted after the due process in courts, such an acquittal may not help the accused to rebuild his lost image in society.

If excessive publicity in the media about a suspect or an accused before trial prejudices a fair trial or results in characterizing him as a person who had indeed committed the crime, it amounts to undue interference with the “administration of justice”, calling for proceedings for contempt of court against the media. Other issues about the privacy rights of individuals or defendants may also arise. Public figures, with slender rights against defamation are more in danger and more vulnerable in the hands of the media. after the judgment in R. Rajagopal v. State of Tamil Nadu :AIR 1995 SC 264.

The UN Special Rapporteur on Freedom of Expression and Opinion received a submission from the British Irish Watch against a very sustained attack by the press on Mrs. Bernadette and Mr. Michael McKevitt who had been advocating national sovereignty for Ireland and who were claiming

the Irish people's right to self-determination through a Committee. It was the media which started linking these two persons to the Omagh bombing of 15<sup>th</sup> August, 1998 which killed 29 people. The media attack started even before the police questioned these two persons. The contents of the representation to the U.N. Rapporteur by the British Irish Watch quoted below, fits well into what is happening with the media in our own country. The representation stated:

“Guilt by association is an invidious device. In the case of Bernadette and Michael McKevitt, the media have created a situation where almost no one in Ireland is prepared to countenance the possibility that they may be innocent, notwithstanding the fact that neither of them has even been questioned by the police in connection with the Omagh bombing. They have demonized, ... .. such media campaigns are self-defeating. If the media repeatedly accuses people of crimes without producing any evidence against them, they create such certainty of their guilt in the minds of the public that, if these persons are even actually charged and tried, they have no hope of obtaining a fair trial. When such trials collapse, the victims of the crime are left without redress. Equally, defendants may be acquitted

but they have lost their good name”.

(see *The Blanket, Journal of Protest and Dissent*, November 2000).

The observations of Mr. Andrew Belsey in his article ‘Journalism and Ethics, can they co-exist’ (published in *Media Ethics : A Philosophical Approach*, edited by Mathew Kieran) quoted by the Delhi High Court in Mother Dairy Foods & Processing Ltd v. Zee Telefilms (IA 8185/2003 in Suit No. 1543/2003 dated 24.1.2005) aptly describe the state of affairs of today’s media. He says that journalism and ethics stand apart. While journalists are distinctive facilitators for the democratic process to function without hindrance the media has to follow the virtues of ‘accuracy, honesty, truth, objectivity, fairness, balanced reporting, respect or autonomy of ordinary people’. These are all part of the democratic process. But practical considerations, namely, pursuit of successful career, promotion to be obtained, compulsion of meeting deadlines and satisfying Media Managers by meeting growth targets, are recognized as factors for the ‘temptation to print trivial stories salaciously presented’. In the temptation to sell stories, what is presented is what ‘public is interested in’ rather than ‘what is in public interest’.

Suspects and accused apart, even victims and witnesses suffer from excessive publicity and invasion of their privacy rights. Police are presented in poor light by the media and their morale too suffers. The day after the report of crime is published, media says 'Police have no clue'. Then, whatever gossip the media gathers about the line of investigation by the official agencies, it gives such publicity in respect of the information that the person who has indeed committed the crime, can move away to safer places. The pressure on the police from media day by day builds up and reaches a stage where police feel compelled to say something or the other in public to protect their reputation. Sometimes when, under such pressure, police come forward with a story that they have nabbed a suspect and that he has confessed, the 'Breaking News' items start and few in the media appear to know that under the law, confession to police is not admissible in a criminal trial. Once the confession is published by both the police and the media, the suspect's future is finished. When he retracts from the confession before the Magistrate, the public imagine that the person is a liar. The whole procedure of due process is thus getting distorted and confused.

The media also creates other problems for witnesses. If the identity of witnesses is published, there is danger of the witnesses coming under pressure both from the accused or his associates as well as from the police. At the earliest stage, the witnesses want to retract and get out of the muddle. Witness protection is then a serious casualty. This leads to the question about the admissibility of hostile witness evidence and whether the law should be amended to prevent witnesses changing their statements. Again, if the suspect's pictures are shown in the media, problems can arise during 'identification parades' conducted under the Code of Criminal Procedure for identifying the accused.

Sometimes, the media conducts parallel investigations and points its finger at persons who may indeed be innocent. It tries to find fault with the investigation process even before it is completed and this raises suspicions in the minds of the public about the efficiency of the official investigation machinery.

The print and electronic media have gone into fierce competition, that a multitude of cameras are flashed at the suspects or the accused and the police are not even allowed to take the suspects or accused from their

transport vehicles into the courts or vice versa. The Press Council of India issues guidelines from time to time and in some cases, it does take action. But, even if apologies are directed to be published, they are published in such a way that either they are not apologies or the apologies are published in the papers at places which are not very prominent.

Apart from these circumstances, basically there is greater need to strike a right balance between freedom of speech and expression of the media on the one hand and the due process rights of the suspect and accused. Art 19(1)(a), 19(2), Art 21 and Art 14 of the Constitution play a very important role in striking an even balance. As we shall be showing in the ensuing chapters, the present Contempt of Court Act, 1971 requires some changes in view of the law that has been declared by the Supreme Court at least in two leading cases, one is A.K. Gopalan vs. Noordeen 1969 (2) SCC 734 and the other is Maneka Gandhi vs. Union of India AIR 1978 SC 597. These judgments have struck a balance between competing fundamental rights which were not noticed or available at the time when the Joint Parliament Committee (1969) made some drastic changes in the Bill prepared by the Sanyal Committee (1963). These issues fall for consideration.

In addition, we have the judgment in Sunday Times case decided by the European Court on prior restraint on press publications, the (UK) Contempt of Court Act, 1981 and the Reports of Law Commissions in Canada, Australia, New Zealand and other countries which have tried to strike an even balance between competing fundamental rights.

It is in the light of the problems mentioned, the drastic changes in the interpretation of Arts 14, 19, 21 of the Constitution of India that have come about on account of judgments of the Supreme Court and the reforms brought in or proposed in other jurisdictions, that we have taken up the subject suo motu.

We shall be discussing a number of important issues relating to the freedom of speech and expression and the right to due process for a fair trial under the criminal law, in the ensuing chapters.

(In this Chapter and in the ensuing Chapters, wherever we use the word 'due process' for fair trial in a criminal proceeding, we mean a procedure established by law under Art 21 which is fair, just and reasonable and not

arbitrary or violative of Art 14 of the Constitution of India as decided by the Supreme Court in (Maneka Gandhi's case above referred to).

## **CHAPTER II**

### **Human Right Conventions, Madrid Principles, Indian Constitution and Contempt of Courts Act, 1971**

Our criminal law and criminal jurisprudence are based on the premise that the guilt of any person charged in a court of law has to be proved beyond reasonable doubt and that the accused is presumed to be innocent unless the contrary is proved in public, in a court of law, observing all the legal safeguards to an accused. Not only that, the accused has a basic right to silence. That right stems from the constitutional right of the accused common to several constitutions that the accused cannot be compelled to incriminate himself. That is also the reason why confessions to the police are inadmissible in a court of law.

The right to silence has been considered in detail in our 180<sup>th</sup> Report, (2001) titled “Art 20(3) of the Constitution of India and the Right to Silence”. At the outset, it is necessary to go into some fundamental concepts relating to human rights as contained in International Conventions,

the Madrid Principles and our Constitution and Contempt of Court Act, 1971.

### Universal Declaration of Human Rights (1948)

There are certain rights of suspects and accused which are basic human rights. They are expressly referred to in various articles of the Universal Declaration of Human Rights (1948).

Article 3 of that Declaration states that everyone has right to life, liberty and security of person.

Article 10 deals with the right of an accused “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 of the Universal Declaration deals with the right to be presumed innocent and reads thus:

“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 all the guarantees necessary for his defence.

(2) No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time it was committed. Nor shall a heavier penalty be imposed than the one that is applicable at the time the penal offence is committed.”

Article 12 deals with the person’s privacy rights and reads thus:

“Article 12: No one shall be subject to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to protection of the law against such interference and attacks.”

Besides these, Article 9 states that “No one shall be subjected to arbitrary arrest, detention or exile.”

So far as freedom of expression is concerned, Article 19 of the Universal Declaration of Human Rights reads:

“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.”

### International Covenant on Civil and Political Rights, 1966

The International Covenant on Civil and Political Rights, 1966 (ICCPR) was ratified by India in 1976 and it states in Article 14(2) as follows:

“Article 14(2) : Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.”

Article 14(3) clause (g) refers to the important right of a person “Not to be compelled to testify against himself or to confess guilt”.

In a criminal trial, there are a number of other safeguards listed apart from the above clause (g) in Article 14(3) of the ICCPR:

“Article 14(3) : In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

- (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
- (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- (c) to be tried without undue delay;
- (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay it;
- (e) to examine, or have examined the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
- (f) to have free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) not to be compelled to testify against himself or to confess guilt.”

Article 4 refers to the special rights of juveniles and states:

“Article 4 : In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.”

Article 15 requires that “no person shall be punished for an act which was not an offence when it was committed”.

### European Convention

The European Convention for the Protection of Human Rights and Fundamental Freedoms 1950 declares in Article 10(1), the same right as to freedom of expression, on the lines of Article 19 of the Universal Declaration. But, Article 10(2) deals with the restrictions:

“10(2) : The exercise of these freedoms, since it carries 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 interest 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 reputation of others , for preventing the disclosure of information received in confidence, or for maintaining the authority and in particular of the judiciary”.

The above right in Article 10(1) as to freedom of expression has to be read along with the following Articles of that Convention:-

(a) Article 2: Right to Life : (1) Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a Court following his conviction of a crime for which this penalty is provided by law.

(b) Article 5: Right to Liberty and Security : (1) Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with as prescribed by law: Clause (a) refers to lawful detention of a person after conviction by a competent court. Clauses (b) to (f) deal with manner of arrest and detention.

Article 5(2) deals with the right of the person arrested to be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

Article 5(3) to (5) refer to rights incidental to arrest and detention.

(c) Article 6: Right to Fair Trial : It reads:

“(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 ... ..

... ..

(2) Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

(3) Everyone charged with a criminal offence has the following minimum rights:

- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
- (b) to have adequate time and facilities for the preparation of his defence.
- (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.
- (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

Article 7:

“(1) No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed ... ..

(2) ... ..”

Article 8: Right to Respect for Private and Family Life :

“(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(1) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of the rights and freedom of others.”

There are similar provisions in the American Convention on Human Rights, 1969 and the African Charter of Human Rights and People’s Rights, 1981.

## **The Madrid Principles on the Relationship Between the Media and Judicial Independence (1994)**

A group of 40 distinguished Legal Experts and Media representatives, convened by the International Commission of Jurists (ICJ), at its Centre for the Independence of Judges and Lawyers (CIJL) and the Spanish Committee of UNICEF met in Madrid, Spain between 18-20, January 1994. The objectives of the meeting were:

- (1) to examine the relationship between the media and judicial independence as guaranteed by the 1985 UN Principles on the Independence of Judiciary.
- (2) To formulate principles addressing the relationship between freedom of expression and judicial independence.

The group of media representatives and jurists while stating in the 'Preamble' that the 'freedom of the media, which is an integral part of freedom of expression, is essential in a democratic society governed by the Rule of Law and that it is the responsibility of the Judges to recognize and give effect to freedom of the media by applying a basic presumption in their favour and by permitting only such restrictions on freedom of the media as are authorized by the International Covenant on Civil and Political Rights ("International Covenant") and are specified in precise law, emphasized that :

“The media have an obligation to respect the rights of individuals, protected by the International Covenant and the independence of the judiciary”.

It refers to the principles which are drafted as “minimum” standards of protection of the freedom of expression.

The Basic Principle :

- (1) Freedom of expression (as defined in Article 19 of the Covenant), including the freedom of the media – constitutes one of the essential foundations of every society which claims to be democratic. It is the function and right of the media to gather and convey information to the public and to comment on the administration of justice, including cases before, during and after trial, without violating the presumption of innocence.
- (2) This principle can only be departed from in the circumstances envisaged in the International Covenant on Civil and Political Rights, as interpreted by the **1984 Siracusa Principles** on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights (U.N. Document E/CN/4/1984/4).
- (3) The right to comment on the administration of justice shall not be subject to any special restrictions.

Scope of the Basic Principle : (deals with media rights during investigation into a crime)

- (1) .. .. .
- (2) .. .. .
- (3) .. .. .

(4) The Basic Principle does not exclude the preservation by law of secrecy during the investigation of crime even when investigation forms part of the judicial process. Secrecy in such circumstances must be regarded as being mainly for the benefit of persons who are suspected or accused and to preserve the presumption of innocence. It shall not restrict the right of any such person to communicate to the press, information about the investigation or the circumstances being investigated.

(5) The Basic Principle does not exclude the holding in camera of proceedings intended to achieve conciliation or settlement of private disputes.

(6) The Basic Principle does not require a right to broadcast or record court proceedings. Where this is permitted, the Basic Principle shall remain applicable.

Restrictions :

- (7) Any restriction of the Basic Principle must be strictly prescribed by law. Where any such law confers a discretion or power, that discretion or power must be exercised by a Judge.
- (8) Where a Judge has a power to restrict the Basic Principle and is contemplating the exercise of that power, the media(as well as any other person affected) shall have the right to be heard for the purpose of objecting to the course of that power and, if exercised, a right of appeal.
- (9) Laws may authorize restrictions of the Basic Principle to the extent necessary in a democratic society for the protection of minors and members of other groups in need of special protection.
- (10) Laws may restrict the Basic Principle in relation to the criminal proceedings in the interest of the administration of justice to the extent necessary in a democratic society:
- a. for the prevention of serious prejudice to a defendant;
  - b. for the prevention of serious harm to or improper pressure being placed upon a witness, a member of a Jury or a victim.
- (11) Where a restriction of the Basic Principle is sought on the grounds of national security, this should not jeopardize the rights of the parties, including the rights of the defence. The defence

and the media shall have the right, to the greatest extent possible, to know the grounds on which the restriction is sought (subject, if necessary, to a duty of confidentiality if the restriction is imposed) and shall have the right to contest this restriction.

- (12) In civil proceedings, restrictions of the Basic Principle may be imposed if authorized by law to the extent necessary in a democratic society to prevent serious harm to the legitimate interests of a private party.
- (13) No restriction shall be imposed in an arbitrary or discriminatory manner.
- (14) No restriction shall be imposed except strictly to the minimum extent and for the minimum time necessary to achieve its purpose, and no restriction shall be imposed if a more limited restriction would be likely to achieve that purpose. The burden of proof shall rest on the party requesting the restriction. Moreover, the order to restrict shall be subject to review by a Judge.

Strategies for Implementation :

Para 1 states that the Judge should receive guidance in dealing with the press and the Judge shall be encouraged to assist the press by

providing summary of long or complete judgment of matters of public interest.

Para 2 says that Judges shall not be forbidden to answer questions from the press etc.

Para 3 is important and states:

“3. The balance between independence of judiciary, freedom of the press and respect of the rights of the individual – particularly of minors and other persons in need of special protection – is difficult to achieve. Consequently, it is indispensable that one or more of the following measures are placed at the disposal of affected persons or groups; legal recourse, Press Council, Ombudsman for the Press, with the understanding that such circumstances can be avoided to a large extent by establishing a Code of Ethics for the media which should be elaborated by the profession itself.

**Siracusa Principles** : (referred to in Para 2 of Basic Principle of Madrid Principles)

The following are extracts from the Siracusa Principles on the Limitation and Derogation Provision in the International Covenant on Civil and Political Rights. (UN Document E/UN4/1984/4)

The principle refers to Limitation Clauses, under several headings dealing with the method of interpretation, the meaning of ‘prescribed by law’, ‘a democratic society’, ‘public order’, ‘public health’, ‘public morals’ ‘national security’, ‘public safety’, ‘rights and freedom of others’ or ‘rights or reputation of others’, which are used by the ICCPR.

So far as the media and criminal law is concerned the following item ‘restrictions on public trial’ is relevant. It says:

“(IX) Restrictions on Public Trial :

38. All trials shall be public unless the Court determines in accordance with law that:

- (a) the press or the public should be excluded from all or part of a trial on the basis of specific findings announced in open Court showing that the interest of private lives of the parties or their families or of juveniles so requires; or
- (b) the exclusion is strictly necessary to avoid publicity prejudicial to the fairness of the trial or endangering public morals, public order or national security in a democratic society.”

**Constitution of India: Rights of suspects and accused and freedom of speech:**

Our Constitution does not separately refer to the freedom of the press or of the electronic media in Part III but these rights are treated by the law as part of the ‘Freedom of speech and expression’ guaranteed by Article 19 (1)(a) of the Constitution of India. The guarantee is subject to ‘reasonable restrictions’ which can be made by legislation to the extent permitted by Article 19(2). The Article reads thus:

“Article 19(1): All citizens shall have the right  
(a) to freedom of speech and expression;  
(b) ... ..  
(g)

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause,

in the interest of the sovereignty and integrity of India,  
the security of the State,  
friendly relations with foreign States,  
public order, decency or morality, or  
in relation to contempt of court, defamation or  
incitement to an offence”.

‘Contempt of Court law’ deals with non-interference with the “administration of justice” and that is how the “due course of justice” that is

required for a fair trial, can require imposition of limitations on the freedom of speech and expression.

Article 20, clause (1) of the Constitution states that no person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence and not be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. Art 20, clause (2) states that no person shall be prosecuted and punished for the same offence more than once. Art 20, clause (3) is important and it deals with the right against self-incrimination. It states:

“Art 20(3): No person accused of any offence shall be compelled to be a witness against himself.”

Art 21 is the crucial article which guarantees the right to life and liberty. It reads:

“Art. 21: No person shall be deprived of his life or personal liberty except according to procedure established by law’.

Article 22(2) requires that a person who is arrested has to be produced before a Magistrate within 24 hours of the arrest.

The Supreme Court in Maneka Gandhi’s case (AIR 1978 SC 597 has interpreted the words ‘according to procedure established by law’ in Art

21as requiring a procedure which is fair, just and equitable and not arbitrary.

The Supreme Court of India, in Life Insurance Corporation of India v. Manubhai D. Shah (1992 (3) SCC 637) has stated that the “freedom of speech and expression” in Article 19(1)(a) means the right to express one’s convictions and opinions freely, by word of mouth, writing, printing, pictures or electronic media or in any other manner.

In Romesh Thapar v. State of Madras : 1950 SCR 594, it was held that the freedom includes the freedom of ideas, their publication and circulation. It was stated in Hamdard Dawakhana v. Union of India : 1960 (2) SCR 671, that the right includes the right to acquire and impart ideas and information about matters of common interest.

The right to telecast includes the right to educate, to inform and to entertain and also the right to be educated, be informed and be entertained. The former is the right of the telecaster, while the latter is the right of the viewers (Secretary, Ministry of Information & Broadcasting v. Cricket Association of West Bengal : 1995(2) SCC 161. The right under Art 19(1)

(a) includes the right to information and the right to disseminate through all types of media, whether print, electronic or audio-visual : (ibid).

The Supreme Court has held that a trial by press, electronic media or by way of a public agitation is the very anti-thesis of rule of law and can lead to miscarriage of justice. A Judge is to guard himself against such pressure (State of Maharashtra v. Rajendra Jawanmal Gandhi : 1997 (8) SCC 386.

In Anukul Chandra Pradhan vs. Union of India, 1996(6) SCC 354, the Supreme Court observed that “No occasion should arise for an impression that the publicity attached to these matters (the hawala transactions) has tended to dilute the emphasis on the essentials of a fair trial and the basic principles of jurisprudence including the presumption of innocence of the accused unless found guilty at the end of the trial”

### **Contempt of Courts Act, 1971:**

So far as interference with criminal law is concerned, Sections 2 and 3 of the Contempt of Courts Act, 1971 are relevant. Section 2(c) defines ‘Criminal Contempt’ as:

“Section 2(c): ‘Criminal contempt’ means the publication, (whether by words, spoken or written or by signs, or by visible representations, or otherwise), of any matter or the doing of any other act whatsoever which

- (i) ... ..
- (ii) prejudices or interferes or tends to interfere with the due course of any judicial proceedings; or
- (iii) interferes or tends to interfere with or obstructs or tends to obstruct, the administration of justice in any manner”.

Section 3(1), however, exempts the following:

“innocent publication, if the publisher had no reasonable grounds for believing that the proceeding was pending”.

We shall refer to the provisions of sec 3 in extenso.

**“3. Innocent publication and distribution of matter not contempt.-** (1) A person shall not be guilty of contempt of Court on the ground that he has published (whether by words spoken or written or by signs or by visible representations or otherwise) any matter which interferes or tends to interfere with, or obstructs or tends

to obstruct, the course of justice in connection with any civil or criminal proceeding pending at the time of publication, if at that time he had no reasonable grounds for believing that the proceeding was pending.

(2) Notwithstanding anything to the contrary contained in this Act or any other law for the time being in force, the publication of any such matter as is mentioned in sub-section (1) in connection with any civil or criminal proceedings which is not pending at the time of publication and shall not be deemed to constitute contempt of Court.

(3) A person shall not be guilty of contempt of Court on the ground that he has distributed a publication containing any such matter as is mentioned in sub-section(1), if at the time of distribution he had no reasonable grounds for believing that it contained or was likely to contain any such matter as aforesaid:

provided that this sub-section shall not apply in respect of the distribution of –

(i) any publication which is a book or paper printed or published otherwise than in conformity with the rules contained in Section 3 of the Press and Registration of Books Act, 1867;

(ii) any publication which is a book or paper printed or published otherwise than in conformity with the rules contained in Section 5 of the said Act.

**Explanation.-** For the purposes of this section, a judicial proceedings-

(a) is said to be pending –

(A) in case of a civil proceeding, when it is instituted by the filing of a plaint or otherwise;

(B) in the case of a criminal proceeding under the Code of Criminal Procedure, 1898, or any other law-

(i) where it relates to the commission of an offence, when the charge-sheet or challan is filed , or when the Court issues summons or warrant, as the case may be, against the accused, and

(ii) in any other case, when the Court takes cognizance of the matter to which the proceeding relates, and

in the case of a civil or criminal proceedings,

shall be deemed to continue to be pending until it is heard and finally decided, that is to say, in a case where an appeal or revision is competent, until the appeal or revision is heard and finally decided or, where no appeal or revision is preferred, until the period of limitation prescribed for such appeal or revision has expired;

- (b) which has been heard and finally decided shall not be deemed to be pending merely by reason of the fact that proceedings for the execution of the decree, order or sentence passed therein are pending.”

Section 4 of the Act protects fair and accurate reporting of judicial proceedings.

Section 7 states when publication of information relating to proceedings in chambers or in camera is not contempt, except in certain cases which are enumerated in that section.

**Pre-trial publications granted immunity under sec 3(2) &**

**Explanation:**

It will be seen from the Explanation below sec 3, the starting point for deeming a criminal proceeding as pending, it is sufficient if a charge sheet or challan is filed or Court summons or warrant are issued. Thus so far as criminal contempt is concerned, the ‘pre-trial’ period has not been given the required importance under the Court of Contempts Act, 1971. ‘Pendency’ under the Explanation to sec 3 starts, in a criminal case, only from the time when the charge sheet or challan is filed or summon or

warrant is issued by the criminal Court and not even from date of arrest, even though from the time of arrest, a person comes within the protection of the Court for he has to be brought before a Court within 24 hours under Art 22(2) of the Constitution of India. If there are prejudicial publications after arrest and before the person is brought before Court or his plea for bail is considered, there are serious risks in his getting released on bail.

Certain acts like publications in the media at the pre-trial stage, can affect the rights of the accused for a fair trial. Such publications may relate to previous convictions of the accused, or about his general character or about his alleged confessions to the police etc.

In the context of a parallel investigation which was undertaken pending arrest and trial in the court, the Supreme Court referred to 'trial by press'. This was, of course, before 1971 Act was enacted. In Saibal v. B.K. Sen (AIR 1961 SC 633) it said:

“It would be mischievous for a newspaper to systematically conduct an independent investigation into a crime for which a man has been arrested and to publish the results of the investigation. This is because, trial by newspapers, when a trial by one of the regular tribunal is going on, must be prevented.

The basis for this view is that such action on the part of the newspaper tends to interfere with the course of justice”.

The words “tends to interfere with the course of justice” used by the Supreme Court in the above case are quite significant.

In the light of the human rights concepts referred to above and the provisions of our Constitution and the Contempt of Courts Act, 1971, the question arises whether any publication of matters regarding suspect or accused can amount to contempt of Court not only when it is made during the pendency of a criminal case (i.e. after the charge sheet is filed) but before that event, e.g. once a person is arrested and criminal proceedings are “imminent”. This issue requires a very detailed examination and will be considered in the ensuing chapters.

### Chapter – III

#### Do publications in the media subconsciously affect the Judges?

There is then a nice question whether a media publication can ‘unconsciously’ influence Judges or Juries and whether Judges, as human beings are not susceptible to such indirect influences, at least subconsciously or unconsciously ?

The American view appears to be that Jurors and Judges are not liable to be influenced by media publication, while the Anglo-Saxon view is that Judges, at any rate may still be subconsciously (though not consciously) influenced and members of the public may think that Judges are influenced by such publications and such a situation, it has been held, attracts the principle that ‘justice must not only be done but must be seen to be done’. The Anglo-Saxon view appears to have been accepted by the Supreme Court as can be seen by a close reading of the Judgment in Reliance Petrochemicals v. Proprietor of Indian Express : 1988(4) SCC 592. If one carefully analyses that judgment, in the light of an earlier

judgment of the Court in P.C. Sen (in Re) :AIR 1970 SC 1821, this view of the Supreme Court appears to be clear.

In P.C. Sen in re the Supreme Court observed: (p 1829)

“No distinction is, in our judgment, warranted that comment on a pending case or abuse of a party may amount to contempt when the case is triable with the aid of a Jury and not when it is triable by a Judge or Judges.”

It appears that it was accepted by the Supreme Court that Judges are likely to be “subconsciously” influenced . That was also the view of Justice Frankfurter of U.S. Supreme Court (in his dissent) and of Lord Scarman and Lord Dilhorne of the House of Lords. We shall presently refer to these views.

P.C. Sen (in Re) (AIR 1970 SC 1821) was, no doubt, a case where a civil action by way of a writ was pending in the High Court. There was a broadcast by the Chief Minister of West Bengal, who had knowledge of the challenge to the West Bengal Milk Products Control Order, 1965 in a Writ Petition that was pending in the Calcutta High Court, and the High

Court held him to be guilty of contempt for justifying the Control Order in his radio broadcast but let him off without punishment.

On appeal, the Supreme Court agreed that the speech of the Chief Minister was ex facie calculated to interfere with the administration of justice. In the course of the judgment, it was stated that no distinction can be made on the ground whether a case is triable by a Judge or Jury. If an action tends to influence the Jury, it may also tend to influence a Judge.

In Reliance Petrochemicals Ltd. vs. Proprietors of Indian Express 1988(4) SCC 592, an order of prior restraint was passed by the Supreme Court initially while a civil case was pending adjudication. There there was a public issue of the commercial company, the company started the public issue after obtaining sanction of the Controller of Capital Issues. The sanction was under challenge by various parties in different High Courts and the company filed a transfer petition in the Supreme Court to bring all the matters before the Supreme Court.

In that case which related to transfer of all similar cases to one Court, initially, at the instance of Reliance Petrochemicals, the Supreme Court passed an order restraining the Indian Express Newspapers from publishing any article, comment, report or editorial on the subject of

public issue by the company. The Indian Express applied for vacating the order and while vacating the order, the Supreme Court considered the case law pertaining to publications which could be prejudicial and referred to the exceptions.

The Supreme Court referred to Article 19(1)(a) which deals with freedom of speech and expression and the restrictions stated in Article 19 (2). It pointed out that the American Constitution does not contain any provision for imposition of reasonable restrictions by law.

It adverted to the absolute terms in which the U.S First Amendment dealing with freedom of speech and expression is couched and to the theory of ‘real and present danger’ which was evolved by the U.S Courts as the only inherent limitation on that right in that country. The Supreme Court in Reliance case stated that the position in India was different, here the right of freedom of speech and expression was not absolute as in USA. The Court observed (see para 10, p.602):

“Our Constitution is not absolute with respect to freedom of speech and expression as enshrined by the First Amendment to the American Constitution.”

The Court again stated (see para 12, p.603,) that it was not dealing with a case of publication by press affecting ‘judicial administration’ in the context of Contempt of court but was examining the question of publication as a matter relating to ‘public interest’. After referring to the First Amendment to the US Constitution which is in absolute terms, the Court stated (p.605, para 15):

“In America, in view of the absolute terms of the First Amendment, unlike the conditional right of freedom of speech under Article 19(1)(a) of our Constitution, it would be worthwhile to bear in mind the ‘present and imminent danger’ theory”.

The Supreme Court then referred to the observations of Justice Frankfurter in John D. Pennekamp v. State of Florida (1946) 328 US 331) to the effect that ‘the clear and present danger’ concept was never stated by Justice Holmes in Abrams v. U.S : (1919) 250 US 616 to express a technical doctrine or convey a formula for adjudicating cases. It was a literary phrase not to be distorted by being taken out from its context. The Judiciary, according to Justice Frankfurter could not function properly if what the press does is reasonably calculated to disturb the judicial judgment in its duty and capacity to act solely on the basis of what is before the Court. The judiciary is not independent unless Courts of Justice are enabled to

administer law by absence of pressure from without, or the presence of disfavour.

There is yet another celebrated passage in the said judgment of Justice Frankfurter (not quoted by our Supreme Court) to which we may refer:-

“No Judge fit to be one is likely to be influenced consciously, except by what he sees or hears in Court and by what is judicially appropriate for his deliberations. However, Judges are also human and we know better than did our forbears how powerful is the pull of the unconscious and how treacherous the rational process ... and since Judges, however stalwart, are human, the delicate task of administering justice ought not to be made unduly difficult by irresponsible print. The power to punish for contempt of court is a safeguard not for Judges as persons but for the functions which they exercise. It is a condition of that function – indispensable in a free society – that in a particular controversy pending before a court and awaiting judgment, human beings, however strong, should not be torn from their moorings of impartiality by the undertone of extraneous influence. In securing freedom of speech, the

Constitution hardly meant to create the right to influence  
Judges and Jurors.”

The Supreme Court next referred to Nebraska Press Association v. Hugh Stuart : (1976) 427 US 539 where the American Supreme Court vacated a prior-restraint order passed by the trial Judge in a multiple murder case while that case was pending, on the ground that the view of the trial Judge that Jurors are likely to be influenced by the press publications, was speculative. The US Supreme Court stated that the trial court should have resorted to alternative remedies such as – change of venue, postponement of trial, a searching voir dire of the Jury panel for bias, and sequestration of jurors – before passing a restraint order. After referring to Nebraska, our Supreme Court observed that (p.607, para 21):-

“We must examine the gravity of the evil. In other words, a balance of convenience in the conventional phrase of Anglo-Saxon Common Law Jurisprudence would, perhaps, be the proper test to follow.”

After thus referring to the US First Amendment as being absolute and to the test of ‘real and present danger’ evolved in US and after holding that the position in India was different because here Article 19(1)(a) granted only a conditional right, the Supreme Court turned to the Anglo-Saxon Jurisprudence and examined the English cases.

The Supreme Court referred to Attorney General v. BBC : 1981 A.C 303 (HL). In that case the Attorney General had brought proceedings for an injunction to restrain the defendants from broadcasting a programme dealing with matters which related to an appeal pending before a Local Valuation Court on the ground that the broadcast would amount to contempt of court. In that context, (though the House of Lords held that contempt law did not apply to the Valuation Court), Lord Scarman observed that 'administration of justice' should not at all be hampered with. Lord Denning in the Court of Appeal had observed that professionally trained Judges are not easily influenced by publications. But, disagreeing with that view of Lord Denning, Lord Dilhorne stated (pp 335) in yet other oft-quoted passage as follows:

“It is sometimes asserted that no Judge will be influenced in his Judgment by anything said by the media and consequently that the need to prevent the publication of matter prejudicial to the hearing of a case only exists where the decision rests with laymen. This claim to judicial superiority over human frailty is one that I find some difficulty in accepting. Every holder of a Judicial Office does his utmost not to let his mind be affected by what he has seen or heard or read outside the Court and he will not knowingly let himself be influenced in any way by the media, nor in my view will any layman

experienced in the discharge of Judicial duties. Nevertheless, it should, I think, be recognized that a man may not be able to put that which he has seen, heard or read entirely out of his mind and that he may be subconsciously affected by it. It is the law, and it remains the law until it is changed by Parliament, that the publications of matter likely to prejudice the hearing of a case before a court of law will constitute contempt of court punishable by fine or imprisonment or both".

No doubt, as stated above, Lord Denning M.R stated in the Court of Appeal that Judges will not be influenced by the media publicity (Att Gen v. BBC : 1981 AC 303 (315) CA), a view which was not accepted in the House of Lords in Att Gen vs. BBC 1981 AC 303 (HL).

In fact, Borrie and Lowe in their Commentary on Contempt of Court (3<sup>rd</sup> Edn, 1996) state that Lord Denning's view is "more a statement of policy rather than literal truth".

Cardozo, one of the greatest Judges of the American Supreme Court, in his 'Nature of the Judicial Process' (Lecture IV, Adherence to Precedent. The Subconscious Element in the Judicial Process) (1921) (Yale University Press) referring to the "forces which enter into the conclusions of Judges" observed that "the great tides and currents which engulf the rest of men, do not turn aside in their course and pass the Judges by".

The full text of the passage in the above essay of Cardozo reads thus:

“Even these forces are seldom fully in consciousness. They lie so near the surface, however, that their existence and influence are not likely to be disclaimed. But the subject is not exhausted with the recognition of their power. Deep below consciousness are other forces, the likes and the dislikes, the predilections and the prejudices, the complex instincts and emotion and habits and convictions, which make the man, whether he be litigant or Judge ... .. There has been a certain lack of candor in much of the discussions of the theme or rather perhaps in the refusal to discuss it, as if Judges must lose respect and confidence by the reminder that they are subject to human limitations .. ...”

Cardozo then stated in a very famous quotation,

“None the less, if there is anything of reality in my analysis of the Judicial Process, they do not stand aloof on these chill and distant heights; ... The great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the Judges by”.

The New South Wales Law Commission in its Discussion Paper (2000) (No.43) on ‘Contempt by Publication’ stated (see para4.50) that most

law reform bodies “tended to take the view that Judicial officers should generally be assumed capable of resisting any significant influence by media publicity. Despite this, they have not gone so far as to exclude altogether as a possible ground of liability for sub-judice contempt, the risk of influence on a Judicial officer. The justification for this approach is two-fold : first, it is always possible that a Judicial officer may be subconsciously influenced; and secondly, it is just as important to protect the public perception of Judges’ impartiality as to protect against risk of bias”. The Discussion Paper notes that in UK, the Phillmore Committee noted that Judges are generally capable of putting extraneous matter out of their minds but, in its recommendations, the Committee did not exclude influence on Judicial officers as a ground for liability.

The NSW Law Commission referred to an article by S. Landsman and R.Rakos “A Preliminary Inquiry into the effect of potentially biasing information on Judges and Jurors in Civil Litigation” (1994) ( 12 Behavioral Sciences and the Law 113), which concluded that there is no empirical data to support or refute the assertion that Judicial officers are not likely to be significantly influenced by media publicity. We cannot forget the Common Law rule laid down in R v. Sussex Justices : Exparte McCarthy : 1924(1) KB 256 that

“Justice should not only be done, it should manifestly and undoubtedly be seen to be done”.

The Irish Law Commission in its Consultation paper (1991) (p 115) on Contempt of Court observed similarly. The Canadian Law Reform Commission also took the view that, while Judges may generally be impervious to influence, the possibility of such influence could not be ruled out altogether, and that in the case of Judicial officers, the sub-judice rule served an important function of protecting public perception of impartiality (see Canadian Law Reform Commission, Contempt of Court : Offences against Administration of Justice {Working Paper 20, 1977, p 42-43} and Report 17 (1982) at p 30).

In Union of India v. Naveen Jindal : 2004(2) SCC 510, it was clearly held that the US First Amendment is in absolute whereas the right under Article 19(1)(a) can be restricted as permitted in Article 19(2)(a), echoing what was stated in Reliance Petrochemicals.

In M.P. Lohia v. State of West Bengal : 2005(2) SCC 686, the facts were that a woman committed suicide in Calcutta in her parents' house but a case was filed against the husband and in-laws under the Indian Penal Code for murder alleging that it was a case of dowry death. The husband (appellant in the Supreme Court) had filed a number of documents to prove that the woman was a schizophrenic psychotic patient. The parents of the

woman filed documents to prove their allegations of demand for dowry by the accused. The trial was yet to commence. The Courts below refused bail.

The Supreme Court granted interim bail to the accused and while passing the final orders, referred very critically to certain news items in the Calcutta magazine. The Court deprecated, two articles published in the magazine in a one-sided manner setting out only the allegations made by the woman's parents but not referring to the documents filed by the accused to prove that the lady was a schizophrenic. The Supreme Court observed:-

“These type of articles appearing in the media would certainly interfere with the course of administration of justice.”

The Court deprecated the articles and cautioned the Publisher, Editor and Journalist who were responsible for the said articles against

“indulging in such trial by media when the issue is sub-judice.”

and observed that all others should take note of the displeasure expressed by the Court.

The Punjab High Court in Rao Harnarain v. Gumori Ram : AIR 1958 Punjab 273 stated that ‘Liberty of the press is subordinate to the administration of justice. The plain duty of a journalist is the reporting and

not the adjudication of cases.’ The Orissa High Court in Bijoyananda v. Bala Kush (AIR 1953 Orissa 249) observed that –

“the responsibility of the press is greater than the responsibility of an individual because the press has a larger audience. The freedom of the press should not degenerate into a licence to attack litigants and close the door of justice nor can it include any unrestricted liberty to damage the reputation of respectable persons.”

In Harijai Singh v. Vijay Kumar : 1996(6) SCC 466, the Supreme Court stated that the press or journalists enjoy no special right of freedom of expression and the guarantee of this freedom was the same as available to every citizen. The press does not enjoy any special privilege or immunity from law.

Summarizing the position, it will be seen that the right to free speech in US is absolute and no restraint order against publication is possible unless there is ‘clear and present danger’ to the right itself.

But, the position in India is different. The right to free speech is not absolute as in US but is conditional and restricted by Article 19(2). Treating a publication as criminal contempt under Section 2(c) of the Contempt of Courts Act, 1971 where the Court comes to the conclusion that

the publication as to matters pending in Court ‘tends’ to interfere {vide Section 2(c)(iii)} with the administration of justice, amounts to a reasonable restriction on free speech. The view obtaining in USA that trained Judges or even jurors are not influenced by publication in the media as stated by the majority in Nebraska (1976) 427 US 539) was not accepted in England in Attorney General v. BBC 1981 AC 303 (HL) by Lord Dilhorne who stated that Judges and Jurors may be influenced subconsciously and Judges could not claim to be super human was quoted by the Supreme Court in Reliance Petrochemicals. In what manner they are so influenced may not be visible from their judgment, but they may be influenced subconsciously. Even in US, Justice Frankfurter has accepted that Judges and Jurors are likely to be influenced. The view of the Indian Supreme Court even earlier in P.C. Sen In re : AIR 1970 SC 1821 was that Judges and Jurors are likely to be influenced and that view in the Anglo-Saxon law appears to have been preferred by the Supreme Court in Reliance case. That Judges are subconsciously influenced by several forces was also the view of Justice Cardozo and of the various Law Commissions referred to above.

## **CHAPTER IV**

### **How ‘imminent’ criminal proceedings came to be excluded from the Contempt of Courts Act, 1971: A historical and important perspective**

Section 3(2) of the Contempt of Court Act, 1971 read with the Explanation below the section (see Chapter II of this Report) excludes from criminal contempt, all publications made, before the filing of charge sheet or challan in court or before issue of summons or warrant, even if such publications interfere or tend to interfere with the course of justice.

In King v. Mirror 1927(1) KB 845, the accused was arrested on January 9, and within 24 hours, brought before the Court on January 10 and investigation started and on January 13, an identification parade was held. Offending photographs were published on January 17. It was held that proceedings have begun. But the question of imminence of criminal proceedings was not decided.

In King v. Parke : (1903) 2 KB 432, it was held that there would be contempt of the assize Court even though no committal had taken place and a bill had been filed. What possible difference can it make, whether a particular Court which is thus sought to be deprived of its independence and its power of effecting the great end for which it is created, be it at the moment in session or even actually constituted or not? It was in this case that Wills J. made the famous observation:

“It is possible very effectively to poison the fountain of justice before it begins to flow. It is not possible to do so when the stream has ceased.”

(See Law of Contempt of Court by K.J. Aiyer, 6<sup>th</sup> Ed, 1983 for the above analysis of Indian case law. But, today this is not good law, the date of arrest rather than the filing of first information report, is the starting point of ‘pendency’ as per judgment of our Supreme Court.)

Question is whether such exclusion amounts to over-protection of freedom of expression and dilution of the protection of due process for fair criminal trials?

It is first necessary to go into the historical basis of the exclusion of prejudicial publications made prior to filing of charge sheet or challan from

the purview of Contempt of Court Act, 1971. A historical perspective will lay bear how such exclusion, as stated above, from contempt liability come into being and whether such exclusion was justified?

Law prior to 1971:

Under both the Contempt of Courts Act, 1926 and 1952, there was no definition of civil contempt and criminal contempt. Further, Courts did apply contempt law to publications which interfered or tended to interfere with administration of justice if criminal proceedings were “imminent” and the person ‘knew or should have known’ that a proceeding was imminent (see Subrahmanyam in re : AIR 1943 Lah 329 (335); Tulja Ram v. Reserve Bank : AIR 1939 Mad 257; State v. Radhagobinda : AIR 195 4 Orissa 1. State v. Editor etc. of Matrubhumi : AIR 1955 Orissa 36; Le Roy Frey v. R. Presad : AIR 1958 Punjab 377; Emperor v. Kustalchar : AIR 1947 Lah 206).

In Smt. Padmavati Devi v. R.K. Karanjia AIR 1963 MP 61, it was held that to attract the jurisdiction of contempt, it was not necessary that the trial of the accused must be imminent in the sense that committal proceedings must have been instituted. The filing of the first information report was sufficient. At any rate, by the production of the arrested person before a Magistrate for remand, the criminal case was actually pending in a

criminal court competent to deal with it judicially. In criminal cases, such a step could be taken in the case of a non-cognisable offence, by the filing of a complaint in the Court and in the case of a cognisable offence by the making of a first information report. Arrest of the accused by the police during investigation could, therefore, be “during” the pendency of the cause. It may be that thereafter the investigation may prove abortive, the prosecution may be dropped or the accused may be released and orders may be passed granting protection to the prosecution and to the accused from unjustified attacks as long as the investigation has not ended. There is no justification for distinction between the English law and the Indian law on the point. In England also, a person may be arrested without warrant and after an arrest, the prosecution may be dropped for paucity of evidence but that has never been considered to be a good reason for not considering the criminal cause as pending.

This is so far as ‘arrest’ is concerned even where a charge sheet or challan was not filed before the 1971 Act.

But, before the 1971 Act, it has been held in Smt. Padmavathi Devi’s case and in the following cases that as soon as a complaint is lodged in the police station and an investigation is started, the matter becomes sub-judice

attracting the judicial power of the Court to punish for contempt. (Diwanchand v. Narender : AIR 1950 East Punjab 366, Rao Narain Singh v. Gumani Ram : AIR 1958 Punjab 273; Emperor v. Chowdhary : AIR 1947 Cal 414; Mankad v. Shet Pannalal : AIR 1954 Kutch 2; State v. Editor etc., Matrubhumi : AIR 1955 Orissa 36; R.K. Garg v. S.A. Azad : AIR 1967 All 37.) But this is not good law in view of the decision in A.K. Gopalan vs. Noordeen (1969) referred to below.

A.K. Gopalan vs. Noordeen: (1969)

In A.K. Gopalan v. Noordeen : (AIR 1969(2) SCC 734) (decided on 15<sup>th</sup> September, 1969 before the 1971 Act), the Supreme Court held that a criminal proceeding is imminent only when an arrest had taken place. In that case, a person lost his life in an incident and first information report was lodged on the same day. About a week later, Mr. A.K. Gopalan (appellant) made a statement and three days later, the respondent and his brother were arrested and remanded to police custody. The statement was published in a newspaper after the arrest. The respondent moved the High Court for contempt against the appellant, editor, printer and publisher of newspaper. The High Court held them all guilty of contempt of Court as the statement on publications were after the filing of the first information

report. The Supreme Court allowed the appeal of Mr. A.K. Gopalan but dismissed the appeal of the editor. The Court held:

- (i) Committal for contempt is not a matter of course. It is a matter of discretion of the Court and such discretion must be exercised with caution. The power must be exercised with circumspection and restraint and only when it is necessary.
- (ii) The publication to constitute contempt must be shown to be such that it would substantially interfere with the due course of justice.
- (iii) On the date on which the first appellant made his statement, it could not be said that any proceedings in a criminal court were imminent merely because a first information report has been lodged. The accused were not arrested till after his statement is made and there was nothing to suggest imminence of proceedings, and there was nothing to show that the first appellant was instrumental in getting the statement published after the arrest.
- (iv) The fundamental right to freedom of speech will be unduly restrained if it is held that there should be no comment on a case even before an arrest had been made. In fact, in cases of public scandals involving companies, it is the duty of free press to comment on such topics and draw the attention of the public.
- (v) As regards the editor, the proceedings in the criminal court were imminent, because by the date the statement was published, the accused was arrested, and remanded by the

magistrate, which shows that proceedings in a court were imminent. The possibility of the accused being released after further investigation is there, but is remote. Even though the name of the accused was not mentioned, it was indicated that the person who committed murder was acting in pursuance of a conspiracy, and that would certainly put the public against the accused.

(The dissenting Judge Mitter J, held that even the first appellant was guilty of contempt of court.)

We have earlier referred to Smt. Padmavatti Devi v. R.K. Karanjia, AIR 1963 MP 61, and other cases where it was held that the law of contempt should be available in cognisable offences from the time when the first information report is filed. This view should be regarded as having been superseded by the Supreme Court decision in A.K. Gopalan v. Noordeen to the extent it said that the criminal proceedings must be treated as imminent from the date of filing of first information report and even before any arrest is made.

The Supreme Court judgment in A.K. Gopalan is quite important in that it decides –

- (1) that criminal proceeding must be deemed to be imminent if the suspect is arrested;
- (2) that if a prejudicial publication is made regarding a person who has been arrested by the police, then the right to freedom of speech and expression under Article 19(1)(a) must give way to the right of the person to a fair trial to be conducted without any prejudice and any prejudicial publication in the press after arrest may cause substantial prejudice in the criminal proceedings which must be taken to be imminent, irrespective of whether the person is released later.

The Sanyal Committee, 1963: date of arrest should be starting point:

Long before the 1971 Act was passed, the Government appointed the Sanyal Committee to go into the 1952 Act and suggest changes. The Sanyal Committee gave its Report in 1963. It did not have the benefit of the Supreme Court judgment of 1969 in A.K. Gopalan's case.

The Sanyal Committee has observed in chapter VI "Contempt in relation to imminent proceedings" as follows:

“(1) .. .. .

(2) Precise statement of the law and reform:

The conclusion we have arrived at raises the immediate question whether it is possible to state the law relating to

imminent proceedings in precise terms and how far it can be clarified or modified. Courts have, by and large, tried to exercise their powers in this respect in such a way that the law of contempt does not seriously interfere with freedom of speech because they have themselves realised that it is extremely difficult to draw the lines between cases where proceedings may be said to be imminent and cases where they may not be. For instance, the mere filing of a first information report may not be conclusive that proceedings are imminent although stern logic may demand that the line should be drawn at that point. Even where an arrest has taken place, it may not always be followed up by a judicial proceeding. The only guidance that we obtain from decided cases is that the question will depend upon the facts of each case (Foot Note 1 extracted below). Are we to leave the law in this unsatisfactory and imprecise state, particularly as fundamental rights are involved?

(3) Civil cases: .. ..  
 .. .. .. .. ..

(4) Criminal cases: In respect of criminal matters, however, a slightly different approach is necessary. As in the case of pending

proceedings, if a person is able to prove that he has no reasonable grounds for believing that the proceeding is imminent, it should completely absolve him from liability for contempt of court, perhaps such a defence is already available to an alleged contemnor, but we would prefer to give a statutory expression particularly as under English law, from which our law of contempt is derived, lack of knowledge would not excuse a contempt though it may have a bearing on the punishment to be inflicted. We would also like to go a little further and provide certain additional safeguards. It has been observed in several cases that once a person is arrested, it would be legitimate to infer that proceedings are imminent (see Foot Note 2 extracted below). But in actual fact that result may not invariably follow. We have already said that it should be a valid defence for an alleged contemnor to prove that he had no reasonable grounds for believing that a proceeding was imminent. To this, we would like to add that where no arrest has been made, a presumption should be drawn in favour of the alleged contemnor that no proceedings are imminent (Foot Note 3 extracted below).”

We shall refer to the Footnotes 1, 2, 3 now:

Foot Note 1: “See the decision of the Supreme Court in Surendra Mohanty v. State of Orissa: (CrL App. No.107/56 dated 23.1.1961. In Smt. Padmavathi Devi v. R.K. Karanjia AIR 1963 MP 61, it appears to be suggested that the law should

extend its protection, in the case of cognisable cases, where the first information report is made because in the Courts' view, the interest of justice would be better served by giving protection as long as the investigation has not ended. This proposition appears to be widely stated. For example, the First Information Report may contain no names.

Foot Note 2: In fact the cases relied on are cases where arrests have taken place.

Foot Note 3: R v. Oldham Press Ltd.: 1957 (1) QB 73; the law in England has already been modified by the Administration of Justice Act, 1960].

It is clear that the Sanyal Committee accepted that in criminal matters, date of arrest could be treated as starting point of pendency for the purpose of contempt law.

To that extent, the Sanyal Report of 1963 is consistent with the judgment of the Supreme Court in A.K. Gopalan's case decided in 1970.

Bill of 1963 prepared by Sanyal Committee refers to ‘imminent’ proceedings:

In the Contempt of Courts Bill, 1963 annexed to the Report of the Sanyal Committee, section 3 deals with “Innocent publication and distribution of matter not contempt” and refers to “any criminal proceeding pending or imminent” at the time of publication which is calculated to interfere with the course of justice.

Section 3 in that Bill reads thus:

“Section 3: Innocent Publication and distribution of matter not contempt:

- (1) A person shall not be guilty of contempt of court on the ground that he has published any matter calculated to interfere with the course of justice in connection with
  - (a) any criminal proceeding pending or imminent at the time of publication, if at the time he had no reasonable grounds for believing that the proceeding was pending or, as the case may be, imminent;
  - (b) any civil proceeding pending at the time of publication, if at that time he had no reasonable grounds for believing that the proceeding was pending.

- (2) Notwithstanding anything contained in any law for the time being in force, a person shall not be guilty of contempt of court on the ground that he has published any such matter as is mentioned in subsection (1) in connection with any civil proceeding imminent at the time of publication, merely because the proceeding was imminent.
- (3) A person shall not be guilty of Contempt of Court on the ground that he has distributed a publication containing any such matter as is mentioned in subsection (1), if at the time of distribution he had no reasonable grounds for believing that it contained any such matter as aforesaid or that it was likely to do so.
- (4) The burden of proving any fact to establish on defence afforded by this section to any person in proceedings for Contempt of Court shall be upon that person.

Provided that, where in respect of the commission of an offence no arrest has been made, it shall be presumed until the contrary is proved that a person accused of Contempt of Court in relation thereto had no reasonable grounds for believing that any proceeding in respect thereof was imminent.

Explanation: For the purposes of this section, a judicial proceeding –

- (a) is said to be pending until it is heard and finally decided, that is to say, in a case where an appeal or revision is competent, until the appeal or revision is heard and finally decided or where no

appeal or revision is preferred, until the period of limitation prescribed for such appeal or revision has expired.

- (b) which has been heard and finally decided shall not be deemed to be pending by reason of the fact that proceedings for execution of the decree, order or sentence passed therein are pending.”

Thus, the Sanyal Committee specifically protected the interests of the suspect where criminal proceedings were pending or imminent, if the person who made the publication had no reasonable grounds for believing that the proceeding was pending or imminent. Under subsection (3), if he had reasonable grounds for believing that the publication did not contain any matters as aforesaid calculated to interfere with the course of justice, there was no contempt. The proviso to section 3(4) stated that if no arrest has been made, it shall be presumed that there are no reasonable grounds for believing that proceedings are imminent.

But this position, as to date of arrest, was given up by the Joint Committee of Parliament in 1968-70.

Joint Committee of Parliament (1968-1970): drops the word ‘imminent’ and requires actual ‘pendency’ in Court

The Joint Committee of Parliament (the Bhargava Committee) gave its Report on 23.2.1970. It prepared a draft Bill and published it in the Gazette in February, 1968 and invited responses. After receiving responses, the Bill was finalized. It provided any definition of ‘contempt’ but in clauses 3 to 7 stated what will not be contempt. The Report stated in para 15 as follows:

“15 .. .. .

The Law of Contempt of Courts touches upon citizens’ fundamental rights to personal liberty and to freedom of expression and therefore, it is essential that all should have a clear idea about it. The Committee were, however, aware that it would be difficult to define in precise terms the concept of Contempt of Court, nevertheless, it was not beyond human ingenuity to frame or formulate a suitable definition thereof. The Committee have, therefore, after giving a very anxious and elaborate thought to this aspect in the Bill, evolved a definition of the expression ‘Contempt of Court’ in clause 2 of the Bill. While doing so, the Committee have followed the well-known and familiar classification of contempts into ‘civil contempt’ and ‘criminal contempt’ and have given essential indications and

ingredients of each class or category of contempt. The Committee hopes that the proposed definitions will go a long way in enabling the public to know what contempt of court means so that they could avoid it; and the courts would find it easy to administer it. The proposed definition would also, the Committee trust, remove uncertainties arising out of an undefined law and help the development of the law of contempt on healthier lines.”

But in para 16, the Committee referred to the “other principal changes by the Committee in the Bill”. They said that reasons therefor are set out in the “succeeding” paragraph and that reads as follows:

Clause 3

“ .. .. .

Paragraph (1) (original): The Committee felt that the word ‘imminent’ in relation to an impending proceeding is vague and is likely to unduly interfere with the freedom of speech and expression.

The Committee are of the view that it is very difficult to draw a line between cases where proceedings may be said to be imminent and cases where they may not be, especially in criminal cases. The Committee have, therefore, deleted the reference to imminent

proceedings from the clause and sub-clause (1) has been suitably modified’.

Sub-clause (2) (Original): The sub-clause has been omitted consequent on the deletion of the reference to imminent proceedings as mentioned earlier.

Sub-clause (2) (New): The Committee have added a new sub-clause to make it clear that no publication of any matter should be deemed to constitute contempt of court if it is made in connection with any proceeding which is not pending in a court at the time of publication.

Sub-clause (3): .. .. .

Sub-clause (4) (Original): The proviso to this sub-clause relating to the burden of proof in imminent proceedings have been omitted consequent upon deletion of the reference to imminent proceedings from sub-clause (1). In view of this, the Committee felt that this sub-clause which otherwise reproduces the rule in section 105 of the Evidence Act, 1872 is unnecessary and the Committee have, therefore, deleted the sub-clause.

Explanation to clause (3): The original Explanation pertaining to pending judicial proceeding covered the period of time upto which a proceeding is said to be pending without laying down the time from which proceeding is said to commence. The Committee are of the

view that the stage or stages from which pendency starts should also be provided in the Explanation, and a proceeding should be deemed to be pending when the case actually goes before a Court and it becomes seized of the matter. The Committee has, therefore, redrafted paragraph (a) of the Explanation and indicated therein the steps after taking which a civil or a criminal case should be deemed to commence.”

Question is whether the changes made by Joint Committee in 1970 are consistent with law declared by Supreme Court in A.K. Gopalan v. Noordeen & Maneka Gandhi case ?

The validity of the changes brought about by the Joint Committee in 1970, in the draft Bill prepared by the Sanyal Committee in 1963, by dropping the word ‘imminent’, and by excluding all publications made before the date of filing of the charge sheet or challan, even if the person had been arrested by the date of publication, will have to be considered in the light of due process of law as decided in Maneka Gandhi’s case 1978 (1) SCC 248 and the fundamental right to life and liberty declared in Article 21, and in the light of the view expressed in A.K. Gopalan v. Noordeen, AIR 1970 SC 1694 as to how liberty and freedom of expression require to be balanced.

The first reason given by the Joint Committee for omitting the word ‘imminent’ is that that word is ‘vague. This aspect will be considered in Chapter V.

The second reason given by the Joint Committee is that if imminent criminal proceedings are to be taken into account for considering the question of prejudice, then freedom of expression may be unduly restricted. This will be considered in Chapter VII.

## Chapter V

### Whether Joint Committee of Parliament was right in stating that the word 'imminent' is vague?

In this Chapter, we shall deal with the view of the Joint Committee (1969) that the word 'imminent' used by the Sanyal Committee in the 1963 is 'vague'.

Before going into the aspect whether the Joint Committee of Parliament was right in stating that the word 'imminent', as used by the Sanyal Committee in 1963 was vague, we shall refer to another statement by the Sanyal Committee that India is a vast country and what is published in one part is not accessible to people in another part of the country.

Whether publications in one part of India do not reach other parts, as stated by Sanyal Committee (1963):

Though the Sanyal Committee, in its Report of 1963, was in favour of the date of arrest being the starting point for defining 'pendency' of a criminal case, and used the word 'imminent' in the Bill, still it made some

observations that publication made in one part of the country by the media do not reach other parts of the country, because our country is so vast. That was the position in 1963.

But, in our view, this observation is no longer tenable today in view of the revolutionary changes that have come about in media publications in the last two decades. The new technology has ushered in the television, and cable services, and internet which are today accessible by millions of people in cities, towns and villages. Print media and the radio services too have tremendously increased. News in internet is available globally. Dissemination of news by the electronic media and internet is so fast that the moment a crime of some significance is alleged to have been committed and somebody is suspected, every News Channel rushes to the place and covers the item within minutes. The suspect is shown on the television or in the internet and almost a parallel inquiry starts. Most newspapers publish their daily newspaper summaries on the web.

By 2002, there have been in India, about 49,000 newspapers of which about 20,000 are in Hindi, over 130 million (13 crores) combined circulation of newspapers all put together, 120 million (12 crores) radio

sets with 20% of population regularly listening, 65 million television sets of whom 50% regularly watch the channels, over 35 million households with cable television connections, 21% of population covered by FM radio, nearly 35 million telephones, over 10 million mobile phones, over 5 million computers and internet subscribers. (see article by Dr. Jaya Prakash Narayan in 2002 National Press Day Souvenir published by Press Council of India). in the last 4 years, these figures have galloped further higher.

It is reported in Hindu (30<sup>th</sup> August, 2006) that according to National Readership Study (NRS 2006), as on 2006, there are 203.6 million readers of daily newspapers, and together with magazines, it touches 222 million readers. Satellite television has 230 million viewers and television has reached 112 million Indian homes. The number of houses having cable and satellite television has gone up to 68 million. Internet use has reached 9.4 million and has touched 12.6 million in the last three months. Radio reaches 27% of the one billion population.

A new development today is that the suspect goes before a TV channel or to the Press and makes statements of his innocence and this is obviously intended to prevent the police from claiming that the suspect has

voluntarily surrendered and confessed to his guilt. Similarly, victims and potential witnesses are also interviewed by the news channels. These technological developments in the media and types of behaviour were not there when the Sanyal Committee in its Report in 1963 stated in one para that our country is so vast that events relating to a crime in one part of the country do not get spread to other parts of the country. This reasoning is no longer tenable. Some of the television channels are national and some are local, in the sense they publish news in local languages but are part of the same cable network and these channels are accessible in other parts of the country too. Today, cable TV system displays regional TV channels in vernacular languages in various states to cater to the customers who hail from the particular region speaking that local language. In Punjab, you can see news from Kerala or Andhra Pradesh or Tamil Nadu, from language channels which cater to those who hail from these states and vice-versa. National channels pick up news from regional channels and regional channels pick up news from National channels. Newspapers too have increased circulation than what was in 1970 and another feature is their coverage of news from the states in National dailies and the coverage of District news in local State newspapers. Above all newspapers publish their news items on the world wide web. Hence, the observations of Sanyal

Committee are no longer valid.

Why the Joint Committee in its Report 1111(1969-70) is not correct in stating that the word 'imminent' used by Sanyal Committee in the Bill of 1963 is 'vague':

The reasoning of the Joint Committee (1969-70) that the word 'imminent' criminal proceeding used by the Sanyal Committee in its draft Bill of 1963 is "vague" and is likely to lead to uncertainty is no longer acceptable. In fact, by the date the Committee submitted its Report, Supreme Court had decided in A.K. Gopalan v. Noorudin AIR 1970 SC 1694: (1969(2) SCC 734) that the word 'imminent' meant the time when a person was arrested, though pendency was not to be reckoned from the time when a first information report was filed. That starting point was fixed by the Supreme Court for the purpose of balancing the freedom of speech and expression in Article 19(1)(a) (read with Article 19(2)) on the one hand and liberty of the person under Article 21 which guarantees due process. There is express reference to the freedom of speech and expression in that judgment. Therefore, the argument of the Joint Committee as to 'vagueness' is no longer available and perhaps the attention of the Committee was not invited to the judgment of the Supreme Court which was already there by the date of its Report. It appears that the last sitting of the

Committee was on 5<sup>th</sup> October, 1969 while the Report was submitted on 20<sup>th</sup> February, 1970. The judgment in Gopalan's case was delivered on 15<sup>th</sup> September, 1969.

Further, the fact that the word 'imminent' is not vague is clear from what has been done in other countries. In several countries, date of arrest which may be anterior to first information report, is treated as the starting point for treating a criminal proceeding as 'pendency' even if no charge sheet or challan is filed by the police in the court.

(a) United Kingdom: date of arrest accepted as starting point:

Section 1 of the U.K. Contempt of Court Act, 1981 introduces the 'strict liability rule' which means that "the rule of law whereby conduct may be treated as a contempt of court as tendency to interfere with the course of justice in particular legal proceeding regardless of intent to do so". Section 2(1) states that any publication, including broadcast, cable programme or other communications in whatever form", which is addressed to the public at large or any section of the public, will be contempt if it –

“creates a substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced”.

Sub-section (3) states that the strict liability rule applies to a publication only if the proceedings in question are active within the meaning of this section at the time of publication. Sub-section (4) of section 2 is important and it states:

“Section 2(4): Schedule 1 applies for determining the times at which proceedings are to be treated as active within the meaning of this section.”

Schedule 1 (clause 3) states that ‘criminal proceedings’ are active from the relevant initial step specified in paragraph 4 until concluded as described in para 5. Clause (4) refers to the initial steps in criminal proceedings as follows:

- “(a) arrest without warrant;
- (a) the issue, or in Scotland the grant of a warrant for arrest;
- (b) the issue of summons to appear, or in Scotland, the grant of a warrant to cite;
- (c) the service of an indictment or other document specifying the charge,
- (d) except in Scotland, oral charge.

Clause 5 refers to conclusion of criminal proceedings as follows:

- (a) by acquittal, or as the case may be, by sentence.

- (b) by any other verdict, finding, order or decision which puts an end to the proceeding;
- (c) by discontinuance or by operation of law.

Clause 11 states that criminal proceedings which become active on the issue of grant of a warrant for his arrest cease to be active at the end of the period of twelve months beginning with the date of the warrant unless he has been arrested within that period, but become active again if he is subsequently arrested.

In UK, more recently, Lord Hope stated in ‘Montgomery v. H.M. Advocate’ (2001 (2) WLR 779) (PC) as follows:

”The right of an accused to a fair trial by an independent and impartial tribunal is unqualified. It is not to be subordinated to the public interest to the detection and suppression of crime. In this respect, it might be said that the Convention right is superior to the common law right.”

- (b) Australia: (New South Wales) : Date of arrest as starting point.

The Report of the New South Wales Law Reform Commission (Report 100) 2003 (issued after Discussion Paper 43 (2000) on ‘Contempt

of Court’ contains a Draft Bill which refers to potential jurors, potential witnesses and potential parties and applies criminal contempt to “active” criminal proceedings.

Prejudice to ‘imminent’ proceedings by publication is part of the law in New South Wales (Australia). The publication must have a tendency to prejudice the framing of proceedings. Sections 7(d), 8(d), 9(c) of the Bill annexed to the Report require that the publication creates substantial risk, according to the circumstances at the time of publication, that juror, witnesses or parties or potential jurors or potential witnesses or potential parties may be influenced.

Schedule 1 describes when criminal proceedings are active and reads as follows:-

“Ch.1. Part 1

1. When is a criminal proceeding active?

(1) A criminal proceeding is active for the purposes of section 7:

(a) from the earliest of the following:

- (i) the arrest of a person in New South Wales or in another State or Territory,
- (ii) the laying of a charge,

- (iii) the issue of a court attendance notice and its filing in the registry of the relevant court,
- (iv) the filing of an ex-officio indictment,
- (v) the making of an order in a country other than Australia that a person be extradited to New South Wales for the trial of an offence.

(c) New Zealand: Case law accepts date of arrest as starting point.

Under the New Zealand Bill of Rights, 1990, section 25(a) protects the right to a fair and public hearing by an independent tribunal and section 25(c) the right to be presumed innocent until proved guilty according to law. Section 24(e) protects the right of an accused charged with an offence to a trial before a jury when the penalty for the offence may be imprisonment for more than three months. Section 138(2) of the New Zealand Criminal Justice Act, 1985 empowers the courts to make orders precluding the press from reporting on criminal proceedings when it is considered that the interests of justice, public morality, the reputation of the victim of a sexual offence or extortion, or the security of New Zealand require such order to be passed.

There are several cases which refer to date of arrest as the starting point to consider the question of prejudice by publications. It is stated that it

is incidental to the right to trial by jury that “a person accused of a crime is entitled to have the .... cases presented to such a jury with their minds open and unprejudiced and untrammelled by anything which any newspaper, for the benefit of its readers, ... takes upon itself to publish before any part of the case has been heard” (Attorney General v. Tonks : 1934 NZLR 141 (149) (FC). In that case it was held that publication of photographs before trial of person who is arrested will be prejudicial if identification was likely to be an issue, and would amount to contempt. Blair J. observed:

“If a photograph of an accused person is broadcast in a newspaper immediately he is arrested, then such of the witnesses who have not then seen him, may quite unconsciously be led into the belief that the accused as photographed is the person they saw. The fact that a witness claiming to identify the accused person, has seen a photograph of him before identifying him, gives the defence an excuse for questioning the soundness of the witness’s identification.”

Tonks decided in New Zealand in 1934 was recently followed by the Australian Court in Attorney General (NSW) v. Time Inc. Magazine Co. Ltd. (unrep.CA 40331/94 dated 15<sup>th</sup> September 1994) in a case arising from the publication of the photo of one Ivan Milat, the accused in the backpacker serial murders’ case. The weekly magazine ‘Who’ had

published Milat's photo on its front page following his arrest. Referring to the danger such actions created, Gleeson CJ observed:

“One of the particular problems about identification evidence is the difficulty that exists where a person, before performing an act of identification of an accused, has been shown a photograph of the accused. If for example, prior to identifying an accused person in a police line-up, a witness had been shown by a police officer a photograph of the accused, then it would be strongly argued that the identification in the line-up was useless, or at least of very limited value. It would be argued that, because of what is sometimes described as the displacement effect, there was a high risk that at the time of the line-up, the witness was performing an act of recognition, not of a person who had been seen by the witness on some previous occasion, but of the person in the photograph.”

In New Zealand, publicity given to confessions allegedly made to the police can create serious prejudice to a suspect or accused. The confession may later be ruled inadmissible, in which case, recollection by a juror of a report of a confession could be highly prejudicial. Reports of the psychiatric history of an accused tending to show a person as dangerous could similarly affect the trial.

In Solicitor General v. Wellington Newspapers Ltd.: 1995(1) NZ LR 45, Gisborne Herald and two other newspaper publishers had been convicted of contempt for reporting the previous convictions of John Giles at the time of his arrest in Gisborne on charges of attempted murder of a police constable.

In Solicitor General v. Television New Zealand : 1989(1) NZ LR page 1 (CA), the Court of Appeal rejected the defence that the court could not grant an injunction to prevent prejudice to imminent court proceedings. It observed:

“In our opinion, the law of New Zealand must recognise that in cases where the commencement of criminal proceedings is highly likely, the court has inherent jurisdiction to prevent the risk of contempt of court by granting an injunction. But, the freedom of the press and other media is not lightly to be interfered with and it must be shown that there is a real likelihood of a publication of material that will seriously prejudice the fairness of the trial (Cooke J)

On facts, no action was taken as the publication did not contain details. In Attorney General v. Sports Newspapers Ltd. : 1992 (1) NZLR 503, the NZ Divisional Court held that criminal proceedings must be pending or imminent. In Television New Zealand case, instead of basing the judgment on whether the criminal proceedings were imminent, the court laid down the test of ‘real likelihood of a publication of material that will seriously prejudice the fairness of the trial’.

(d) Australia: Case law and Law Reform Commission prejudice on account of ‘imminent’ proceedings: accepted in Australia:

Western Australia has a provision in section 11A of the Evidence Act, 1906 which authorises a Judge to restrict publication of evidence in any proceeding where the Judge considers that publication may tend to prejudice any prosecution that has been or may be brought against a person.

The Law Reform Commission of Australia issued a number of discussion papers addressing the issues of contempt by publication in 1986, 1987 and 2000. These papers assert that contempt arises when there has been publication of prejudicial material, regardless of whether or not there was an intention to interfere consciously with an imminent or ongoing court case. Typical examples of prejudicial publicity include publication of a

prior criminal record of an alleged offender, or insinuations of the offender's guilt or innocence, and reporting a confession (Australian Law Reform Commission, 1987; Pearson, 1997) (as quoted by Keylene M. Douglas in his article "Pre-trial publicity in Australian print media : Eliciting bias effects on Juror decision making (2002)").

We shall next refer to the peculiar case of Glennon in Australia. Glennon's case related to pending criminal proceedings but it is relevant in the present context.

### Summary

We are, therefore, of opinion that the word 'imminent' criminal proceedings is no longer vague in as much as the Supreme Court in A.K. Gopalan v. Noordeen AIR 1970 SC 1694 has stated that publications made after 'arrest' of a person and before the filing of a charge sheet, can be the starting point of 'pendency'. Any publications which are prejudicial to the suspect who has been arrested before filing of charge sheet/challan can be contempt under section 3 if they interfere or tend to interfere with the cause of justice. In our view, the word 'imminent', if it is so defined, cannot be

said to be any longer vague. In fact, in UK, in New South Wales, date of arrest is treated as the starting point while in Australia and New Zealand, the fact that criminal proceedings are 'imminent' is a sufficient consideration.

For all these reasons, we are firmly of the view that though section 3 (2) may be retained so as to exclude from contempt certain publications, the Explanation below section 3 requires to be modified, so far as clause (B) relating to criminal proceedings is concerned, so as to include the arrest of a person in addition to filing of charge sheet or challan or issue of summons or warrant against the accused.

## CHAPTER VI

**Does ‘A.K. Gopalan v. Noordeen’ (1969)(SC) make ‘imminence’ relevant only in respect of arrests for serious offences ? What is the effect of the 24 hour rule?**

In this Chapter we shall deal with an editorial comment in the SCC report of A.K. Gopalan vs. Noordeen: 1969(2) SCC 734 where it is observed that that case held criminal proceedings are imminent because it was a case of arrest in a murder case. If the offence is not serious, arrest does not mean criminal proceedings are imminent.

We propose to discuss this view critically. We have, as will be seen at the end of this Chapter, come to the conclusion on an exhaustive discussion, that there can be no question of criminal proceedings being ‘imminent’ after arrest only in case of ‘serious’ offences. No such distinction between ‘serious’ and ‘less serious’ offences can be recognized nor has been recognized in any country for deciding if criminal proceedings are ‘imminent’ after an arrest.

We start our discussion with the two Supreme Court judgments dealing with the word ‘imminent’.

The first case on the subject is Surendra Mohanty v. State of Orissa (Criminal Appeal No. 107 of 1956 : Judgment dated 23.1.1961) and the second one is A.K.Gopalan v. Noordeen 1969(2) SCC 734 to which we have already referred..

(a) In the first case in Surendra Mohanty, (unreported, quoted in extenso in A.K. Gopalan’s case) the Supreme Court examined the question as to whether the prejudicial publication of a statement in the media at a time when the only step taken was the recording of first information report under Section 154 of the Code of Criminal Procedure,1898, could be contempt of court. Kapur, J observed:

“Before the publication of the comments complained of, only the first information report was filed in which though some persons were mentioned as being suspected of being responsible for causing the breach in the Bund, there was no definite allegation against any one of them. In the charge-sheet subsequently filed by the police these suspects do not appear amongst the persons accused. It was, therefore, argued that by the publication there could not be any tendency or likelihood to interfere with the due course of justice. The learned Additional Solicitor-General for the State submitted on the other hand that if there is a reasonable probability of a prosecution being launched against any person and such prosecution be merely imminent, the publication would be a contempt of court.

The Contempt of Courts Act (1952) confers on the High Courts the power to punish for the contempt of inferior courts. This power is both wide and has been termed arbitrary. The courts must exercise this power with circumspection, carefully and with restraint and only in cases where it is necessary for maintaining the course of justice pure and unaffected. It must be shown that it was probable that the publication would substantially interfere with the due course of justice; commitment for contempt is not a matter of course but within the discretion of the court which must be exercised with caution. To constitute contempt is not necessary to show that as a matter of fact a judge or jury will be prejudiced by the offending publication but the essence of the offence is conduct calculated to produce an atmosphere of prejudice in the midst of which the proceedings will have to go on and a tendency to interfere with the due course of justice or to prejudice mankind against persons who are on trial or who may be brought to trial. It must be used to preserve citizen's rights to have a fair trial of their causes and proceeding in an atmosphere free of all prejudice or prepossession. It will be contempt if there is a publication of any news or comments which have a tendency to or are calculated to or are likely to prejudice the parties or their causes or to interfere with the due course of justice.

As to when the proceedings begin or when they are imminent for the purposes of the offence of contempt of court must depend upon the circumstances of each case, and it is unnecessary in this case to define the exact boundaries within which they are to be confined.

The filing of a first information report does not, by itself, establish that proceedings in a court of law are imminent. In order to do this various facts will have to be proved and in each case that question would depend on the facts proved.”

Kapur J further observed:

“In the present case all that happened was that there was a first information report made to the police in which certain suspects were named; they were not arrested; investigation was

started and on the date when the offending article was published no judicial proceedings had been taken or were contemplated against the persons named in the information report. Indeed after the investigation the suspects named in that report were not sent up for trial. At the date of this offending publication was made, there was no proceeding pending in a court of law nor was any such proceeding imminent.”

A reading of the above observations shows that the date of filing of a first information report under Section 154 of the Code of Criminal Procedure Code cannot be the starting point for treating a criminal proceeding as pending, still there could be contempt if criminal proceedings are ‘imminent’. In that case in the charge sheet, some of the names referred to in the first information report were not included. In order that publications are in contempt, they must be such as would “substantially” interfere with the due course of justice. It is not necessary to show that as a matter of fact a Judge or Jury will be prejudiced by the offending publication but the essence is whether the publication was calculated to produce an atmosphere of prejudice in the midst of which the proceeding will have to go on and has a tendency to interfere with the due course of justice or to prejudice mankind against persons who are on trial or who may be brought to trial. It must be used to preserve citizens’ right to have a fair trial of their causes and that the proceedings are carried in an atmosphere

free of all prejudice or prepossession. It will be contempt if there is a publication of any news or comments which have a tendency to or are calculated to or are likely to prejudice the parties or their cause or to interfere with course of justice. As to when proceedings begin or when they are imminent must depend upon the circumstances of each case. It was felt that the exact boundaries do not fall for decision in the case. Apart from the facts in information report, various other facts have to be proved. In the above case, the first information report alone was there but, it was stated, that none was arrested as on the date of the publication. Nor was any proceeding pending in Court.

(b) In the second case in A.K. Gopalan v. Noordeen 1969(2) SCC 734 already referred to, an investigation was going on against a person into a charge of murder. We have referred to the case earlier but, we shall discuss the judgment in greater detail in the context of the editorial note in SCC in that case.

The accused was arrested on September 23, 1967. While the statement of Mr. A.K. Gopalan about the arrested person was made on 20<sup>th</sup> September 1967, the first information was lodged on 11<sup>th</sup> September 1967 but the accused was not arrested while by the date of publication in the newspaper, they were arrested. The Supreme Court held that Mr. A.K. Gopalan was not guilty of contempt and so far as the printers and publishers

were concerned, the Court took the view that the question was whether proceedings in a court were imminent? The Court “referred” to arrest in a serious cognizable case i.e. one of alleged murder, and stated that ‘arrest’ means that the police was prima facie on the right track. It also referred to the fact that the accused must have been produced before a Magistrate within 24 hours of the arrest in accordance with Article 22 of the Constitution and the Magistrate must have authorized further detention of the accused.

The Court stated “In these circumstances, it is difficult to say that any proceedings in a court were not imminent”.

Not only that, the Supreme Court stated further:

“The fact that the police may have, after investigation, come to the conclusion that the accused was innocent does not make the proceedings any the less imminent”.

Why publication could subvert the course of justice was:

“because it would tend to encourage public investigation of a crime and a public discussion of the character and antecedents of an accused in detention.”

The Court also observed that it is not in every case when a person is arrested, a proceeding in a court can be said to be imminent because there

could be delay in the scrutiny of accounts may take time. If it is a case against a company, a large number of accounts may have to be investigated by the police and criminal proceedings may not be imminent in spite of arrest. On that ground the Court said :

“as observed by this Court, it is difficult to lay down any inflexible rule”.

It then said :

“But, as far as an investigation of a charge of murder is concerned, once an accused has been arrested proceedings in Court should be treated as imminent”.

(Mitter, J however, held even Mr.A.K. Gopalan guilty of contempt.)

It is the above observations that appear to be the basis of the editorial comment in SCC.

However, it appears to be the law declared by the Supreme Court in A.K. Gopalan's case that the fact that an arrest under Section 41 of the Cr.PC has been made may be prima facie proof that criminal proceedings are 'imminent'.

But, it is true the Court made an observation that there can still be exceptions where notwithstanding an arrest, criminal proceedings may not be imminent such as where a mass of accounts of a company are to be scrutinized or investigated before charge sheet is filed under Section 173. Those observations deal with a delayed time factor but that does not, in our opinion, mean that in the case of (say) arrest of a company's Director, there can be prejudicial publications because of delay in the filing of charge-sheet. This requires a proper meaning being given to the word 'imminent'.

In our view, the word 'imminent' does not mean merely that the charge sheet must be filed in Court "immediately" after arrest. 'Imminent' here means the 'reasonable likelihood' of the filing of charge sheet whether immediately or in a reasonable time. If the word 'imminent' should mean "immediate", then in all cases where there are delays in investigation such as when investigation is entrusted to the CBI or the ACB in the States, there could be a free licence to issue prejudicial publications. That cannot be the law. 'Imminence', in our view, really means 'reasonable likelihood' of filing of charge sheet.

But we are not saying that once arrest is made, the media is obliged to make no publications at all. What the law requires is that they should not, while making publications, prejudice the case of the suspect by referring to his character, prior convictions, confessions, photographs (where identity is in question) or describe him as guilty or innocent (see Chapter IX). Further, sec 3 grants immunity to publications made without knowledge of the pendency of the criminal proceeding.

Nor is the editorial note correct in suggesting that the word ‘imminence’ requires a person who wants to make a prejudicial publication to go to the police station or to somehow find out if the police had come to a preliminary conclusion to file a charge sheet. Such an interpretation of the word ‘imminent’ is a highly unreasonable one and impracticable. We do not see any problem in understanding that ‘imminence’ in respect of a person who is ‘arrested’ means that he is “most likely” to be charge sheeted.

Further, as stated below, ‘arrest’ is important in another sense because of the 24 hour rule which we shall presently discuss. This is a constitutional requirement that a person arrested has to be produced before a magistrate within 24 hours of the arrest. Today, the word ‘imminent’ is understood as

being a stage when a person comes within the constitutional protection of a Court after arrest. (see heading 'B' below).

(A) Prejudice to the suspect means prejudice irrespective of whether offence is a serious one or nor:

In A.K. Gopalan's case, no doubt, the Court uses the words 'serious' offence of murder. But, in our opinion, when we are considering the prejudice to the suspect, then prejudice may occur whether offence is a serious one or not. Prejudice must be viewed from the point of view of the personal right of the suspect for a fair trial when he is arrested and not from the point of view whether the arrest was for a serious offence. Prejudice is in relation to a person and is not in relation to the offence with which the person is charged.

No country has made a distinction between a serious offence and a non-serious offence, for judging whether a publication regarding the offence has caused prejudice to the suspect or accused.

(B) Care and protection of Court under Article 22(2) of the Constitution and Sections 57 & 76 of the Code of Criminal Procedure are sufficient to show court proceedings are imminent:

The entire argument based on possible delay in filing charge sheet after arrest is without basis for it ignores Art 22(2) of the Constitution under

which soon after arrest, a person comes under the protection of the Court. This according to Court judgments and other authorities is the proper meaning of the word 'imminent'. Whether a person is arrested in a cognizable case by the police without warrant on the basis of 'reasonable suspicion' or by a warrant from the Court in the case of non-cognizable case where the Magistrate applies his mind as to whether arrest is necessary and under Sections 57 and 76 of the Code of Criminal Procedure, 1973, a person arrested has to be brought before a Magistrate within 24 hours of the arrest. That is imperative under Article 22(2) of the Constitution of India. Once arrest is made, the person arrested comes within the care and protection of the Court and such a relationship with the court has been treated as sufficient to show that 'court proceedings' are 'imminent'. This is clear from the decision in Hall v. Associated Newspapers : 1978 SLT 241 decided by the Court in Scotland (to which we shall be referring hereinbelow). That, according to Borrie and Lowe, (Contempt of Court) (3<sup>rd</sup> Ed) (1996) (p 247, 256), is the basis of the UK Act, 1981 for treating a criminal proceeding as 'active' from the time of arrest (see discussion below). That is also the view of other leading authorities.

It is, therefore, not correct to think that prejudice to the suspect starts only after the charge sheet or challan is filed under Section 173(2) of the

Criminal Procedure Code, 1973, when the police come to the conclusion that “an offence appears to have been committed”.

(C) UK – Hall vs. Assorted Newspapers: “24 hour rule”:

The crucial decision which is the basis for the UK Act of 1981, according to the authors Borrie and Lowe (1996, 3<sup>rd</sup> Ed, (page 247, 256) is Hall v. Associated Newspapers : 1978 S.L.T 241 (248). In that case, the Scotland Court referred to the test as to whether proceedings have reached the stage when it can be said “that the court has become seized of a duty of care towards individuals who have been brought into a relationship with the court”. Applying that test, it was held (at page 247 of Hall) that contempt applied “from the moment of arrest or (obiter) from the moment when a warrant for an arrest has been granted. With regards to arrest, it was felt that, at that time, the person arrested is within the protection of the court since he is vested with rights (for example he must be informed of the charge and must be brought before a magistrate within 24 hours) which he can invoke and which the court is under a duty to enforce.”

(D) New South Wales (Australia): 24 hour rule applied:

The above judgment of the Scotland Court was followed by A.G for NSW v. T.C.N.Channel Nine Pty Ltd : (1990)20 NSWLR 368 in which a

film of an arrested man being led around the scene of the crime by the police was shown on television with a commentary which clearly implied that he had confessed to a number of murders (which was indeed the case). At the time of the broadcast, the man had been arrested and charge had not yet been brought before the court. The New South Wales Court of Appeal thought that as held in Hall v. Associated Newspapers, “from the moment of arrest, the person arrested is in a very real sense under the care and protection of the court”. The N.S.W.Court concluded that the critical moment for contempt was the time of arrest from that moment : (p 378)

“The process and procedures of the Criminal Justice system, with all the safeguards they carry with them, applied to him and for his benefit, and .... Publications with a tendency to reduce those processes, procedures and safeguards to impotence are liable to attract punishment as being in contempt of court.”

and applied the principle in R v. Parke : 1903(2) KB 432 which stated that ‘fountain of justice’ can be polluted at its source.

Thus, the Australian position appears also to be that contempt law applies from the stage of arrest whether the offence is a serious one or not, because the arrested person comes within the protection of Court.

(E) New Zealand: Case law refers to ‘arrest’ or ‘imminent’ stage:

In New Zealand, in Television New Zealand Ltd v. S.G (1989) 1 NZLR 1, the Court of Appeal initially granted an injunction at the instance of the Solicitor General, to prevent a television news broadcast which included comments and opinions about the man-hunt for a named man but no charge had yet been laid for his arrest. The court later rescinded the order on the ground that the material sought to be published did not have prejudicial content. The court said:

“In our opinion, the law of New Zealand must recognize that in cases where the commencement of criminal proceeding is highly likely, the Court has inherent jurisdiction to prevent the risk of contempt of court by granting injunction.”

We have already referred, in the previous Chapter, to a number of decisions of the New Zealand Courts where either ‘arrest’ or ‘imminence’ of criminal proceedings was treated as sufficient to grant protection against publications. (Attorney General vs. Tonks: 1934 NZRL 141 (FC): Solicitor General vs. Wellington Newspapers: NZRL 45; Attorney General vs. Sports Newspapers 1992(1) NZRL 503.

(F) Canada: 'arrest' is given importance

In Canada, according to Stuart M. Robertson, Courts and the Media (1981) Butterworth, Toronto) p 48 (quoted by Borrie and Lowe, 3<sup>rd</sup> Ed, 1999, p 249) it is stated that the 'sub judice' rule begins to apply when the court obtains jurisdiction over the matter

“and in criminal cases, that is when information is sworn before a Justice of the Peace upon which either a summons or warrant is issued or where a person is arrested by a police officer.”

Canadian Law Reform Commission : refers to 'arrest':

The Canadian Law Reforms Commission (1977, Working Paper, No.20, p 44 & 1982 Report No.17, p 44, 54-6) was also impressed by the need for certainty but it too rejected the Phillmore Committee recommendations and proposed instead that the sub judice period must begin at the moment an information is laid (i.e. first information report). The Australian Law Reforms Commission (Report No. 35, para 296) recommended that contempt should apply from the time when a warrant for arrest has been issued, a person has been arrested without warrant, or charges have been laid, whichever is the earliest. However, it also recommended that if a person 'implicated' in a publication at an earlier point acted with the intention of prejudicing the relevant trial, so as to

amount to an attempt to prevent the course of justice, he should be liable to be prosecuted for that offence under Section 43 of the Crimes Act, 1914) (Cmth). This has echos of the position reached in the United Kingdom after Contempt of Court Act,1981.

We have already referred to the views of the New South Wales Law Commission in the previous Chapter.

(G) Irish Law Reforms Commission: refer to ‘imminent or virtually certain’:

The Irish Law Reforms Commission(1991, July, p 321) has commended two tests. The first, which would apply in ‘normal’ cases, namely to ‘active’ proceedings as defined in the UK Contempt of Court Act of 1981. The second would apply contempt to ‘the rare case where, in relation to proceedings which are not active but are imminent, a person publishes material when he is actually aware of facts which, to his knowledge, render it certain, or virtually certain, to cause serious prejudice to a person whose imminent involvement in criminal or civil legal proceedings is certain or virtually certain”.

(H) Borrie & Lowe

Borrie and Lowe (pp 253, 254) refer to the need for a definite point of time and refer to the views of Law Commissions in UK, Canada, Australia and Ireland as to the need for fixing a definite point of time and as to when proceedings can be said to be “imminent” so that the vagueness concept built up by the Phillmore Committee (1974) could be easily surmounted and they say that finally, the UK Act of 1981, by giving the criteria in Sch 1, para 4, (i.e. date of arrest etc.) virtually adopting the Scotland decision in Hall v. Associated Newspapers Ltd 1978 SLT 241, the ‘vagueness’ obstacle has indeed been surmounted. The authors say that confining the contempt law to publication made only after filing a charge in court, results in an unjust superior position being granted to freedom of speech and expression as against liberty. The above views of the authors are quite important and we shall refer to the crucial paragraphs from that book.

The authors say under the heading “Proposals for Reform”, as follows (pp 253,254):

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Starting Point :

The Phillmore Committee (1974, Cmnl 5794, para 113) could see no case for retaining the concept of ‘imminence’ since it defies definition and could apply arbitrarily depending on the chance of outcome of events. As the Committee said, the vagueness of

‘imminence’ has ‘an inhibiting effect on the freedom of the press which is out of all proportion to any value there may be in preserving it.’

Moving away from the concept of ‘imminence’ does not resolve the difficulty of deciding when contempt ought to begin to apply. There remains the problem of selecting a starting point that is both sufficiently certain and early enough to afford real protection to any ensuing trial. The Phillmore Committee (paras 123, 216) recommended that for criminal proceedings, the starting point should be (a) in England and Wales, when the accused person is charged or a summons served and (b) in Scotland, when the person is publicly charged on petition or otherwise or at the first calling in court of a summary complaint. Had this recommendation been implemented, it is suggested that it would have tipped the balance too far in favour of freedom of speech. Quite simply, the suggested starting point would have been late to afford real and necessary protection to the accused.”

The authors say that a subsequent Government Discussion Paper (1978, (Cmnd 7145, para 14) seemed to take a similar view. As it said:

“charges often follow shortly after a serious crime becomes known; and indeed, from the point of view of an accused person, it may be as important to have protection from prejudicial comment during the period immediately before he is charged, when media and public interest in the crime is strong, as it is after a charge has been formally laid”.

The Government Discussion Paper concluded that on that footing, “there is ground for the view that the Phillmore recommendation goes too far in allowing prejudicial publication before a formal charge is made, so endangering the fair trial of accused persons”.

The authors Borrie and Lowe say (see p 254) that the UK Law was reformed with an earlier starting point than the one recommended by Phillmore.

In the Schedule I, para 4, of the UK Act of 1981 so far as criminal proceedings are concerned, it is stated that the criminal proceedings become ‘active’ upon

- “(a) arrest without warrant;
- (b) the issue of summons to appear, or in Scotland, the grant of a warrant;

- (c) the service of an indictment or other document specifying the charge;
- (d) except in Scotland, oral charge.”

Borrie & Lowe state (p 256) that para 4 of Sch. 1 “is a virtual enactment of the starting point in Scotland as laid down by Hall v. Associated Newspapers Ltd (1978 SLT 241) and in any event, closely corresponds to what the Common Law in England and elsewhere understand as ‘pending’ proceedings.”

However, under Section 3 of the UK Act, a publisher can defend himself stating that at the time of publication, he had taken all reasonable care but he neither knew nor suspected that the relevant proceedings were active and (probably) that he published in good faith. Borrie and Lowe state (p 258) that Section 3 might not provide a complete answer but it goes a long way to meet the fears of the Phillimore Committee.

It is significant that in A.K. Gopalan vs. Noordeen (1969(1) SCC 734 at page 741 the Supreme Court indeed referred to the 24 hour rule and observed, while stating the facts, as follows:

“Arrest means that the police was prima facie on the right track. The accused must have been produced before a Magistrate within 24 hours of the arrest in accordance with Art 21 (Art 22) of the

Constitution, and Magistrate must have authorized further detention of the accused.”

But from Hall, it is clear that coming under care of the Magistrate is sufficient and it is not necessary that Magistrate must have authorized arrest.

The following observations of Borrie & Lowe (see p 258) are quite important in the context in India of balancing Article 19(1)(a) and Article 21. The authors say:

“The timing provisions under para 4 are not as generous to the news media as the Phillimore Committee recommendations, which was that the sub-judice period should begin only when the person was charged or a summons served. However, despite the difficulties adverted to above, it is submitted that the Act gets the timing about right. Paragraph 4 strikes a reasonable compromise between the Phillimore Committee’s proposals, which would not have protected a trial from the real risk of prejudice that publicity prior to the charge can cause, and the undesirable uncertainty of the Common Law position. Indeed, it was the extraordinary publicity which followed the arrest of Peter Sutcliffe in January,

1981, which began even before he had been charged with the ‘Yorkshire Ripper’ murders, which doomed any attempt in the later stages of the Bill to ease the sub-judice provision and follow the Phillimore recommendation. Paragraph 4 should have had the advantage of creating a uniform and reasonably certain starting point applicable to England and Wales, Scotland and Northern Ireland. However, as we have seen, this statutory certainty has been undermined by the continuing operation of the Common Law, with its concept of ‘imminent’ for intentional contempt.”

Summary: Editorial Note in 1969(2) SCC 734 is not correct:

The above discussion of the meaning of the word ‘imminent’ leads us to the conclusion that the time of arrest can be reasonably taken as starting point, whether the offence is a serious one or otherwise. The moment an arrest is made, the person comes within the protection of the Court for he has to be produced in Court within twenty four hours. This reason is given by the Scotland Court in Hall’s case (1978) as above stated

and is the basis of Schedule 1 of the UK Act of 1981. This reason is also accepted by the New South Wales (1990).

We do not, therefore, accept the editorial comments given below A.K. Gopalan's case in 1969(2) SCC 734 that that case treats 'arrest' as the starting point of 'imminence' in a criminal case when publications are made in relation to 'serious' offences like 'murder' and that only in such case there is likelihood of charge sheet being filed. In our view, from the point of the person arrested, whether the arrest is for a serious offence or not, the prejudicial publication affects the process of a fair trial.

## CHAPTER VII

### Freedom of expression, Contempt of Court,

#### Due Process to Protect Liberty

The Chapter deals with the second reason given by the Joint Committee of Parliament for rejecting the word ‘imminent’ as used in the Bill by the Sanyal Committee. The Joint Committee felt that the word ‘imminent’ was vague and would unduly restrict freedom of expression. We have already stated that now, after A.K. Gopalan’s case, the word ‘imminent’ is not vague. It remains to consider whether freedom of expression is unduly restricted if the date of ‘arrest’ is treated as starting point.

Article 19 and Art 14, 21: Balancing rights of free speech and due process:

In Express Newspapers vs. Union of India 1959 SCR 12, the Supreme Court exhaustively dealt with freedom of the press but stated that it can not be unbridled. Like other freedoms, it can also suffer reasonable restrictions.

The subject of ‘trial by media’ or prejudice due to ‘pre-trial’ publications by the media is closely linked with Article 19(1)(a) which guarantees the fundamental right of ‘freedom of speech and expression’, and the extent to which that right can be reasonably restricted under Article 19(2) by law for the purpose of Contempt of Court and for maintaining the due process to protect liberty. The basic issue is about balancing the freedom of speech and expression on the one hand and undue interference with administration of justice within the framework of the Contempt of Courts Act, 1971, as permitted by Article 19(2). That should be done without unduly restricting the rights of suspects/accused under Article 21 of the Constitution of India for a fair trial.

There is no difficulty in stating that under our Constitution, the fundamental right of freedom of speech and expression can, by law, be restricted for purposes of contempt of Court. However, this can be done only by law passed by the Legislature and the restrictions that can be imposed on the freedom must be “reasonable”. If the restriction imposed by any law relating to contempt of Court is unreasonable, it is liable to be struck down by the Courts on the ground that the restriction is not proportionate to the object sought to be achieved by the restriction.

As at present, the provisions of Section 3 of the Contempt of Courts Act, 1971 restrict the freedom of speech and expression – which includes the freedom of the media, both print and electronic – if any publication interferes with or obstructs or tends to obstruct, the course of justice in connection with any civil or criminal proceeding which is actually ‘pending’ (i.e. when charge-sheet or challan is filed, or summon or warrant is issued). Further Section 3(1) protects the publication, if the person who made the publication had no reasonable grounds for believing that the proceeding was pending.

In our view, the provisions of sec 3(2), now allow totally unrestricted freedom to make publications, granting full immunity even if criminal contempt is committed, even if they interfere or tend to interfere with the criminal proceeding, if such proceedings are not actually ‘pending’ in a Court at the time of the publication. The Explanation below sec 3 defines ‘pendency’ of a judicial proceeding. So far as a criminal proceeding is concerned, we have to refer to sub clause (B) of clause (a) of Explanation which reads:

“(B) In the case of a criminal proceeding, under the Code of Criminal Procedure, 1898 (5 of 1898) or any other law –

- (i) where it relates to the commission of an offence, when the charge-sheet or challan is filed; or

when the court issues summons or warrant, as the case may be, against the accused, and

- (ii) in any other case, when the court takes cognizance of the matter to which the proceedings relates ... ..  
.....”

Therefore under sec 3 of the Act, the starting point of the pendency of the case is only from the stage where the court actually gets involved when a charge-sheet or challan is filed under Section 173 of the Code of Criminal Procedure,1973 or when the criminal court issues summons or warrant against the accused. Any publication before such events if it interferes or tends to interfere with rights of suspects or accused for a fair trial, is not contempt because Section 3(2) starts with the words,

“Notwithstanding anything to contrary contained in this Act or any other law for the time being in force”.

Two questions arise for consideration:

- (1) Whether the provisions of Section 3 (2) of the Contempt of Courts Act,1971 read with the Explanation below that section are in violation of due process as guaranteed by Article 21 of the Constitution of India, in so far as they grant immunity to prejudicial publication made before the filing of the charge sheet/challan ?

(2) If the answer to Question No.1 is in the affirmative, whether the Explanation to Section 3 has to be and can be modified by shifting the starting point of “pendency” of a criminal proceeding to the anterior stage of arrest, and whether such a change in the law would amount to an unreasonable restriction on freedom of speech guaranteed under Article 19(1)(a) of the Constitution ?

So far as the first Question is concerned, as already stated, as at present, if a publication which is made before the filing of a charge sheet or challan, interferes or tends to interfere with the course of justice in connection with a criminal proceeding, the rights of a person who has been arrested and in respect of whom the prejudicial publication is made, are not protected by the law of Contempt of Court. But, if such publications are prejudicial to the suspect or accused, will they not offend the principle of due process rights of a suspect or an accused as applicable in criminal cases and as declared by the Supreme Court in Maneka Gandhi v. Union of India : AIR 1978 SC 597 ?

Article 21 guarantees that “No person shall be deprived of his life or personal liberty except according to procedure established by law”. As is well known, overruling the earlier view in A.K.Gopalan v. State of Madras : AIR 1950 SC 27, the Supreme Court held in Maneka Gandhi’s case that the “procedure established by law” must be a law which is fair, just and

equitable and which is not arbitrary or violative of Article 14 of the Constitution of India.

If indeed a publication is one which admittedly interferes or tends to interfere or obstructs or tends to obstruct the “course of justice” in a criminal proceeding, in respect of a person under arrest (see Section 3[1]), but the law gives it immunity under sec 3(2) because the publication was made before the filing of the charge sheet/challan, is such a procedure fair, just and equitable ?

In several countries, U.K, Australia, New Zealand etc, any publication made in the print or electronic media, after a person’s arrest, stating that the person arrested has had previous convictions, or that he has confessed to the crime during investigation or that he is indeed guilty and the publication of his photograph etc, are treated as prejudicial and as violative of due process required for a suspect who has to face a criminal trial. It is accepted that such publications can prejudice the minds of the Jurors or even the Judges (where Jury is not necessary). The impact on Judges has been elaborately discussed in Chapter III of this Report. The Supreme Court of India has indeed accepted, in more than one case, that Judges may be ‘subconsciously’ prejudiced against the suspect/accused. We have indeed referred to some opinions to the contrary expressed by Courts

in USA where the freedom of speech and expression is wider than in our country. In USA the restrictions are narrow, they must only satisfy the test of ‘clear and present danger’.

In India restrictions can be broader and can be imposed, if they are “reasonable”. Restrictions intended to protect the administration of justice from interference can be included in the Contempt Law of our country under Art 19(2), if they are ‘reasonable’ It is even accepted in our country that actual prejudice of Judges is not necessary for proving contempt. It is sufficient if there is a substantial risk of prejudice. The principle that “Justice must not only be done but must be seen to be done” applies from the point of view of public perception as to the Judges being subconsciously prejudiced as has been accepted in UK and Australia.

In view of the above, such a publication made in respect of a person who is arrested but in respect of whom a charge sheet or challan has not yet been filed in a Court, in our view, prejudices or may be assumed by the public to have prejudiced the Judge, and in that case a procedure, such as the one permitted by Section 3(2) read with Explanation of the Contempt of Courts Act, 1971, does not prescribe a procedure which is fair, just and equitable, and is arbitrary and will offend Article 14 of the Constitution of India.

Contempt law which protects the ‘administration of justice’ and the ‘course of justice’ does not accept undue interference with the due process of justice and the due process includes non-interference with the rights of a suspect/accused for an impartial trial. Thus, Contempt of Court law protects the person who is arrested and is likely to face a criminal trial. No publication can be made by way of referring to previous convictions, character or confessions etc. which may cause prejudice to such persons in the trial of an imminent criminal case. Such a procedure, therefore, would interfere or tend to interfere or obstruct or tend to obstruct the course of justice.

Once an arrest is made and a person is liable to be produced in Court within 24 hours, if, at that stage, a publication is made about his character, past record of convictions or alleged confessions, it may subconsciously affect the Magistrate who may have to decide whether to grant or refuse to grant bail, or as to what conditions have to be imposed or whether the person should be remanded to police custody or it should be a judicial remand. Further, if after a publication, a bail order goes against the arrested

person, public may perceive that the publication must have subconsciously affected the Magistrate's mind.

The Contempt of Courts Act, 1971 can therefore be validly amended to say that such prejudicial publication made even after arrest and before filing of charge sheet/challan will also amount to undue interference with administration of justice and hence would be contempt and such a restriction is 'reasonable' and proportionate to the object, protection of rights of the arrested person and the administration of justice.

So far as Question 2 is concerned, if the contempt law in Section 3 is to be amended, as proposed above, so as to treat publications of the manner referred to above made even after arrest and but before filing of charge sheet or challan, as liable to contempt by redefining the Explanation (B) to deem that a criminal case is "pending" from the stage of arrest, then will such a law unreasonably restrict the right to freedom of speech and expression guaranteed under Article 19(1)(a) and will it fall outside the reasonable limits permissible under Article 19(2).

If a restriction on the freedom of speech and expression is intended by the legislature to protect the administration of justice or the course of justice which requires to be meted out to a subject under arrest, and if but for the immunity granted for such publication, it would admittedly interfere or tend to interfere with the course of justice, then from the point of view of

the person under arrest, in our opinion, such a restriction cannot be said to be unreasonable within Article 19(2). Such a restriction on freedom of speech and expression under Article 19(2) cannot be said to be violative of Article 19(1)(a). It is reasonable because, in fact, it is absolutely necessary as per fair due process after Maneka Gandhi, for the purpose of protecting the administration of justice which includes protection of the rights of a person under arrest who is entitled to a procedure which is fair, equitable and just under Article 21 and which is consistent with Article 14. The restriction is reasonable if intended to prevent prejudice on the part of the Judge, or intended to prevent any impression of prejudice in the minds of the public as to prejudice in the mind of Judges. This is a straight answer.

Art 19(2) raises a question of 'proportionality' of a restriction that may be imposed bylaw such as the Contempt of Courts Act, 1971.

The provisions of the Contempt of Court Act, 1971, if they treat as contempt, publications made after the filing of a first information report, then in view of Surendra Mohanty vs. State of Orissa (1961)(quoted in A.K. Gopalan vs. Noordeem 1969(2) SCC 7341 such a provision would be an unreasonable restriction on freedom of publications. But, if the proposal is that that the prejudicial publications made after the date of arrest is contempt, that, according to A.K. Gopalan vs. Noordeen is not an unreasonable restriction on the freedom of publication.

Secondly, it is now well settled that the right to freedom and expression under Article 19(1) is not absolute. The Constitution itself permits in Article 19(2) restrictions to be imposed on that right if they are reasonable. Article 19(2) says:

“Nothing in sub-clause (a) of Clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of or in relation to Contempt of Court ...”

The Indian Supreme Court has repeatedly held that this freedom is not absolute. Even in USA, it has been so accepted. The difference only is that in USA, the principle is of ‘clear and present’ danger while our Constitution permits ‘reasonable’ restrictions.

A restriction on the right to due process which requires that no such prejudicial publication can be made, after arrest of a person, which would interfere or tend to interfere or obstruct or tend to obstruct the course of justice, must be treated as reasonable, for it is not a permanent or absolute restriction.

New Zealand: freedom of expression and liberty have to be balanced in such a way that there is no prejudice to the suspect or accused:

We next come to the case in Gisborne Herald Ltd. v. Solicitor General: 1995(3) NZLR 563 (CA). Now, the New Zealand Bill of Rights, 1990 referred to in Article 14 to Freedom of expression: “Everyone has the right to freedom of expression, includes the freedom to seek, receive and impart information and opinion of any kind or any form.” Article 8 refers to right to life not to be deprived of life except on such grounds as are established by law and are consistent with the principle of fundamental justice; Article 25(a) which deals with minimum standards of criminal procedure refer in clause (a) to the right to a fair and public hearing by an independent and impartial court; clause (c) to be presumed innocent until proved guilty according to law. Article 5 speaks of ‘justified limitations’ and says that the rights and freedom in the Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The Court of Appeal in the above case of Gisborne Herald refused to follow the law in USA which was based on the principle of ‘clear and present danger’ to the administration of justice (Bridges v. California : (1941) 314 US 252. It refers to the law in Canada in Dagenais v. Canadian

Broadcasting Corp. : 1994 (3) SCR 835 that a publication ban should only be ordered if ‘necessary in order to prevent a real and substantial risk to the fairness of the trial, because reasonably available alternative measures will not prevent the risk’ and if the court is of the opinion that ‘the salutary effects of the publication ban outweigh the deleterious effect to the freedom of those affected by the ban’. The Canadian Supreme Court relied on the Canadian Charter Article 2(b) which deals with freedom of expression, Article 11 with fair trial, 11(d) which deals with presumption of innocence till proven guilty according to law in a fair and public hearing by an independent and impartial tribunal; Article 1 of that Charter permits limitation on Rights and Freedoms only to such reasonable limitations prescribed by law as can be demonstrably justified in a free and democratic society.

After refusing to follow the law in USA and Canada, the New Zealand Court of Appeal stated in Gisborne Herald Ltd. v. Solicitor General: 1995 (3) NZLR 563 (CA):

“We are not presently persuaded that the alternative measure suggested by Lamer CJ in Dagenais should be treated as an adequate protection in this country against the intrusion of potentially prejudicial material into the public domain. Resort to any of those

measures has not been common in New Zealand. Change of venue application are infrequent and usually follow sensationalized localised publicity of a particular crime. Venue changes are inconvenient for witnesses and many of those others directly involved. They are expensive. Further, we have always taken the view that there is a particular interest in trying cases in the community where the alleged crime occurred. Next, challenges for cause are rare. And for the reasons indicated in the contemporaneous judgment of this court in R v. Sanders 1995 (3) NZLR 545, cross-examination of prospective jurors about their views and beliefs is generally undesirable. Sequestration of jurors for the duration of trials has not been a practice in New Zealand. Clearly it would add to the pressure on jurors and affect their ordinary lives. Adjournment of trials as a means of reducing potential prejudices occasioned by pretrial publicity runs up against the right to be lived without undue delay.”

The Court of Appeal stated:

“So far as possible, both values should be accommodated. But, in some cases, publications for which free expression rights are claimed may affect the right to a fair trial. In those cases, the impact of any

intrusion, its proportionality to any benefits achieved under free expression values and any measures reasonably available to prevent or minimise the risks occasioned by the intrusion and so simultaneously ensuring protection of both free expression and fair trial rights, should all be assessed.”

It is, however, commented (see <http://www.crownlaw.govt.nz/uploads/contempt.pdf>) that there appears to be slight shift in the Court of Appeal in Gisborne in respect of balancing both rights. In the court below which heard the case against Gisborne New Herald and other papers in Solicitor General v. Wellington Newspapers Ltd., 1995 (1) NZLR 45, stated (at p.48):

“In the event of conflict between the concept of freedom of speech and the requirements of a fair trial, all other things being equal, the latter should prevail.”

and in that case it was also said:

“In pretrial publicity situations, the loss of freedom involved is not absolute. It is merely a delay. The loss is an immediacy; that is

precious to any journalist, but is as nothing compared to the need for fair trial.”

In the appeal, in Gisborne Herald Ltd. v. Solicitor General, there appears to have been a shift that both rights be balanced. The Court of Appeal also stated in Gisborne:

“The common law of contempt is based on public policy. It requires the balancing of public interest factors. Freedom of the press as a vehicle for comment on public issues is basic to any democratic system. The assurance of a fair trial by an impartial court is essential for the preservation of an effective system of justice. Both values have been affirmed by the Bill of Rights. The public interest in the functioning of the courts invokes both these values. It calls for free expression of information and opinions as to the performance of these public responsibilities. It also calls for determination of disputes by courts which are free from bias and which make their decisions safely on the evidence judiciously brought before them. Full recognition of both these indispensable elements can present difficult problems for the courts to resolve. The issue is how best those values can be accommodated under the New Zealand Bill of Rights Act, 1990.”

Finally, the Court of Appeal stated –

“The present rule is that where on the conventional analysis, freedom of expression and fair trial cannot both be fully assured, it is appropriate in our free and democratic society to temporarily curtail freedom of media express so as to guarantee a fair trial.”

In other words, while the trial Judge said fair trial rights override media rights, the Court of Appeal said both must be balanced and the Court may impose a temporary ban.

### Australia

Glennon & Hinch cases: freedom of speech and liberty have to be balanced. But a conviction for contempt due to likelihood of interference with administration of justice need not result in setting aside the conviction of an accused: Is it correct?

Glennon was a Roman Catholic priest who, in 1978 was convicted of indecently assaulting a girl under 16. Seven years later, he appeared as a

Crown witness in an assault case against his nephew and another person who had allegedly assaulted him (i.e. Glennon). Counsel for the youths cross-examined Glennon about the 1978 conviction and accused him of indecently assaulting the two youths. Extensive media coverage was given to those allegations.

Glennon was subsequently charged with other sexual offences and he appeared before the Magistrate's Court on 12<sup>th</sup> November, 1985. In three separate broadcasts, one Mr. Hinch, speaking on a popular Melbourne radio station, alleged severe criminal conduct and sexual impropriety on Glennon's part. Hinch specifically spoke about Glennon's prior conviction. Hinch was convicted for contempt and the same was affirmed in the High Court in Hinch v. Attorney General (Victoria) (1987 164 CLR 15). The High Court observed:

“Clearly, the three broadcasts on a popular Melbourne station, in a context where specific reference was made to the pending criminal proceedings against Glennon in a Melbourne Court, constituted one of the most severe cases of contempt of court involving the public pre-judgment of the guilt of a person awaiting trial to have come before the courts of this country.”

Dean J stated (at p.58) that:

“The right to a fair and unprejudiced trial is an essential safeguard of the liberty of the individual under the law. The ability of a society to provide a fair and unprejudiced trial is an indispensable basis of any acceptable justification of the restraints and penalties of the criminal law. Indeed, it is a touchstone of the existence of the rule of law.”

The High Court of Australia held that although the trial might not take place until some two years after the first broadcast by Mr. Hinch, the trial courts were entitled to reach the conclusion that there was ‘a substantive risk of serious interference with the fairness of trial’. In sensational cases, jurors were prone to remember the publication in spite of lapse of time. The broadcasts of Hinch were not saved by the ‘public interest’ defence.

But when Glennon was later convicted and he raised a question that his trial was vitiated on account of unfair publicity about his past character and conviction. He relied on the judgment punishing Mr. Hinch for his publication. But the High Court of Australia rejected his plea in R.V. Glennon: (1992) 173 CLR 592 and restored the conviction of Glennon for sexual offences against young people. The Court made a distinction

between preventing prejudicial publicity rather than minimising its impact at trial. It stated that different tests were applicable in contempt proceedings and on the one hand to criminal convictions. Contempt proceedings are concerned with potential prejudice, which must be assessed as at the time of publication. Actual prejudice is not an element of contempt charge. By contrast, before a conviction is set aside, a court of appeal is concerned with the extent of actual prejudice and, in particular, whether a miscarriage has occurred. There was no inconsistency in upholding the convictions of Glennon and punishing Hinch for contempt. Community's expectations, it was observed, must be fulfilled. It stated that in such a situation, the quashing of convictions may indeed open 'flood-gates'.

But the Judgment in Glennon has been criticised.

Allam Ardik, in the Faculty of Griffith University (2000), *Alternative Law Journal*, page 1, says that the appellate judge restored the conviction on account of 'fear of public outrage'.

Prof. Michael Chesterman (1999) *NSW Unit of Tech*, (Sydney Law Review p.5 refers to statistics to say that 11 cases out of 20 cases since 1980 in Australia, where there was 'convergence' in the sense that the trial was

aborted and the contemnor convicted. Out of the remaining 9 ‘divergent’ cases, seven were either where the jury did not encounter publicity or the trial Judge made no such finding as to whether the jury encountered publicity. Only in three cases, the jury trial was aborted but contempt proceeding failed on the ground of superior public interest. The NSW Law Commission has recommended in 2003 for amendment of the Evidence Act, 1995 and Crimes Act, 1900 to allow courts to pass ‘suppression’ orders in civil and criminal cases.

We shall next refer to the Reports of the Law Commission on this question of balancing both fundamental rights.

**New South Wales (Australia) : balancing of expression and due process in criminal trials :**

In Australia, the New South Wales Law Commission had prepared a comprehensive Discussion Paper, Paper No.3 (2000) on ‘Contempt by Publication’ and a Final Report 100 (2003) (See [www.lawlink.nsw.gov.au/tra.nsf/pages/dp43](http://www.lawlink.nsw.gov.au/tra.nsf/pages/dp43) toc and Lawlink NSW). In the Discussion Paper, in Ch 1 (para1.20), it is stated:

**“Competing Public Interests:**

1.20. Because it imposes restraints on the publication of information, the sub judice rule may be seen to limit

both access to information about matters before the courts and freedom of discussion in our society. The Courts justify these limitations on the basis that the public interest in protecting the proper administration of justice, particularly in criminal cases, should generally outweigh the public interest in access to information and freedom of speech. Critics of the sub judice rule have sometimes questioned the balance which is struck between the competing public interests. The Commission examines these criticisms in Chapter 2”.

In Chapter 2 of the Discussion Paper (NSW) (2000) there is a full discussion of the subject and it is stated as follows:-

“Freedom of Speech v. Due Process of Law

2.4 : There is no doubt that freedom of expression is one of the hall-marks of a democratic society, and has been recognized as such for centuries. (Numerous great political and intellectual figures, Burke, Paine, Jefferson and Mill, to name a few – have been associated with this principle.) Freedom of public discussion of matters of legitimate public concern is, in itself, an ideal of our society : Hinch v. Attorney General : (1987)

164 CLR 15(57) Deane J). Justice Mahoney, in Ballina Shire v. Ringcanol : (1994) 33 NSWLR 680 (720) spoke of the ends which are achieved by the capacity to speak without fear and reprisal and the importance of these ends in a free society : “ideas might be developed freely, culture may be refined, and the ignorance or abuse of power may be controlled”.

2.5 : However, freedom of speech cannot be absolute. In legal, political and philosophical contexts, it is always regarded as liable to be overridden by important countervailing interests, including state security, public order, the safety of individual citizens and protection of reputation.

2.6 : One such countervailing interest is due process of law. Freedom of speech ought not to take precedence over the proper administration of justice, particularly in criminal trials where an individual’s liberty and/or reputation are at stake, and where the public have an interest in securing the conviction of persons guilty of serious crime. Indeed, the belief that the public interest in a fair trial will always outweigh the public interest in freedom of expression, generally goes unchallenged. Therefore, a discussion of how to reconcile these competing public interests proceeds on the basis of acceptance of this

notion. The question to resolve, then, is whether justice can be done, as well as seen to be done, in the absence of sub-judice liability. If the answer is no, then, sub judice rule is essential to achieving the proper balance between the competing interests, the question must then be asked whether the operation of the sub judice rule restricts freedom of speech more than necessary to ensure a fair trial”.

The Commission then refers (in para 2.7) exclusively to the case law relating to the ‘Legal Protection of Expression’ – Theophanous v. Herald Weekly Times Ltd : (1994) 182 CLR 104, Lange v. Australian Broadcasting Corpn : (1997) 189 CLR 520 in which it was stated that while freedom of expression was basic, it was not absolute. In Attorney General v. Time Inc Magazine Co Pte Ltd : (NSW Appeal 40,331/94 dated 15.9.1994) the NSW Court of Appeal observed that the Common Law principles have been established as a result of a balancing of competing interests, namely, the public interest in freedom of expression and the public interest in the administration of justice. The NSW Court also stated that freedom of expression is not unconditional. “Expression can, for legally relevant purposes, be free even though it is subject to other legitimate interests” (ibid, Gleeson, CJ).

The Commission referred (see paras 2.13 to 2.15) to Article 19(2) of the International Covenant of Civil and Political Rights which permits restriction on freedom of speech and expression for various purposes and stated:

“Furthermore, Article 19 of the ICCPR is made subject to Article 19(1) which guarantees the right to individuals to a ‘fair hearing by a competent, independent and impartial tribunal’..

The Commission referred (see paras 2.16 to 2.19), to the ‘Principle of Open Justice’ which again is not absolute and it stated (see para 2.18) that “media can effectively perform this ‘watch dog’ role, promoting discussion of courts and the justice system, ‘without publishing the most obviously prejudicial material specifically relevant to a case’.

The Commission dealt with (see paras 2.20 to 2.22) the Rules of Evidence, about the presumption of innocence until proven guilty beyond reasonable doubt as a basic tenet of criminal procedure. Rules of evidence exclude opinion evidence, allegations as to the general character or credibility of an accused, confessions which are not established as voluntary, prior conviction or prior conduct. Such inadmissible evidence cannot be introduced through the back door.

The Commission referred (see paras 2.23 to 2.26) to the principle that ‘Justice must be seen to be done’. Due process of the law encompasses

not only the right to a fair trial, but also the preservation of public confidence in the administration of justice. ‘Justice should not only be done but must be seen to be done’ R v. Sussex Justices; Ex Parte Mc Carthy : (1924) 1 KB 256 (259). In this way, public confidence in the administration of justice is maintained. If the media publishes prejudicial material or wages a campaign, not only it may affect criminal adjudication but if it does not, public may see and the accused may believe that justice is not done. Such material can also influence witnesses.

It referred (see para 2.27) to ‘time limits’ and stated that a publication will constitute a contempt under the sub judice rule, if it relates to proceedings which are current or pending. For example, material concerning a particular crime, which is published before anyone has been arrested or charged with the crime, will not constitute a contempt, even if it later turns out to be prejudicial to the trial of the accused.

The Commission referred (see para 2.30) to several points raised by critics of prohibition of publication after arrest or after charge is filed on the ground that there is no empirical evidence of influence on Jurors or that some publications fade away in public memory when there are delays in the trial; that people mistrust what is published in the media etc. (In some countries like US, potential jurors are initially examined in large number to elicit if they admit they have already been influenced by the media publicity

and if they admit, they are excluded.) There can be conscious or unconscious influence based on appearance, race, religion, sect, cultural attributes, or by publicity as to prior convictions, alleged confessions etc.

The Commission stated (see para 2.35):

“However, what the sub judge rule seeks to do is to filter out the most damaging of prejudicial effects so that views formed prior to the trial or from extrinsic sources during the trial, are not held strongly that they cannot be displaced by the evidence which is presented and tested in the courtrooms, as well as by judicial directions and instructions on the law and submissions by counsel on that evidence. It seeks to suppress only that material which, in accordance with the present Common Law test, has a real and definite tendency, as a matter of practical reality, to prejudice legal process or on a reformulated test, creates a substantial risk that the fairness of the proceedings would be prejudiced. Furthermore, suppression is for a limited time only and liability for contempt is only sheeted home where any of the grounds of exoneration (discussed below) are not available.”

Under the head of defences, are the following:

that the person who published did so bona fide without knowing or believing it is prejudicial or after becoming aware, took steps to prevent publication or that they had taken reasonable care. There can be matters of public interest which require publication. Public safety could also be a reason.

The Commission gave specific examples of media publicity (see para 2.45) which can cause prejudice :

- (i) a photograph of the accused where identity is likely to be an issue, as in criminal cases;
- (ii) suggestions that accused had previous convictions, or has been charged for committing an offence and/or previously acquitted, or has been involved in other criminal activity;
- (iii) suggestions that the accused has confessed to committing the crime in question;
- (iv) suggestions that the accused is guilty or involved in the crime for which he or she is charged or that the Jury should convict or acquit the accused; and
- (v) comments which engender sympathy or antipathy for the accused and/or which disparage the prosecution or which make favourable

or unfavourable references to the character or credibility of the accused or a witness.

Each of these is discussed in detail (see paras 2.46 to 2.54) though the Commission refers (see para 2.52) to the Common Law assumptions that (while Jury may be influenced), Judicial Officers are not. (A view which has not been accepted in India, as detailed in Chapter III of our Report and also not accepted by the House of Lords also as stated elsewhere.)

Final Report of NSW Law Reforms Commission (2003) :

In the Final Report of the NSW Law Reforms Commission, it was stated in (Chapter 2 para 2.5) (Freedom of Speech vs. Due Process of Law) that “measures which are necessary for due process of the law take precedence over freedom of speech”. It referred to Brennan J in R v. Glennon: (1992) 173 CLR 592 and stated that while the two rights have to be balanced, the integrity of the administration of criminal justice is fundamental.

Other Law Commission Reports referred to by the NSW Law Commission.

The NSW Law Commission also referred to the Report of the New Zealand Law Commission (Preliminary Paper 37 on Juries in Criminal Trials, Part II [Vol 1, p.289] ) that:

“When a conflict arises between fair trial and freedom of speech, the former prevailed because the compromise of fair

trial for a particular accused will cause them permanent harm  
.... whereas the inhibition of media freedom ends with the  
conclusion of legal proceedings”.

and to Michael Kirby J’s observations in John Fairfax Publications Pty Ltd v. Doe : (1995) (37 NSWLRC 81) that it would be unthinkable to allow destroying the essential power and duty to protect fair trial of persons accused of crimes.

In Chapter 4 the NSW Law Commission dealt with prejudice in criminal proceedings and in Chapter 7 with time limits and ‘imminence’

In relation to criminal proceedings, it recommended (see para 7.12) that “sub judice period commences from the time the process of law has been set in motion for bringing an accused to trial. It stated that issue of warrant need not be the starting point because arrest may be delayed and that it is sufficient to say ‘arrest of the accused’ rather than ‘arrest without a warrant’. Recommendation 13 was as follows:

“13. Legislation should provide that, for purposes of sub judice rule, criminal proceedings should become pending and the restrictions on publicity designed to prevent influence on juries, witnesses or parties should apply, as from the occurrence of any of these initial stages of the proceedings:

(a) the arrest of the accused;

- (b) the laying of the charge;
- (c) the issue of a court attendance notice and its filing in the registry of the relevant court; or
- (d) the filing of an ex officio indictment.

Schedule 1 (clause 4) of the NSW Bill, 2003 incorporates this provision.

**Australian Law Commission: On balancing the rights :**

In Australia, the Australian Law Reform Commission (See ALRC Report No. 35 at page 247) looked at whether reform of the law governing contempt by publication was desirable and if so, in what respects. It concluded that –

“the right of citizens to a fair trial in criminal proceedings before a Jury would be significantly jeopardized if there were no restrictions whatsoever of freedom of publication relating to the trial”.

While it attached considerable importance to the principle of Open Justice, which is promoted by reporting of what goes on in Australian Courts, it concluded that –

“prohibition currently imposed by contempt law on publications relating to current or forthcoming trials should not ..... be completely dismantled”.

It recommended, however, that prohibitions should be ‘confined to the minimum necessary to eliminate substantial risk of prejudice’.

That would mean that to the extent, the freedom of speech and expression must be subordinated to due process in protecting liberty.

**Canadian Law Reform Commission: on balancing the rights:**

In Canada, the Canadian Law Reforms Commission (Report No. 17 at p.9) referred to section 1 of the Canadian Charter of Rights which guarantees rights subject only to reasonable restrictions as can be demonstrably justified in a free and democratic society; to section 2 which refers to freedom of speech and expression and to section 11(a) which speaks of the presumption of innocence until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal. After referring to the duty of the State to see that ‘the administration of justice is impartial and fair’, the Commission argued that the State could not tolerate an individual attempting to influence unduly the outcome of a trial before a jury. The purpose of the sub judice rule is to preserve the impartiality of the judicial system by protecting it from undue influence which might affect its

operation, or at least might appear to do so. While there must be competition between different rights, there is need to retain the sub judice rule.

**Irish Law Reform Commission: on balancing the rights :**

In Ireland, the Law Reforms Commission (Report 47, 1994 para 6.4) stated that press, radio and television had a powerful effect on the people and if it is not subjected to reasonable safeguards, there could be potentially serious effects for the proper administration of justice and may result in long imprisonment of innocent people. In contrast, the public interest in the free flow of information is by no means wholly interrupted by a careful observance of the sub judice rule, since, at worst, the inhibition of unrestricted comment and publication of allegedly relevant facts is of a temporary nature only. It rejected the argument that the sub judice rule offends against the guarantee of freedom of expression (Art 40.6.1). Juries could be affected by prejudicial publications affecting fairness in adjudication and other alternatives would not be sufficient.

Thus all these Law Reforms Commissions in NSW, Australia, Canada and Ireland supported the sub judice rule and observed that for that purpose freedom of speech could be restricted.

**United Kingdom & the Sunday Times Case :**

The competing rights of freedom of expression and fair administration of justice came up for consideration in Attorney General v. Times Newspapers : 1973(3)All ER 54 (HL). The result was in favour of the administration of justice and against the newspapers. The further petition before the European Court of Human Rights resulted in an opinion in Sunday Times v. United Kingdom (1979) (2) EHRR 245 that the injunction granted by the Court in U.K. against publication was in absolute terms and without time limit and was very wide and violated the European Convention and that the contempt law in UK (i.e. before 1981) was vague and difficult to comply with. The facts were as follows:

Sunday Times published a series of articles to bring pressure on the Distillers Ltd to settle several pre-trial civil cases which were filed by or on behalf of those affected by thalidomide drug administered during pregnancy to women. The Attorney General commenced proceedings for injunction restraining the newspaper from publishing one in the series which was about to be published. Injunction was granted. But, the Court of Appeal vacated the injunction granted by the Divisional Court. The House of Lords allowed the appeal and restored the injunction. It was held that when the civil cases were pending, it was contempt of court to publish articles pressurizing the Distillers to settle the matters as that would affect the administration of justice. Some of the Law Lords held that it was likely to prejudice the mind

of witnesses, jury or magistrates. Some stated that it can be assumed that it would not affect a professional Judge. Injunction was restored.

On petition by Sunday Times, the European Court in Sunday Times v. U.K 1979(2) EHRR 245 dealt with the matter on the basis of Article 10 of the European Convention (freedom of speech and expression) and posed a preliminary question “Was the interference prescribed by law ?” as required by Article 10(2). It came to the conclusion that the interference was by law since ‘law’, under that Article covered not only statute law but also ‘unwritten law’ and the publishers had sufficient notice of the existence of such a law.

The next question the Court posed was “Did the interference have aims that are legitimate under Article 10, para 2 ?”. Under Article 10(2), restrictions were permissible if they were “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 of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of judiciary”. The majority in the European Court held that ‘authority’ of the judiciary did cover its adjudicative functions as well as its powers to record settlements. Here, it went by the Phillimore

Report. The contempt of court law provided the guidance. The interference was legitimate with Article 10(2).

The next question the Court posed was whether interference was ‘necessary in a democratic society’ for maintaining the authority of the judiciary ? This question was more factual because the point was whether public interest required publication of the evil effects of thalidomide. ‘Necessary’ in Article 10(2) was not synonymous with ‘indispensable’. ‘Necessary’, the Court said, was not as flexible as the words ‘admissible’, ‘ordinary’, ‘useful’, ‘reasonable’ or ‘desirable’. It implied a ‘pressing social need’ or one which was ‘proportionate to the legitimate aim pursued’. The general injunction granted by the Court did not meet this standard as it was in very wide terms, further, there was not much pressure on the Distillers Ltd for settlement since the issue was also debated in Parliament. But the House of Lords’ view that ‘trial by newspaper’ was not permissible was a concern in itself ‘relevant’ to the maintenance of the ‘authority of the judiciary’. The European Court accepted that :

“If the issues arising in litigation are ventilated in such a way as to lead the public to form its own conclusion thereon in advance, it may lose its respect for and confidence in courts’

and that

“Again, it cannot be excluded that the public’s becoming accustomed to the regular spectacle of pseudo-trials in the news media in the long run have nefarious consequences for the acceptance of the Courts as the proper forum for the settlement of legal disputes”.

But, the European Court held on facts, that the proposed article by Sunday Times was “couched in moderate terms and did not present just one side of the evidence or claim that there was only one possible result at which a Court could arrive”. It said “There appears to be no neat set of answers ...” to the effects of Thalidomide. Therefore, the effect of the article on readers was likely to be ‘varied’ and hence not adverse to the ‘authority of the judiciary’. As the settlement was in progress over a long period, there was not much prospect of a trial of the (civil case) coming through. But it agreed:

“Preventing interference with negotiations towards settlement of a pending suit is a no less legitimate aim under Article 10(2) than preventing interference with a procedure situation in the strictly forensic sense”.

But, here the negotiations were prolonged and at the time of publication, they did not reach a final stage of trial.

The Court then emphasized the role of the press and of the Courts but said it was not a matter of balancing competing interests but going back to Article 10(2) to find out if the interference was necessary having regard to the facts and circumstances prevailing in the specific case before it. The thalidomide disaster was a matter of public concern and under Article 10, public had a right to be informed about the drug. Having regard to all the circumstances, the interference complained of did not correspond to a social need sufficiently pressing to outweigh public interest in freedom of expression within the meaning of the Convention. The restraint was not 'proportionate' to the legitimate aim pursued and was not necessary in a democratic society for maintaining the authority of the judiciary.

The Court stated that the law must be certain and that in U.K it remained uncertain if the question of balancing rights was left to be decided in individual cases.

In our view, the decision of the European Court has no application to publications which may prejudice the rights of a person who has been arrested and where such arrest indicates that a trial could more likely follow by the filing of a charge sheet. Sunday Times related to a civil case, it concerned Article 10(2) of the European Convention which uses the words

‘necessary’. The Court itself admitted that ‘necessary’ was more narrow than the word ‘reasonable’, a word used in Article 19(2) of our Constitution.

One other important point to be noted here is that while it is open for U.K citizens to approach the European Court for relief on the ground of violation of the European Convention, the judgment of the European Court does not amount to overruling the opinion of the House of Lords. In fact, in Sunday Times case itself, the European Court pointed out:

“Whilst emphasizing that it is not its (European Court’s) function to pronounce itself on an interpretation of English law adopted in the House of Lords”,

Borrie and Lowe state clearly (p 102, 3<sup>rd</sup> Ed, 1999) that “although the Convention is not directly applicable to U.K domestic law and the decisions of the European Court are not binding precedents”, nevertheless it was to be presumed and it was necessary that U.K is reminded of its international obligations assumed under the Convention. “Even in other Common Law jurisdictions outside Europe, the European Court’s decision is not totally irrelevant although it may not be regarded as persuasive as the House of Lords decisions”. (See Commercial Bank of Australian Ltd v. Preston : 1981(2) NSWLR 554).

But, after Sunday Times' case, the UK law was no longer vague in view of the Contempt of Courts Act, 1981, which prescribed the date of arrest as the starting point.

### Our Conclusion

It is, therefore, permissible to amend the Explanation in Section 3 of the 1971 Act in such a way that prejudicial publications made even after arrest are brought within the fold of contempt law. It is sufficient, if upon arrest, the person comes within the protection that the Constitution and the laws give him, that he must be produced in a Court within 24 hours.

Here, we have considered cases of bailable offences, where the police have to and may themselves grant bail within 24 hours of arrest, without producing the person in Court. But even so there can be cases where a person is not able to satisfy the conditions imposed by the police and then he may have to be produced in court within 24 hours. As stated earlier, according to the judgment in Hall, decided by the Scotland Court in 1978 referred to above, the test is whether a person has come within the fold of protection of the Court and not whether, if the offence is bailable, he is able to satisfy the conditions and get released within 24 hours by the police. The moment an arrest is made, the person comes within the protection of Court

and that is sufficient to state that Court proceedings are imminent, for the person has to be produced in Court within 24 hours.

## Chapter VIII

### Postponement of Publications by Court: Whether ‘substantial Risk of prejudice as in UK inappropriate?’

The issue of orders by the Courts, - postponing publications to prevent prejudice to a suspect in an impending or pending criminal case is of great importance. The punishment of a person who makes publication amounting to undue interference of course of justice under sec 3 of the Contempt of Court Act, 1971 is not always sufficient nor does it in any way help the suspect or accused. Question is whether such prejudicial publications may be directed to be postponed by a general or specific order.

#### Prior restraint and subsequent punishment are distinct

There is a well recognized distinction between prior restraint and subsequent punishment. In Constitutional Law (4<sup>th</sup> Ed)(1991) by John E. Nowah & Ronald D. Rotunda, while referring to the position in USA it is stated: (p 970)

“While it is no longer true that the first amendment means only freedom from prior restraint, prior restraint is still considered to be more serious than subsequent punishment”.

Mr. A. Bickel states that a ‘criminal statute ‘chills’ while prior restraint ‘freezes’ (see the Morality of Dissent, p 61 1975). In our view, if it is ‘prior restraint’ but only ‘postponement’ of publication, there is no ‘freezing’ at all.

Stringent conditions have to be imposed if postponement of publications by Court is to be permitted:

While subsequent punishment may deter some speakers, prior restraint limits public debate and knowledge more severely and prior restraint must be subjected to stringent conditions, whether it is permanent or temporary.

Under English law, sec 4(2) requires proof of ‘substantial risk of prejudice’ has to be proved if a postponement order has to be passed by Court. We have to examine what kind of restrictions can be imposed under our law to postpone publications which are likely to prejudice trial.

In fact, we have seen in the last Chapter the peculiar case of Glennon in Australia, - to which we have already referred to in Chapter IV, where the person who made the prejudicial publication was punished for contempt on the ground of likelihood of prejudice to the accused but later on, the Court refused to quash the accused's conviction when a plea was raised by the accused relying on the judgment in the contempt case, that the trial was vitiated. The Court required proof of actual prejudice for quashing the trial and said that likelihood of prejudice which is relevant for contempt, was not relevant for quashing a conviction. This judgment has, as already stated, been severely criticized.

It is, therefore, necessary to see if there can be prevention of prejudice rather than take serious measures after prejudice has occurred. Of course, this has to be limited to extreme cases because it amounts to 'prior restraint' on publications which it is accepted as being a serious encroachment on the freedom of speech.

In the United States where the only exception is 'grave and present' danger, prior restraint procedures are very narrow. We have pointed out

that there is considerable difference between the American law which does not contain any provision like Art. 19(2) of the Constitution of India which permits 'reasonable' restrictions on the freedom of speech and expression for certain exceptional purposes and contempt of Court is constitutionally recognized as one which the exceptions.

The Sunday Times case discussion in Chapter VII was also a case of a restraint order. But, we have pointed out that that case is distinguishable because the Court's order of prior restraint related to the publication of prejudicial matter affecting settlement in a batch of civil cases. Several civil actions were filed against a company which sold thalidomide to pregnant women who filed cases against the company on account of the probable after-effects of the drug on their children to be borne. The publications criticized the drug and the company when settlement proceedings were pending. We pointed out that that case did not relate to publications affecting suspect or accused in a pending or imminent criminal law.

Yet another point we had noted was that the European Court while deciding Sunday Times case held that in order to grant an injunction it was incumbent on the party affected to prove 'necessity' because Art. 1 of the

European Convention requires that the restriction to be imposed on the freedom of speech was ‘necessary’ in a democratic society. The European Court specifically pointed out that the Convention did not use the word ‘reasonable’ but used the word ‘necessary’. Our Constitution uses the words ‘reasonable restriction’ and permits a law to be made imposing ‘reasonable restrictions’. Further, the European Court commented on the ‘absolute nature of the injunction’ granted by the UK Courts and said that while such a permanent ban on publication was not necessary, an order postponing the publication for some time was permissible even under the Convention.

Therefore, US precedents and Sunday Times case are not precedents in our country.

In the Indian context, where an injunction was granted and vacated in Reliance Petrochemicals case, we have pointed out in Chapter III that the injunction in that case related to a civil case and that that case is also not relevant so far as restraints on publications to prevent prejudice in criminal cases, particularly, after arrest.

While there are these differences between the American and Strasbourg jurisprudence and Reliance case on the one hand and the Indian constitutional provisions, it is still incumbent for us to decide whether serious interference with the freedom of speech and expression guaranteed by our Constitution in Art. 19(1) can be prevented by an injunction order of a temporary nature. We have also to decide what conditions have to be imposed.

The provision for postponement orders in sec. 4(2) of the (UK) Contempt of Courts Act, 1981: Substantial risk of serious prejudice:

The provisions of sec. 4(2) of the UK Act, 1981 were brought in after the Sunday Times case was decided in 1979 by the European Court. The subsection was drafted in the light of the comment by the European Court that UK law of contempt was vague. It reads:

“sec. 4(2): In any proceedings, the Court may, if it appears to be necessary for avoiding a substantial risk of prejudice to the administration of justice in those proceedings, or in any other proceedings pending or imminent, order that the publication of any

report of the proceedings or any part of the proceedings, be postponed for such period as the Court thinks necessary for that purpose”

The section applies to prejudice in civil and criminal proceedings.

The important words in this provision are the words ‘necessary’ and ‘substantial risk of prejudice’. The other words ‘pending or imminent’ refer to proceedings ‘imminent’ as enumerated in the Schedule 1 to that Act, which includes the ‘date of arrest’.

In this connection, we may point out that there is an exhaustive discussion of what words should be used while enabling Courts to pass ‘suppression’ orders. The New South Wales Law Reform Commission, in its Discussion Paper 43 (2000) on ‘Contempt by Publication’ devotes a full chapter for ‘Suppression Orders’ (Chapter X). In the Final Report of 2003, the subject is again discussed in Chapter X, ‘Suppression Orders’. We shall report to these Reports.

The Discussion Paper of the New South Wales Law Reform Commission (2000):

In the Discussion Paper, the following aspects are discussed – (i) the concept of open justice, (ii) the qualifications to the principle of open justice, including hearings in camera, concealment of information from those present in Court, power to forbid publication of proceedings heard in open Court, (iii) existing powers to suppress publication of proceedings in New South Wales including common law powers, statutory powers to issue suppression orders, legislative provisions with a prescription of non-publication, legislative provisions with a broad discretion to impose suppression orders, (iv) Suppression Orders in New South Wales under the headings: issues and options, including the question of conferring general power on Courts to direct non-publication necessary for administration of justice, background (prejudice to a fair trial), specific statutory provisions in Australia, fair trial as an element of proper administration of justice, law reform options, the Commission’s tentative view, a broad power and ‘substantial risk’, power to suppress names as well as evidence, power to apply to both civil and criminal proceedings, legislative provisions for standing and appeals.

The proposal 21 refers to the ‘substantive risk of prejudice’ principle with a further provision enabling the media to apply to the Court for

variation or revocation of such an order, after hearing the applicant who obtained the suppression orders.

Final Report of the New South Wales Law Commission (2003):

In the final Report, the NSW Law Commission considered the following aspects (i) statutory suppression orders including why they are needed, who is subject to a suppression order, knowledge of the existence of a suppression order, existing statutory regulation of publication, (ii) recommendations under the sub-titles, standing, interim suspension orders, a strict liability offence, material to which suppression orders apply and finally gave its Recommendations as follows:

“A new provision should be introduced into the Evidence Act, 1995 (NSW) which provides that any Court in any proceedings, has the power to suppress the publication of reports of any part of the proceedings (including documentary material), where this is necessary for the administration of justice, either generally or in relation to specific proceedings (including proceedings in which the order is made). The power should apply in both civil and criminal proceedings and should extend to suppression of publication of evidence and oral submissions, as well as the material that would lead

to the identification of parties and witnesses involved in proceedings before the Court. The new section should not replace the common law, and should operate alongside existing statutory provisions that restrict publication unless a successful application has been made rendering such a provision inapplicable in the circumstances. However, sec. 119 of the Criminal Procedure Act, 1986 (NSW), together with any other provisions contained in other statutes which give Courts discretion if grounds are affirmatively made out to impose suppression orders, should be repealed.

A section should be introduced into the Crimes Act, 1900 (NSW) making breach of an order a criminal offence. The offence created by this section should be one of strict liability.

The Evidence Act, 1995 (NSW) should also expressly provide that a person with a sufficient interest in the matter should be eligible to apply to the Court for the making, variation or revocation of a suppression order. The application for a suppression order, together with the media and anyone else regarded by the court as having a sufficient interest may be heard on the application. The same categories of persons should also be able to appeal in relation to a suppression order. Such a person, if heard previously on the original

application, should be entitled to be heard on the appeal. Any other person with a sufficient interest may seek leave to be heard.

An appeal against a decision should be heard by a single Judge of the Supreme Court, except where a suppression order was made in the Supreme Court, in which case, an appeal should be to the Court of Appeal.

The Court should also be empowered to make an interim suppression order, having a maximum duration of seven days, before proceeding to a final determination. The Court should have the power to grant subsequent interim suppression orders.”

The Commission prepared a draft Bill to enable ‘suppression orders’ to be passed by Court. We shall refer to it in detail later on.

#### Other Law Reform Commissions:

We shall also briefly refer to the views of other Law Reform Commissions on “suppression” orders.

The Australian Law Reform Commission in its Report on Contempt and Prejudice to Jury (Report No.35, 1987) accepted the risk that reports of legal proceedings may contain material that could prejudice a jury trial. It

recommended that a Court should have power to postpone publication of a report of any part of proceedings if it is satisfied that the publication could give rise to a substantial risk that the fair trial of an accused for an indictable offence might be prejudiced because of the influence which the publication may have on jurors (para 324). In para 327 it recommended ban on media reports of committal proceedings.

The Law Reform Commission of Victoria (Australia) was of the same opinion as the Law Reform Commission of Australia (Law Reform Commission of Victoria, Comments on the Australian Law Reform Commission Report on contempt No.35 (unpublished, 1987).

The Commonwealth Government (Australia) also recommended the implementation of its 1992 Paper (Australia, Attorney General's Dept, The Law of Contempt: Commonwealth Position Paper (1992)) and prepared a Bill on that basis for the consideration of a Standing Committee of Attorney General. The Bill of 1993 was called the Crimes (Protection of the Administration of Justice) Amendment Bill, 1993 (cth).

In Canada, it is not permissible to pass a suppression order on the basis of speculative possibility of prejudice to a fair trial but the publication must be of such as would create 'real and substantial risk' of prejudice to a fair trial (Dagenais v. Canadian Broadcasting Corpn: (1994) 120 DLR (4<sup>th</sup>) 12.

The Irish Law Reforms Commission has recommended stricter provisions of a ban on reporting of preliminary proceedings of indictable offences, such as committal proceedings. (Irish Law Reform Commission, Contempt of Court, Report No.47, 1994, para 6.37to 6.42 and Consultation Paper (1991) 343-350). In fact, that was the position under sec. 17 of the (Ireland) Criminal Procedure Act, 1967 (which of course did not apply to bail proceedings) and the Commission felt that that provision has never been questioned in Ireland. Such a procedure would ensure that media did not report matters which a criminal court could treat as 'inadmissible' later.

There are several statutes such as the Code of Criminal Procedure, 1973, the Terrorist and Disruptive Act, 1985 (1987), the Prevention of Terrorism Act, 2002, and the Unlawful Activists (Preventive) Act, 1967as

amended in 2004. These Acts contain a number of exceptions to the principles of open justice.

Indian statutes have created some exception to open justice:

In our 198<sup>th</sup> Report on ‘Witness Identity Protection and Witness Protection Programmes’ (2006) and in the Consultation Paper (August 2004) which preceded it, there was an exhaustive discussion of these statutes which are exceptions to the principle of open justice which is also part of our law. We have referred to the statutes dealing with sexual offences and terrorists where witness identity protection or in camera proceedings are held as valid exceptions to the principle of open justice. We have pointed out that right from the time when Scott v. Scott was decided in 1913 AC 417 (463), ‘open justice’ has been the law in our country. We have also referred to the decisions which stated that that principle of open justice has exceptions where the exception can be justified by yet another ‘overriding’ principle. The needs of a fair trial in the administration of justice is one such. We have also referred elaborately in the said Reports that the right to freedom of speech is also not absolute in

our country. We do not propose to refer to all that literature and to comparative law to which we have referred in those Reports.

Suffice it to say that just as there is need to protect fairness in criminal proceedings by bringing in provisions for ‘witness identity protection’, there is also need to protect the rights of the accused for a fair criminal trial.

Draft Bill attached to the Report (2003) of NSW Law Reform Commission:

The New South Wales Bill, 2003 appended to their Final Report (2003) is more elaborate than the UK Act, 1981. We shall refer to the provisions in that Bill.

Under sec. 3 of the Bill ‘criminal proceeding’ is defined as follows:

“criminal proceeding: means a proceeding in a court relating to the trial or sentencing of a person for an offence and includes

- (a) a proceeding for the committal of a person for trial, and
- (b) a proceeding for the sentencing of a person following conviction,  
and
- (c) a proceeding relating to bail (including a proceeding during the trial or sentencing of a person), and

- (d) a proceeding relating to an order under Part 15A (Apprehended violence) of the Crimes Act, 1900, and
- (e) a proceeding preliminary or ancillary to:
- (i) a prosecution for an offence, or
  - (ii) a proceeding for committal of a person for trial, or
  - (iii) a proceeding relating to bail, or
  - (iv) a proceeding relating to an order under Part 15A (Apprehended violence) of the Crimes Act, 1900, and
- (f) a proceeding by way of an appeal with respect to the trial or sentencing of a person.”

Clause (e) of sec. 4 obviously includes the stage when a person has been ‘arrested’.

Sec. 7 to 10 of the Bill is important and deal with the ‘substantial risk’.

Sec. 7 deals with ‘Contempt because of risk of influence on jurors and potential jurors’ and applies to civil as well as criminal proceedings. Sec. 8 deals with ‘Contempt because of risk of influence on witnesses and potential witnesses’ and applies to civil and criminal proceedings; sec. 9 deals with ‘Contempt because of pressure on parties or prospective parties to civil proceedings’; sec. 10 deals with ‘Contempt because of pressure on

parties or prospective parties to criminal proceedings’. The clauses of these sections are all similar with minor differences. Some sections have extra clauses. We shall refer to sections 7, 8 and sec. 10 which are more relevant for us:

Sec. 7: ‘Contempt because of risk of influence on jurors and potential jurors’

(1) A person is guilty of subjudice contempt proceeding against a person if:

- (a) the person publishes matter or causes matter to be published, and
- (b) a criminal or civil proceeding is active at the time of the publication of the matter, and
- (c) the proceeding is one that will be, may be or is being tried before a jury, and
- (d) the publication of that matter creates a substantial risk, according to the circumstances at the time of publication, that a juror in the proceeding or a person who could become a juror in the proceeding (a potential juror) will become aware of the matter, and
- (e) there is a substantial risk, according to the circumstances at the time of publication, that the juror or potential juror will recall the matter at the time of acting as a juror in the proceeding, and

(f) because of the risk that the juror or potential juror will recall the matter at that time, there is a substantial risk, according to the circumstances at the time of publication, that the fairness of the proceeding will be prejudiced through influence being executed on juror or potential jurors by the published matter.

(2) A person can be found guilty as referred to in subsection (1) whether or not the person intended to prejudice the fairness of the proceeding.

(3) Part 1 of Schedule 1 applies for determining the times at which a proceeding is active for the purposes of this section.

(4) This section extends to the publication of matter outside New South Wales.

Sec. 8: Contempt because of risk of influence on witnesses and potential witnesses:

(1) A person is guilty in a subjudice contempt proceeding against the person if

(a) the person publishes matter or causes matter to be published, and

(b) a criminal or civil proceeding is active at the time of the publication of the matter, and

(c) the publication of that matter creates a substantial risk, according to the circumstances at the time of publication, that a witness in

the proceeding or a person who could be a witness in the proceeding (a potential witness) will become aware of the matter, and

(d) there is a substantial risk, according to the circumstances at the time of publication, that a witness will recall the contents of the matter at any stage of the proceeding or of any official investigation in relation to the proceeding, and

(e) because of the risk that the witness will recall the matter at that time, that the fairness of the proceeding will be prejudiced through influence being executed on witnesses or potential witnesses by the published matter.

(2) A person can be found guilty as referred to in subsection (1) whether or not the person intended to prejudice the fairness of the proceeding.

(3) Part 2 of Schedule 1 applies for determining the times at which a proceeding is to be treated as active within the meaning of this section.

(4) This section extends to the publication of matter outside New South Wales.

Sec. 9: Contempt because of pressure on parties or prospective parties to civil proceedings:

(1) A person is guilty of subjudice contempt proceeding against the person if:

- (a) the person publishes matter or causes matter to be published and
- (b) the matter contains unfair comment or material misrepresentation of fact that incites hatred towards severe contempt for, or severe ridicule of a person in his, her or its character as a party or prospective party to a civil proceeding and
- (c) because of the publication of the matter, there is substantial risk, according to the circumstances at the time of publication, that a person of reasonable fortitude in the position of a party or a prospective party to the proceeding would make a different decision in relation to the instituting, maintaining, defending, continuing to defend or seeking to settle the proceeding then he, she or it would otherwise make.

(2) A person can be found guilty as referred to subsection (1) whether or not the person intended to give rise to a risk such as described in subsection (1)(c).

(3) This section does not apply to or in respect of a publication of matter concerning a party or prospective party to a civil proceeding after the conclusion of any appeal in the civil proceeding and the expiry of any period permitted for appeal or further appeal (whichever is later).

(4) This section extends to the publication of matter outside New South Wales.

(5) In this section, prospective party, in relation to a proceeding, means

(a) any person who, there are reasonable grounds for believing, could be or become a party in the proceeding, and

(b) any person who is or may be in a position to institute the proceeding, whether or not actually minded to do so.

Sec.10: Contempt because of pressure on parties or prospective parties to criminal proceeding:

(1) a person is guilty in a subjudice contempt proceeding against the person if:

(a) the person publishes matter or causes matter to be published.

(b) The matter contains unfair comment or material misrepresentation of fact that incites hatred towards, serious contempt for, or severe ridicule of a person in his, her or its character as a party or prospective party to a criminal proceeding, and

(c) because of the publication of that matter, there is a substantial risk, according to the circumstances at the time of publication, that a person of reasonable fortitude in the position of a party or prospective party to the proceeding will make a different decision

in relation to instituting, maintaining, defending, pleading guilty in or accepting a plea of guilty in the proceedings than he, she or it would otherwise make.

(2) A person can be found guilty as referred to in subsection (1) whether or not the person intended to give rise to a risk of the kind described in subsection 1(c).

(3) This section does not apply to or in respect of matter concerning a party or prospective party to a criminal proceeding after the conclusion of any appeal proceeding instituted in the criminal proceeding and the expiry of any period permitted for appeal or further appeal (whichever is the later).

(4) This section extends to the publication of matter outside New South Wales.

(5) In this section, .....

Part III of the Bill refers to factors in making a finding of criminal subjudice contempt and sec. 11 states pre-existing publicity does not prevent finding of contempt. Sec. 12 states that ‘Evidence relating to discharge of jury following publication is admissible in contempt proceedings’.

Part IV of the Bill refers to ‘Defences in subjudice contempt proceedings: Sec. 13 bears the title “Defence if conduct is innocent or if no relevant knowledge or control”, sec. 14 bears the title ‘Defence if no editorial control over the content of publication’.

Part 5 refers to exclusion of liability in subjudice proceeding. Sec. 15 refers to ‘exclusion of liability when publication relating to a matter of public interest’ but the exclusion is not available if the benefit does not outweigh the harm caused to the administration of justice by risk of the influence on jurors, potential jurors, witnesses, potential witnesses or parties or potential parties. Sec. 16 refers to exclusion of liability when publication is necessary to protect public safety.

Part 6 refers to ‘suppression orders’ if there is actual or threatened criminal contempt.

“Sec. 17: Restraint of actual or threatened contempt of Court:

(1) Any person having a sufficient interest may bring a proceeding in the Supreme Court for an order to restrain a contempt of Court by publication of matter (whether within or outside the State) that has a tendency to prejudice the fairness of another proceeding in a court of the State.

- (2) An application must not be made under this section unless the Attorney General and the parties to the other proceeding (if any) have been notified of the application.
- (3) The Director of Public Prosecution does not have to comply with subsection (2).
- (4) A proceeding under this section may be brought by a person on his or her own behalf or on behalf of himself or herself and on behalf of other persons (with their consent), or a body corporate or unincorporated (with the consent of its Committee or other controlling or governing body), having like or common interests in that proceeding.”

Part 7 refers to ‘costs of trial discontinued because of contemptuous publication’. Sec. 18 deals with this aspect.

Sec. 19 states that the Attorney General may apply for an order under sec. 18 for the benefit of the accused, or the State or any person or persons of a class.

Sec. 20 deals with calculation of costs. Sec. 21 with nature of costs.

Sec. 22 with certification of costs; sec. 23 with nature of order; sec. 24 with enforcement of order; sec. 25 with recovery; sec. 26 ‘procedure’.

Part 8 refers to criminal contempt generally:

Sec. 27 states that any person may commence proceeding for criminal contempt; sec. 28 states that mere prejudging issues in proceeding is not enough to constitute contempt.

Schedule 1: Part 1 (sec. 7, 8) states when a criminal proceeding is active. It says:

“1(1) A criminal proceeding is active for purposes of section 7:

- (a) from the earliest of the following:
  - (i) the arrest of a person in New South Wales or in any other State or Territory,
  - (ii) the laying of a charge,
  - (iii) the issue of a Court attendance notice and filing in the registry of the relevant Court,
  - (iv) the filing of an ex officio indictment,
  - (v) the making of an order in a country other than Australian that a person be extradited to New South Wales for the trial of an offence.
- (b) until
  - (i) the verdict of a jury in the proceedings, or

- (ii) the making of any order, or any other event, having the effect that the offence or offences charged will not be tried before a jury, or at all.

(2) If a retrial before a jury is ordered, a criminal proceeding is active from the time the order for retrial is made.

Part 2 of Schedule 1 deals with meaning of the word ‘active’ for purposes of risk of influence on witnesses and potential witnesses.

Sec. 4 states:

(1) A criminal proceeding is active for the purposes of sec. 8

(a) from the earliest of the following:

- (i) the arrest of a person in New south Wales or in any other State or Territory,
- (ii) the laying of a charge,
- (iii) the issue of a Court attendance notice and its filing in the registry of the relevant Court,
- (iv) the filing of an ex officio indictment,
- (v) the making of an order in a country other than Australian that a person be extradited to New South Wales for the trial of an offence.

(b) until the later of the following:

- (i) the conclusion of any appeal proceedings;
  - (ii) the expiry of any period permitted for appeal or further appeal.
- (2) If a retrial is ordered in a criminal proceeding, the criminal proceeding is active again from the time the order for a retrial is made, until
- (a) the conclusion of any appeal proceedings, or
  - (b) the expiry of any period permitted for appeal or further appeal whichever is late.

Appendix by the Report refers to a Bill on suppression order and prevention of examination of records.

We have referred to the various provisions of the UK Act, 1981 and the Bill attached to the N.S.W. Law Reforms Report (2003) which deal with suppression orders and the ‘substantial risk of prejudice’.

Considerations for proposals for postponement orders: ‘substantial risk of prejudice’:

If we propose a provision in the proposed Bill for amendment of the Contempt of Courts Act, 1971, it is not merely sufficient to amend sec 3 and its Explanation as stated earlier, but it is necessary to introduce a provision enabling courts to pass ‘postponement’ order as in sec 4(2) of the UK Act,

1981, that sub section uses the words ‘substantial risk of prejudice’.

Question is whether we should use similar words in the proposed provision.

Interpretation of the words ‘Substantial risk’ of prejudice to administration of justice by Courts in UK creates problems:

Section 4(2) of the U.K. Act states that a restraint order may be passed by a Court if there is ‘substantial risk’ of prejudice to the administration of justice. These words have come up for interpretation in a number of cases in U.K. It will be seen that the Draft Bill (2003) of New South Wales (Australia) also uses the word ‘substantial risk’ in Sections 7,8 & 9 follows the UK provision.

It is necessary to refer to the views expressed by Courts and other commentators

(A) as to the meaning of the words ‘substantial risk of prejudice’ and

(B) as to why these words are defective.

(A) Meaning of ‘substantial risk of prejudice’ in Section 4(2) :

In Attorney General v. Newsgroup Newspapers : 1986 (2) ALLER 833

Sir John Donaldson MR stated (p 841) as follows:

“There has to be substantial risk that the course of justice in the proceedings in question will be seriously impeded or prejudiced.

This is a double test. First, there has to be some risk that the proceedings This is a double test. First, there has to be some risk

that the proceedings in question will be affected at all. Second there has to be a prospect that if affected, the effect will be serious. The two limbs of the test can overlap, but they can be quite separate. I accept the submission of counsel for the defendant that substantial as a qualification of risk does not have the meaning of ‘weighty’ but rather means ‘not insubstantial’ or ‘not minimal’. The ‘risk’ part of the test will usually be of importance in the context of the width of publication.”

Again in Ex parte the Telegraph Group and Others 2001(1) WLR 1983 (CA) (Longmore, LJ, Douglas Brown & Eady JJ), after referring to Section 4(2), the Court of Appeal stated that in order to decide if the suppression order is ‘necessary’ in the context of Arts 6 and 10 of the European Convention, a three pronged test must be satisfied:-

“the first question was whether reporting would give rise to a non insubstantial risk of prejudice to the administration of justice in the relevant proceedings and if not, that would be the end of the matter; that, if such a risk was perceived to exist, then the second question is whether a Sec 4(2) order would eliminate the risk, and if not there could be no necessity to impose such a ban and again that would be the end of the matter; that, nevertheless, even if an order would achieve the

objective, the Court should still consider whether the risk could satisfactorily be overcome by some less restrictive means, since otherwise it could not be said to be ‘necessary’ to take the more drastic approach; and that thirdly even if there was indeed no other way of eliminating the perceived risk of prejudice, it still did not follow necessarily that an order had to be made and the Court might still have to ask whether the degree of risk contemplated should be regarded as tolerable in the sense of being the lesser of two evils; and that at that stage, value judgment might have to be made as to the priority between the competing interests represented by articles 6 and 10 of the Convention”.

In that case, an order of postponement of reporting the case until after the conclusion of another trial arising out of the same closely related facts was passed and upheld by the Court of Appeal. The order was made during trial of a charge of murder against a police officer, Christopher Sherwood. The same Judge was to preside over another trial of 3 more senior police officers criminally charged in respect of the same incident with ‘misconduct in public office’, who were all under suspension.

The Court of Appeal agreed that all the three tests were satisfied. It rejected a plea that a Jury may not be prejudiced if properly directed by the Judge or on account of delay that may take place before the other trial. It stated that in high profile cases, the impact is substantial. It referred to Kennedy LJ's observation in Attorney General v. Associated Newspapers : (31<sup>st</sup> October, 1977, unreported) which were as follows:

“With potential Jurors receiving information in so many different ways, high profile cases would become impossible to try, if Jurors could not be relied on to disregard much of the information to which they may have been exposed, but that does not mean that they can be expected to disregard any information, whenever and however it is received, otherwise there would be no point in withholding from them any relevant information however prejudicial in content or presentation, hence the need for the Law of Contempt which we are required to enforce.”

That was a case where the Evening Standard revealed potentially damaging information about the past records of IRA activists who were currently being tried inter alia for breaking prison. It was held that a one-sided picture cannot be allowed to be presented by the press. The Court of Appeal there observed as follows:

“The Court needs, therefore, to be very careful about sanctioning any course that would lead to information about a

criminal trial being presented to the public in a way that actually distorted what was taking place, rather than merely summarising it. This might be a significant factor for the Court to weigh in a case where partial restriction was being contemplated as a realistic option”.

(B) Defects in the language of Section 4(2) of the U.K. Act

In the Discussion Paper 43 (2000) on “Contempt by Publication” (Ch.10), (para 10.80) of the NSW Law Reform Commission, it was stated:  
“The breadth of the U.K. provision has meant that the section has proved controversial, attracting criticism that it is applied inconsistently, routinely and unnecessarily”.  
(quoting CJ Millers, Contempt of Court (1989), pp 332-338 and A Arlidge & T. Smith, on ‘Contempt’ (1999) (pp 413-459)).

In the Final Report, Ch 10, the Commission observed in para 10.18 as follows (as to Section 4(2) ):

“10.18 : One of the difficulties with the ‘substantial risk of prejudice’ formulation is that while the risk must be great, the prejudice need not be (N. Lowe and B. Sufrin, The Law of Contempt, 1996, p 286). Eady and Smith express the opinion that it seems strange that a Court could impose an order restraining publication where the prejudice in contemplation is less than severe (A. Arlidge and T. Smith on Contempt of

Court (1999) (para 7.133). Even the meaning of ‘substantial risk’ is more elusive than might at first appear. In one English case, for example, the Master of Rolls accepted counsel’s interpretation of ‘substantial’ as not meaning ‘weighty’ but rather ‘not substantial’ or ‘not minimal’ ( Att.Gen v. English 1983(1) A.C 116 (142) (HL) ). Another problem encountered in England, where the formula ‘substantial risk of serious prejudice’ is employed (i.e. in Section 2) to determine liability under sub-judice principle, is that determining the degree of risk may require a Judge to assess the susceptibility of a particular Jury to influence from the publication, (C. Walker et al (1992) 55 Modern Law Review 647 at 648), as opposed to making an objective assessment of the prejudice to justice likely to result from the publication.

Borrie & Lowe, the Law of Contempt, (1996) (3<sup>rd</sup> Edn) (see p 287) refers to the observation of Lindsay J in MSN Pension Trustees Ltd v. Bank of America National Trust and Savings Association : 1995(2) All ER 355. Considering both Section 2 (strict liability) which uses the words ‘substantial risk’ and the words ‘seriously impeded or prejudiced’ and Section 4(2) which, for the purpose of granting postponement order uses the words ‘substantial risk of prejudice’, Lindsay J stated that ‘substantial’ meant ‘not insubstantial’ and this would lower the threshold for the operation of Section 4(2) than the legislature intended. However, he

assumed in favour of the Serious Fraud Office which was applying for the postponement order, that substantial meant ‘not insubstantial’ or ‘not minimal’.

Therefore, it is for consideration whether we should use the words ‘substantial risk of prejudice’ in the proposed provision enabling postponement orders.

Power of Court to order postponement of publication is not inherent but has to be conferred by statute :

A question has arisen whether a court has inherent power to pass ‘postponement order’ as to publication ? In R v. Clement (1821) 4 B & Ald 218 there are observations that the Court has inherent power but this view has recently been not accepted by the Privy Council in Independent Publishing Co Ltd v. Attorney General of Trinidad & Tobago : (2004) UKPC 26 (see <http://www.bailie.org>) and it was held that there is no inherent power and power to postpone publication must be conferred by statute.

Likewise, the NSW Law Reform Commission, in its Discussion Paper 43 (2000) (Ch 10) (see paras 10.22 to 10.27) has held that the authority of Clement as to inherent power to restrain publication is shaken in Australia in cases such as John Fairfax Ltd v. Police Tribunal : (NSW) 1986 5 NSWLR 465. In this connection, it may be noted that Borrie &

Lowe in their 'Law of Contempt' (see p. 279) say that the point has become academic in view of Section 4(2) of the UK Act of 1981.

In view of the criticism of the words, we do not want to use the words 'substantial risk of prejudice' in the new provision whereby power should be vested in the Court to pass orders for postponement of publication.

As to what words have to be used in our statute for the purpose of postponement order, we shall deal with that in Chapter X.

## CHAPTER IX

### What categories of media publications are recognized as prejudicial to a suspect or accused?

We feel it necessary as a matter of information to the media and to the public to refer to the categories of publications in the media which are generally recognized as prejudicial to a suspect or accused.

There is a full discussion of the subject in Borrie and Lowe, 'Law of Contempt', 3<sup>rd</sup> Ed (1996)(Ch 5)(pp 132 to 179) as to what publications are accepted as resulting in prejudice to criminal proceedings. We shall refer to the cases quoted there. (Article by Ms Vismai Rao, on Trial by Media, 5<sup>th</sup> Year, USLSS, Indraprastha University, 2006).

(1) Publications concerning the character of accused or previous conclusions:

Pigot CB stated in R v. O'Dogherty (1848) 5 Cox C.C 348 (354) (Ireland) that

“Observations calculated to excite feelings of hostility towards any individual who is under a charge ... .. amount to a contempt of court.”

Borrie and Lowe state (p 132):

“Publications which tend to excite ‘feelings of hostility’ against the accused amount to contempt because they tend to induce the Court to be biased. Such ‘hostile feelings’ can be most easily induced by commenting unfavourably upon the character of the accused.” These also can be influenced on the Jury. “Such publications amount to gross contempt because they bring to the notice of the Jury facts very damaging to the accused, which they are not entitled to know, and which have a tendency to create bias against the accused.”

Publication of past criminal record is recognized as a serious contempt, satisfying the ‘substantial risk of serious prejudice’ test used in Section 4(2) of the U.K Act of 1981 as well as under Common Law. The above authors quote Moffit P in AG(NSW) v. Willisee : (1980) (2) NSWLR 143 (150) that there is

“popular and deeply rooted belief that it is more likely that an accused person committed the crime charged if he has a criminal record, and less likely if he has no record”.

See also Gisborne Herald Co. Ltd. vs. Solicitor General 1995(3) NLLR 563 (569) (CA).

The need to prevent prejudice caused by past criminal record is one of the ‘most deeply rooted and zealously guarded principles of the criminal law’ (Per Viscount Sankey in Maxwell v. DPP (1935) AC 309(317) and such evidence will have to be treated as inadmissible. But still it may affect the adjudicator subconsciously, as stated in Chapter III of this Report.

In the famous case R v. Parke : (1903) (2) KB 432, after an accused was arrested and remanded on a charge of forgery, the Star published articles that he had admitted an earlier conviction for forgery and that he had been sentenced to imprisonment. Wills J held that that was “unquestionably calculated to produce the impression that, apart from the charges then under enquiry, he was a man of bad and dissolute character”.

Again in R v. Davis : (1906) 2 KB 32 a woman was arrested on a charge of abandoning her child and the publication in a newspaper that she was convicted of fraud on more than one occasion, was treated as highly prejudicial.

In Solicitor General v. Henry and News Group Newspapers Ltd : 1990 COD 307, a person was arrested for robbery and an article was published that he had a previous conviction of rape and it was held to be contempt even under the strict rule in Section 2 of UK Act, 1981 as creating

a 'substantial risk of serious prejudice' and the newspaper was fined 15,000 Pounds.

In another case reported in Times (31<sup>st</sup> March,1981), the Guardian Newspaper was fined 5,000 Pounds for revealing, during the middle of a long fraud trial, that the two accused had previously been involved in an escape from custody.

Borrie & Lowe refer (pp 135-136) to A.G of New South Wales v. Truth and Sportsman Ltd. : (1957) 75 WN (NSW) 70 where a newspaper was held to be in contempt for publishing an article describing a person charged for possessing a pistol without licence, as a 'notorious criminal'.

In R v. Regal Press Pty Ltd : (1972) VR 67 (Victoria), the newspaper was held to be in contempt for publishing that the accused, who was arrested and charged for driving under influence of alcohol, was earlier convicted of murder. The argument of the publisher that the public already knew about it was rejected on the ground that public might have forgotten it and the publication would bring it back to their memory.

In Solicitor General v. Wellington Newspapers Ltd : 1995 NZLR 45, Gisborne Herald and two other newspapers were convicted for contempt for reporting the previous conviction of John Giles at the time of his arrest in Gisborne on charges of attempted murder of a police constable. The argument that the prejudicial statement was casually made in a general

discussion was rejected in Hinch v. AG (Victoria) : (1987) 164 CLR 15 and in AG(NSW) v. Willesee : 1980 (2) NSWLR 143.

In Canada, it was stated in Re Murphy and Southern Press Ltd (1972) 30 DLR (3d) 355 that ‘Except in the most unusual circumstances, the press should refrain from publishing criminal records of any accused person, alleged co-conspirator or witness’. Report of previous conviction was held to be contempt in Re AG of Alberta and Interwest Publications Ltd : (1991) 73 DLR (4<sup>th</sup>) 83.

R v. Thomson Newspapers Ltd, ex parte AG 1968(1) ALLER 268, a person awaiting trial under the Race Relations Act, 1965 was, according to the press publication, stated to be of bad character as he was a brothel keeper and property racketeer. The comment was held to amount to contempt.

In AG v. Times Newspapers Ltd, (1983) Times 12<sup>th</sup> Feb, several newspapers which published comments on the merits of the charges concerning Michael Fagan, who had intruded into the Queen’s bedroom in the Buckingham Palace, were fined.

## (2) Publication of Confessions :

Though a confession to police is inadmissible in law still publications of confessions before trial are treated as highly prejudicial and affecting the

Court's impartiality and amount to serious contempt. In R v. Clarke, ex p Crippen : (1910) 103 LT 636, Crippen was arrested in Canada but not formally charged, but a publication appeared in England in Daily Chronicle, as cabled by its foreign correspondent, that "Crippen admitted in the presence of witnesses that he had killed his wife but denied the act of murder". The publication was treated as contempt. Darling J observed that "Anything more calculated to prejudice the defence could not be imagined".

In Fagan's case referred to above also, a publication that Fagan confessed to stealing wine was held to create 'very' substantial risk of serious prejudice.

Captain Alfred Dreyus, a Jewish officer in French Army, was charged in 1894 with high treason for allegedly passing military secrets to the German Embassy in Paris. The anti semetic media immensely highlighted his untold confessions, unfounded charges and illusory events. He was prosecuted and sentenced to imprisonment on Devil's Island. Twelve years after his imprisonment, the truth was discovered and he was exonerated and readmitted into the army (Media, The Fourth Pillar by Miss Vismai Rao, V year, University School of Law & Legal Studies, Indraprastha University).

In New South Wales, a police officer was found guilty of contempt in AG (NSW) v. Dean (1990) 20 NSWLR 650, when, in the course of police

media conference following the arrest of a suspect in a murder inquiry, he answered a journalist's question with a statement which suggested that the person confessed to the police. He was held to be in contempt but was let off without fine.

(3) Publications which comment or reflect upon the merits of the case :

This is indeed the extreme form of 'trial by newspaper' since the newspaper usurps the function of the Court without the safeguards of procedure, right to cross-examine etc. Such publications prejudge the facts and influence the Court, witnesses and others.

It is, however, permissible to publish the fact of arrest and the exact nature of charge as in R v. Payne 1896(1) QB 577 and that is not contempt.

Assertions of guilt or innocence of the person are treated as serious contempt. In R v. Bolam, ex p Haigh : (1949) 93 Sol Jo 220, Haigh was described as a 'vampire' and that he had committed other murders and the publication gave the names of victims. Lord Goddard sent the editor to jail and fined the proprietors of Daily Mirror calling it "a disgrace to English journalism". In R v. Odham's Press Ltd ex p AG : 1957 (1) QB 73, the paper described the person who was accused for brothel keeping that he was 'in the foul business' of 'purveying vice and managing street women'. That

was held to be contempt. In AG v. News Group Newspapers Ltd : 1988(2) ALLER 906 it was held that the publication of guilt amounted to contempt.

Assertion of guilt by ‘innuendo’ was also held to be contempt in Thorpe v. Waugh : (1979) CA Transcript 282, R v. McCann : (1990) 92 Cr App Rep 239, AG v. English: 1983 (1) AC 116.

In Shamim vs. Zinat: 1971 CrL L5 1586 (All), an article was published in a magazine pending an appeal against conviction for murder expressing opinion on the merits of the case. The High Court held that it amounts to contempt of court because it is an interference into the course of justice.

(4) Photographs :

Apart from publication of photographs interfering with the procedure of identification of the accused, there is also the likelihood of such publication giving a colour of guilt with added emphasis. In AG v. News Group Newspapers Ltd : (1984) 6 CrL App Rep (S) 418, the Sun Newspaper published, on the second day of trial, a photograph of a man who was charged with causing serious injuries to his baby and the baby’s mother was also accused of the offences. The caption was “Baby was blinded by Dad”. This allegation was not part of the Crown’s allegations. Stephen Brown L.J said that “the juxtaposition of the photograph undoubtedly carried with it

the risk that the accused, who had pleaded not guilty, might be regarded in a very unpleasant light by those who saw this particular photograph and headline”. Sun admitted contempt and was fined 5000 Pounds.

In New Zealand (see Chapter V of this Report), in Attorney General v. Tonks : 1934 NZLR 141 (FC), it was held that publication of photographs of an accused before trial if the identification was likely to be in issue would amount to contempt. Blair J observed:

“If a photograph of an accused person is broadcast in a newspaper immediately after he is arrested, then such of the witnesses who have not then seen him, may quite unconsciously be led into the belief that the accused as photographed is the person they saw. The fact that a witness claiming to identify the accused person, has seen a photograph of him before identifying him, gives the defence an excuse for questioning the soundness of the witness’s identification”.

We have also referred (see Chapter IV) to the NSW case from Australia in Attorney General (NSW) v. Time Inc Magazineco Ltd : (Unrep. CA 40331/94 dated 15<sup>th</sup> September 1994) where the weekly magazine ‘Who’ published the photo of Ivan Milat, accused in a serial murder case, in the front page after his arrest and Gleeson CJ observed that this would seriously interfere with identification by witnesses when the person is lined up with others. It could be strongly argued for the accused that

“that the identification in the line-up was useless, or atleast of very limited value. It would be argued that, because of what is sometimes described as displacement effect, there was a high risk that at the time of the line-up, the witness was performing an act of recognition not of a person who had been seen by the witness on some previous occasion but of the person in the photograph”.

In R v. Taylor : (1994) 98 Cr App Rep 361, there was a charge of murder against two sisters for the murder of the wife of the former lover of one of them. Some newspapers obtained a copy of the video made at the deceased's wedding and froze a frame from the sequence of guests emerging from the church, kissing first the bride and then the groom, so that it appeared that the 'peck' on the cheek given by the accused to the groom, her former lover, was a mouth-to-mouth kiss. This photograph was accompanied by the headline 'Cheats Kiss' and 'Tender Embrace – the Lovers share a kiss just a few feet from Alison'. On account of the prejudicial publication, the Court of Appeal quashed the convictions and did not order a retrial.

(5) Police activities :

We have already referred to AG (NSW) v. Dean : (1990) NSWLR 650 (under the heading publication of confessions) how a disclosure by police of an alleged confession after arrest was held to be contempt.

Borrie & Lowe (1996, 3<sup>rd</sup> Ed p 151) refer to activities of police which can also amount to contempt. They say “It can be perfectly proper to publish references to police activity surrounding a crime, such as the various searches, questioning of suspects and any arrest that may be made but it should not be thought that there is an automatic immunity in so doing  
.....”

In an Australian case, R v. Pacini, (1956) VLR 544, for example, a radio station was held to have committed a contempt by broadcasting, at a time when the accused was awaiting trial, an interview with a detective who had been concerned with the arrest of the accused, in which it was intimated that the detective’s investigation had been brought to a successful conclusion with the accused’s arrest, the implication being that the accused was guilty.

In AG (NSW) v. TCN Channel Nine Pty Ltd : (1990) 20 NSWLR 368, in the case of a murder of two women and a child at two distant locations, the suspect surrendered to the police, was interviewed, confessed and was then taken to the scenes of the crimes by the police where he demonstrated various significant matters to them. On these visits, the police

and the suspect were accompanied by a journalist including television crews. At one point, the television crew travelled in the same aircraft with the suspect and the police, to the scene of the crime. The police held a press conference at which it was announced that the suspect had confessed. These matters were all broadcast on television news. The NSW Court of Appeal stated that the tendency of this publication was to create a risk of prejudice to the accused at the trials (which did not take place ultimately since the accused committed suicide while in custody) and was not lessened because of the very strong evidence against the accused. The Court of Appeal observed (p 382):

“A notion that the rules relating to contempt of court somehow apply with less rigour to the case of a person against whom there is a very strong case would reflect a fundamental misunderstanding of the nature and purpose of those rules”.

The contempt was not also lessened because of the role of the police in encouraging the publicity. The Court of Appeal said (p 381):

“... as a general rule, we regard it grossly offensive to the principles embodied in this aspect of the law, and to the proper administration of justice, for police to display for the benefit of the media, persons in the course of being questioned or led round the scene of a crime”.

Borrie and Lowe refer to R v. Carochhia : (1973) 43 DLR (3d) 427 (Quebec CA) from Canada where a police officer was held guilty of contempt for issuing a press release to charges that had been brought against a particular company and stating that more charges were to come and generally linking the accused company with organized crime.

The authors say that these cases are ‘a salutary warning’ to the police both with respect to their press releases and to the access they give to the media. In England, there have been occasions in which the police have overstepped the mark of prudence (though no prosecution has even been brought), the most notorious example being the ‘euphoric’ press conference held by the police following the arrest (on other charges) of Peter Sutcliffe who was later charged with being the so called ‘Yorkshire ripper’. There was much concern over the treatment of Sutcliffe’s arrest but it was the press, rather than the police themselves, who bore the brunt of the criticism, no doubt because of the subsequent behaviour of the press over the case. The authors say that “Irrespective of the responsibility that lies on the police, the media themselves have a responsibility that reliance on a police press release will not be a defence to charges of contempt brought against them, if their publication is held creative of real risk of prejudice” (as in AG (NSW) v. TCN Channel Nine News Pty Ltd (1990) 20 NSWLR 368).

The authors refer to a Scottish case for highlighting the facts which the press has to take into account in describing police operations. In HM Advocate v. George Outram & Co Ltd : 1980 SLT (Notes) 13 (High Court of Justiciary), the Glasgow Herald was fined 2000 Pounds for publishing the headline “Armed Raids Smash Big Drugs Ring in Scotland”, giving a detailed account of the arrest and police operations. In holding the article to be contempt, the newspaper was said to have published alleged evidence of highly incriminating character tending to suggest that the guilt of the accused might be presumed.

It may not be contempt if the publication is intended to warn public at the instance of the police that a notorious criminal had escaped and public have to be careful or watch out for him. (see p 170 of Borrie & Lowe)

(6) Imputation of innocence :

The authors refer to decisions which show that direct imputations of the accused’s innocence can be considered as contempt as was done in R v. Castro Onslow’s and Whelley’s case (1873) L.R 9 Q.B 219 where the claimant to succession to property was awaiting a trial on charges of perjury and forgery and a public meeting was held and two M.Ps who were present alleged that the accused was not guilty but was the victim of a conspiracy. Both MPs were held guilty of contempt by Cockburn CJ.

This reminds us of the famous statement in Ambard v. AG of Trinidad and Tobago (1936) A.C. 322 of Lord Atkin in the context of criticism of Judges:

“The path of criticism is a public way: the wrong headed are permitted to err therein; provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and are not acting in malice or attempting to impair the administration of justice they are immune. Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men”.

The border line between fair criticism and contempt may be thin. The path of criticism is a public way and the wrong headed are permitted to err therein but may yet take the risk of contempt.

In Australia in DPP v. Wran : 1986 (7) NSWLR 616 (NSW CA), the premier of NSW was held to be in contempt for saying, in response to a journalist’s question, that he believed in the innocence of a High Court Judge who had been convicted of charges concerning the perversion of the course of justice when he said that a retrial could result in a different verdict. The Premier and the newspaper were held guilty of contempt.

(7) Creating an atmosphere of prejudice:

Borrie and Lowe (ibid, p 154) refer to the following cases.

In R v. Hutchison , ex p McMahon: 1936 (2) All ER 1514, a news film whose caption implied a charge which was more serious than the actual charge was held to be contempt. When a man was arrested and charged with unlawful possession of a firearm when it was discovered whilst the king was riding in a procession in London, the news film showed the man's arrest under the title 'Attempt on King's life'. It was held to be contempt. Swift J warned the proprietors that:

“.... if they want to produce sensational films, they must take care in describing them not to use any language likely to bring about any derangement in the carriage of justice”

In another case, where the publication described an act of the accused as 'murder', when the issue before the jury was whether the car in question got burnt due to some reason or whether it was intentionally set fire by the accused to kill the occupant, it was held likely to mislead the jury. In fact, the case of murder related to another person who had died when a car was burnt. R v. Daily Herald ex p Rouse (1931) 75 Sol Jo 119.

In USA, in Sheppard vs. Maxwell: (1965) 381. US 532, Dr. Sheppard was tried for murder of his wife. The coroner inquest was held in a school with live broadcasting. Later, in the Courtroom, three to four benches were assigned for accommodation of media, a press table was erected inside the bar of the Court, so close to the accused that he could not even consult his lawyer without being overheard. The jurors were subjected to constant publicity. The Supreme Court of US set aside the conviction appalled by the prejudice the accused suffered.

In M.P. Lohia vs. State of West Bengal AIR 2005 SC 790, to which we have earlier referred, the Supreme Court seriously deprecated a one-sided article in a newspaper in which the allegations made by the parents of the wife in an alleged dowry death case were published but the record filed by the accused that his wife` was schizophrenic were not published. These publication create a pressurised atmosphere before the Judge.

(8) Criticism of witnesses:

The same authors refer to the following cases (ibid p 155):

Witnesses may be deterred if they become the object of public criticism. In R v. Bottomley, (1908) Times, 19<sup>th</sup> Dec., one Horatio Bottomley, a Member of Parliament, was on trial for conspiracy to defraud. He was the editor of a newspaper. The newspaper of the accused described

the cross-examination as ‘relentless cross-examination’ and commented on the prosecution witness. It was held that the article interfered with a fair hearing because it held up the witnesses for the prosecution to ‘public opprobrium’ if the witness was described as “an unhappy man, writhing in the ..... of their relentless cross-examination”. Such comments tended to prejudice the prosecution case and also deter future witnesses.

As a general rule, adverse comment upon a witness should be avoided since such comment can only add to the general reluctance of witnesses to appear in Court (R v. Castro Onslow’s and Whalley’s case, (1873) LR 9 QB 219) (R v. Daily Herald ex p Bishop of Norwich, 1932 (2) ICB 402).

Discrediting witnesses is also prejudicial to a trial. In Labouchere, ex p Columbus Co. Ltd. (1901) 17 TLR 578, an article was published in Truth which attacked a certain witness and even discredited the character of the witness. Bruce J stated:

“Looking at the whole of the article in question, he could not doubt that it was calculated to imply that Cowen was not a witness to be relied upon, that it held him up as a person whose conduct was to be condemned and that it might prejudice the mind of any jurymen against Cowen, who happened to read it”

In another case, there was a publication that a witness was being paid by a national newspaper, the amount being contingent upon the final

outcome of the case. Contempt prosecution followed: see AG v. New Statesman and Nation Publishing Co.Ltd. : 1980 (1) All ER 644.

(9) Premature publication of evidence:

Borrie and Lowe (ibid p. 156) state that a newspaper conducting its own private investigation and publishing the results before or during the trial is perhaps the most blatant example of ‘trial by newspaper’. Such publications hinder the Court’s determination of facts and might otherwise be ‘prejudicial’. There is no guarantee that the facts published by the newspaper are true, there being no opportunity to cross-examine nor to have the evidence corroborated. There is no guarantee that the published facts will be admitted at the trial, if it amounted to hearsay. In R v. Evening Standard, ex p DPP (1924) 40 TLR 833, the Court found that certain newspapers ‘had entered deliberately and systematically on a course which was described as criminal investigation’. The defence of the newspaper was that they had a duty to elucidate the facts. This defence was rejected by Lord Hewart CJ (p. 835) as follows:

“While the police or the Criminal Investigation Department were to pursue their investigation in silence and with all reticence and reserve, being careful to say nothing to prejudice the trial of the case, whether from the point of view of the prosecution or .... of the

defence, it had come to be somehow for some reason the duty of newspapers to employ independent staff of amateur detectives who would bring to an ignorance of the law of evidence a complete disregard of the interests whether of the prosecution or the defence....

”

To publish results of such investigations could prejudice a fair trial and will therefore amount to contempt. In that case, the proprietors of Evening Standard were fined 1000 pounds and two other papers, 300 pounds each.

The authors, however, point out (pp 157-158) that today the position has changed with ‘investigative’ journalism. Cases such as Watergate etc. the Thalidomide case were the work of journalists.

But, in our view, assuming investigation journalism is permissible, if that is continued after criminal proceedings become ‘active’ and a person has been arrested, and if by virtue of the private investigation, the person is described as guilty or innocent, such a publication can prejudice the courts, the witnesses and the public and can amount to contempt.

(10) Publication of interviews with witnesses:

Borne and Lowe state (ibid p. 158) that in principle, it can amount to contempt to publish the evidence which a witness may later give in Court. That is not to say that no statement of a witness can be published pending trial.

Statement of witnesses, which have not suffered cross-examination case, in our opinion, present a one-sided picture of the matter.

It may be that some 'bare facts' be mentioned as stated by the above authors to satisfy public curiosity, even if charges are pending in Court. But in-depth interview with a witness can create problems.

In this behalf, certain pertinent aspects were referred by the Salmon Committee (Committee on the Law of Contempt as it affects Tribunals of Inquiry under the chairmanship of Salmon CJ, 1969 Cmnd Leo 78, para 31). The Committee said that a witness could be bullied or unfairly led into giving an account which was contrary to truth or which contained a start. The witness could, in a television interview, commit himself to a view due to tension by an inaccurate recollection of facts. When later they have to give evidence, they may feel bound to stick to what they have said in the media interview. The Phillimore Committee also accepted the above view

and were worried about television interview of witness, the authors pointed out: (see 1974 Cmnd 5794, para 55). That Committee stated:

“Television interview import added dangers of dramatic impact. For example, the ‘grilling’ on television of a person involved in a case can seem to take the form of a cross-examination in Court. It could obviously create risk of affecting or distorting the evidence he might give at the trial. Such an interview could be regarded as ‘trial by television’.”

The Committee, no doubt, agreed that interviews make a useful contribution to public information.

The authors say that the absence of prosecution for contempt may elucidate that such interviews have not been treated as contempt. But, the authors, say there are dangers as in AG(NSW) v. Mirror Newspapers Ltd. (1980) (1) NSWLR 374 (CA). There was a coroner’s inquiry into the death of seven people during a fire accident at an amusement centre. One witness, who had already given evidence, was widely reported as saying, in effect, that an attendant had allowed two children to go on a ‘ghost train’ into the fire. The Daily Telegraph, believing that the attendant would not be giving evidence, published a detailed account by him in which he sought to defend himself from the previous witnesses’ allegations. Part of that

article stated that the publication in Daily Telegraph may sound that he (the attendant) had sent the two kids to death. But, he said, it was not so. He even had to wrestle with one young lad who was determined to follow his mates into the fire and that he had to tear him from the car. The Court of Appeal held that the publication interfered with the course of justice and was contempt and fined the proprietors in a sum of 10,000 Australian dollars.

The authors say that the conducting of interview, with a view to publication of ‘background’ material after the trial is generally regarded as legitimate practice, but would amount to contempt if it could be shown to have been of a ‘bullying’ kind such as to deter witnesses from giving evidence.

Payments to witnesses in current legal proceedings for their stories is contrary to clause 8 of the (UK) Press Complaints Commission Code of Practice. (The authors provide a detailed discussion on ‘Payments to Witnesses’ pp. 408 to 410). But the authors say (p. 409) that “such an arrangement could amount to contempt since it seems to provide an inducement to the witness to ‘tailor’ his evidence so as to ensure the more financially lucrative result”

In the trial of Jeremy Thorpe, there were allegations (the authors pointed out) there were allegations that the Sunday Telegraph agreed to pay

a fee to Peter Bessel, a leading witness, for his revelations as a future witness for a fee being reportedly contingent on a verdict of guilty. This was condemned by the Press Council. Earlier, on a similar issue, the Attorney General promised to make changes in the law, but no such changes were made probably because of action by the Press Council.

Borrie and Lowe (p. 409-410) state that “the practice of paying witness’s fee, the amount of which is contingent upon a particular verdict, is undesirable as it is likely to create a risk of prejudice. As we know from the revelations published by the New Statesman (see AG v. New Statesman and Nation Publishing Co.Ltd.: 1980 (1) All ER 644), the jurors in the Thorpe trial were greatly influenced by the agreed payments to Bessell and in any event, such agreements seem obvious inducements to witnesses to embellish and tailor their evidence”.

In the post-consultation Report of the Lord Chancellor’s office, (March, 2003), it was felt that legislation was not necessary and the media agreed that a self-regulation procedure could be evolved which must incorporate well-settled principles. By February 2003, the proposals made by the media were accepted by Government.

NSW Law Commission in its Discussion Paper 43 (2000) in para 2.45 has enumerated a long list of publication which may be prejudicial to a suspect or accused.

- (i) a photograph of the accused where identity is likely to be an issue, as in criminal cases;
- (ii) suggestions that accused had previous convictions, or has been charged for committing an offence and/or previously acquitted, or has been involved in other criminal activity;
- (iii) suggestions that the accused has confessed to committing the crime in question;
- (iv) suggestions that the accused is guilty or involved in the crime for which he or she is charged or that the Jury should convict or acquit the accused; and
- (v) comments which engender sympathy or antipathy for the accused and/or which disparage the prosecution or which make favourable or unfavourable references to the character or credibility of the accused or a witness.

India:

There are also a large number of decisions of the Indian Courts falling under these very headings. We do not want to add to the bulk of this Report by referring to them.

In our country, lack of knowledge of the law of contempt currently shows that there is extensive coverage of interviews with witnesses. This is highly objectionable even under current law, if made after the charge sheet is filed.

This Chapter is, in fact, intended to educate the media and the public that what is going on at present in the media may indeed be highly objectionable. Merely because it is tolerated by the Courts, it may not cease to be contempt.

## CHAPTER X

### Recommendations for amending the provisions of the

#### Contempt of Court Act, 1971

In this Chapter we shall refer to our recommendations for amendment of the Contempt of Courts Act, 1971 on the basis of what we have discussed in the earlier Chapters.

(1) It is initially necessary to define “publication” as including publication in print and electronic media, radio broadcast and cable television and the world-wide web by insertion of an Explanation in clause(c) of Section 2 of the principal Act, to enlarge the meaning of the word ‘publication’ as stated above. This proposal is contained in Section 3 of the Bill.

2 (a) We have pointed out in the earlier Chapters that it is necessary to create a just balance between the freedom of speech and expression guaranteed in Article 19(1)(a) and the due process of criminal justice required for a fair criminal trial, as part of the administration of justice.

Though Article 19(2) does not refer to the imposition of reasonable restrictions for the purposes of administration of justice, the reference in Article 19(2) that restrictions can be imposed for purpose of the Contempt of Courts Act clearly indicates that the Contempt of Courts

Act, 1971 (sections 2, 3) take care of the protection of the administration of justice and duecourse of justice.

Our recommendation must naturally be intended to bring the provisions of Section 3, particularly, the Explanation to Section 3, into conformity with the decision of the Supreme Court in A.K.Gopalan v. Noordeen :1969(2) SCC 734 wherein, after referring to freedom of speech and expression, the Supreme Court held that publications made after the arrest of a person could be criminal contempt if such publications prejudice any trial later in a criminal court. As the Explanation now stands, ‘pendency of a criminal proceeding’ is defined in clause (B) as starting from the filing of a charge sheet or challan or issuance of summons or warrant by a criminal court. The Supreme Court in the above case held that publication made even after arrest and before filing of charge sheet could also be prejudicial. If so, that guarantee must be implied in the ‘due process’ under Article 21 as explained in Maneka Gandhi’s case and to that extent, it is permissible to regulate publications by media made after arrest even if such arrest has been made before the filing of the charge sheet or challan.

We have seen that in U.K and several countries, a criminal proceeding is treated as “active” if an arrest is made. This is to accommodate the principle decided by the Scotland Court in Hall (see Chapter VI) that a person arrested comes immediately within the protection of a Court for he has to be produced before a Court within 24 hours of the arrest. Taking “arrest” as starting point, any restriction on prejudicial publications will be reasonable if they have to satisfy the due process requirement under Article 21 which, after Maneka Gandhi’s case AIR 1978 SC 597, as that judgment requires that the procedure protecting liberty must be fair, just and reasonable and not arbitrary or violative of Article 14.

Therefore, in our view, the word ‘pending’ used in Section 3(1),(2) and Explanation clauses (a) and (b) at different places must be substituted by the word ‘active’ because the word ‘pending’ gives an impression that a criminal case must be actually pending. The word ‘active’ used in the U.K Act,1981 and in the Bill annexed to the Report of the NSW Law Commission, 2003 in our opinion, is more apt and under the above Act and Bill, a criminal proceeding is defined as being ‘active’ from the date of arrest.

We, therefore, recommend that the word ‘pending’ in Section 3(1), (2) and Explanation, used at different places must be substituted by the word ‘active’.

(b) Further, the revised definition of the word ‘active’ must be applicable not only for purposes of Section 3 but for the purposes of the entire Act. In fact, the word ‘pending’ has not been used in any other section of the Act except sec 3. Some of the new provisions which we propose, use the word ‘active’ and hence the definition of the word ‘active’ must be applicable to “all provisions of the Act” and not merely to sec 3.

These changes are proposed in Section 4 of the Bill.

3). So far as breach of sec 3, as proposed, when even a prejudicial publication is made after arrest or after a charge sheet is filed, or summons or warrant is issued, at present, if there is criminal contempt of subordinate courts, those courts have no power to punish for contempt but can only make a reference to the High Court under sec 15(2). This provision is good except that in the special case of contempt by publication offending provisions of sec 3(2) and Explanation (or rather even the existing section 3 (2) and Explanation), the procedure is cumbersome and time consuming. Much damage by publication can result if the contempt power has to be

exercised by the High Court for purposes of sec 3(2) violations through a reference to the High Court.

We are of that view, that a separate section has to be inserted (section 10A) for the purpose of enabling the Court to punish for criminal contempt by publication under sub clause (ii) and (iii) of sec 2(c), so that action can be taken directly in the High Court in the manner stated under sec 15(1) either suo motu or as the application of any person – such as accused or suspect or others affected by the prejudicial publication. We are referring to clause (1) of sec 2 here, and restricting the sub clauses (ii) and (iii) and clause © which deal with publications. We are not here concerned with clause (i) of sec 2© for which sec 15(2) procedure by reference or motion by Advocate General will continue to apply.

Further once we refer to clause (ii) and (iii) of sec 2©, it will take in all criminal contempt as to publication falling under those sub clauses (ii) and (iii) which are not protected by the various sections of the Act. In addition we provide that consent of the Advocate General as specified in sec 15(1).

(4) The next question is to provide something akin to Section 4(2) of the U.K Act or Sections 7,8, 9 of the Bill attached to the NSW Report (2003). We shall first refer to these provisions.

(a) Section 4(2) of UK Act, 1981, permits the Court to pass orders postponing publication of reports of criminal cases which are active, if such publication would create a “substantial risk of prejudice” to such a proceeding or any imminent proceeding. Section 4(2) is applicable to civil as well as criminal proceedings which are ‘active’. Our recommendations here are confined only to publications affecting active criminal proceedings.

(b) We are not happy with the provision postponing ‘reporting’ of court proceedings which are active as contained in Section 4(2) of the U.K Act. We are, in fact, concerned with publications which prejudice a fair trial.

(c) Sections 7,8,9 of the NSW Bill deem publications as amounting to contempt if they create substantial risk of prejudice. They do not relate to postponement orders. The Bill is in Annexure A to that Report of the NSW Law Commission (2003). But, Appendix B to that Bill contains another draft Bill giving powers to court to regulate access to court records or reports and contains a provision for passing

‘suppression orders’ but the sections as proposed there do not refer to substantial risk of prejudice by publications.

(d) In our view, firstly, the section to be proposed by us must vest powers in Court to pass postponement orders as to prejudicial publication of any matter relating to an active criminal proceeding and not merely to reporting about the case as in Section 4(2) of the U.K Act.

(e) Further, in view of the interpretation of the words ‘substantial risk of prejudice’ by English Courts as where ‘there is no substantial risk’ or ‘no remote risk’ and the absence of any adjective governing the word ‘prejudice’, we are of the view that instead of the words ‘substantial risk of prejudice’ in Section 4(2) of the U.K Act, in the proposed section giving powers to the Court to pass ‘postponement’ orders, we should use the words:

“real risk of serious prejudice”

so that the emphasis is not only on the word ‘risk’ but also on the word ‘prejudice’.

(f) A question may be asked as to why we are not using these words (significant risk of serious prejudice) in Section 3 which deals with ‘interference’ or ‘tending to interfere’ with the administration of justice in sec 2 or the words ‘course of justice’ in Section 3.

The reason is that the words used in sec 2© and 3 define what publication may be ‘criminal contempt’ but the question of restricting freedom of speech by passing an order of ‘prior restraint’ as in sec 4(2) of the UK Act, 1981 requires more stringent conditions. That is why, for purposes of passing postponement orders as to publication, it is necessary to use the words “significant risk of serious prejudice”. Prior restraint as pointed by the Supreme Court in Reliance Petrochemicals is a serious encroachment on the right of the press for publication under Art 19(1)(a) and cannot be interfered with merely because the publication interferes or tends to interfere with the course of justice as stated in sec 2(c) or sec 3. Prior restraint requires more stringent conditions.

(g) The next question is as to which Court should pass postponement orders. In our view, such powers cannot be vested in the subordinate courts where the criminal proceedings are ‘active’. This is because under the 1971 Act, the subordinate courts have no power to take action for contempt. Under Section 15(2), they can only make a ‘reference’ to the High Court.

Further, the balancing of the rights of freedom of speech and the due process right of the suspect/accused as explained in Maneka Gandh’s case

can be done more appropriately by the High Court which is a Constitutional Court.

The High Court for the purpose of passing postponement orders will be a Bench of not less than two Judges.

(h) Postponement of publication does not mean result in an absolute prohibition. Initially, an order of postponement must be temporary, and can be passed ex parte and but must be made for a week enabling the media to come forward for variation or cancellation. Of course, the initial order of restraint must be published in the Media, so that the media will have an opportunity to know about the passing of the order and have the order varied/cancelled.

(i) There is, however, danger of the postponement order lapsing at the end of one week, if no application is filed for variation or modification by the media and no variation/cancellation is granted in a week. Hence, it is necessary to provide for its automatic extension by law, in case no application is filed within one week or where the order is not varied or cancelled within one week. Of course, after such automatic extension also, the media can apply for variation or cancellation.

(j) We, therefore, recommend insertion of Section 14A as stated in sec 6 of the Bill annexed.

(4) We also propose Section 14B under which any breach of a postponement order i.e. where the media makes a publication in breach of the postponement order, it will amount to contempt of court for which the High Court may take action according to law for criminal contempt. (This is also contained in Section 6 of the Bill):

We are using the word ‘according to law’ for the High Court may take action under the Contempt of Court Act r under Art 215 of the Constitution

(5) We have proposed Section 14A and 14B as above for the purpose of passing postponement orders in respect of publications, and breach of such an order. But, as stated in our discussion under sec above, a more important need is the punishment for criminal contempt of a subordinate court where criminal proceedings are active as stated in subsection (2) of section 3.

(6) As far as applicability of the amending Act is concerned, it shall apply to publications amounting to criminal contempt in respect of active criminal proceedings within subsection (2) of section 3, made after the commencement of the amending Act. This is contained in sec 7 of the Bill.

A Draft Bill on these lines is herewith annexed.

(7) Media persons to be trained in certain aspect of law:

The freedom of the media not being absolute, media persons connected with the print and electronic media have to be equipped with sufficient inputs as to the width of the right under Art 19(1)(a) and about what is not permitted to be published under Art 19(2). Aspects of constitutional law, human rights, protection of life and liberty, law relating to defamation and Contempt of Court are important from the media point of view.

It is necessary that the syllabus in Journalism should cover the various aspects of law referred to above. It is also necessary to have Diploma and Degree Course in Journalism and the Law.

We recommend accordingly.

**(Justice M. Jagannadha Rao)**  
**Chairman**

**(R.L. Meena)**  
**Vice-Chairman**

**(Dr. D.P. Sharma)**

## **Member-Secretary**

**Contempt of Court (Amendment) Bill, 2006**

An Act to amend the provisions of the Contempt of Courts Act, 1971 (70 of 1971).

BE it enacted by Parliament in the fifty-seventh year of the Republic of India, as follows:

**Short title and commencement**

- 1.(1) This Act may be called THE CONTEMPT OF COURTS (AMENDMENT) ACT, 2006.
- (2) It shall come into force on such date as may be notified by the Government of India in the Official Gazette.

**Definitions**

2. In this Act, the words 'Principal Act' shall mean the Contempt of Courts Act, 1971.

**Amendment to section 2**

3. In section 2 of the Principal Act, an Explanation shall be inserted below clause (c) of section 2:

“Explanation: publication includes publication in print, radio broadcast, electronic media, cable television network, world wide web.”

### **Amendment to section 3 of the Principal Act**

- 4.(a) In section 3, subsection (1) of the Principal Act, for the words

“any civil or criminal proceeding pending at the time of publication, if at that time he had no reasonable grounds for believing that the proceeding was pending”

the following words shall be substituted, namely,

“any civil or criminal proceeding active at the time of publication, if at that time he had no reasonable grounds for believing that the proceeding was active”

- (b) In section 3, subsection (2) of the Principal Act, for the words

“any civil or criminal proceeding which is not pending”

the following words shall be substituted, namely,

“any civil or criminal proceeding which is not active”

- (c) In the Explanation below subsection (3) for the words “For the purposes of this section”, the words “for the purposes of this Act” shall be substituted.
- (d) In the Explanation, in clause (a),
  - (i) for the words, “is said to be pending” occurring before the bracket and the word (A), the words “is said to be active”, shall be substituted.
  - (ii) for the words, “Code of Criminal Procedure, 1898” occurring in clause B, the words “Code of Criminal Procedure, 1973” shall be substituted.
  - (iii) for clause (B)(i), the following clause (B)(i) shall be substituted, namely,
    - “(i) where it relates to the commission of an offence, when a person is arrested or when the chargesheet or challan is filed or when the Court issues summons or warrant, as the case may be, against the accused, whichever is earlier, and”.
  - (iv) for the words, “shall be deemed to continue to be pending” occurring after the subclause (B)(ii) and the words “in the case of a civil or criminal proceeding”, the words “shall be deemed to continue to be active”, shall be substituted.
- (e) In the Explanation, in clause (b),

for the words, “deemed to be pending” occurring after the words “which has been heard and finally decided shall not be”, the words “deemed to be active”, shall be substituted.

#### **Insertion of section 10A**

5. The following section shall be inserted after section 10, namely,

“Cognizance of criminal contempt of subordinate court by publication.

10A. Notwithstanding anything contained in subsection (2) of section 15, in respect of criminal contempt of courts subordinate to the High Court arising out of publications falling within sub-clauses (ii) and (iii) of clause (c) of section 2, the High Court may take action on its own motion or on a motion made by the persons referred to in subsection (1) of section 15.

Provided that it shall not be necessary to obtain the consent of the Advocate General or of the Law Officer notified by the Central Government in the Official Gazette as stated in subsection (1) of section 15.”

6. **Insertion of sections 14A and 14B**

The following sections shall be inserted after section 14 of the Principal Act, namely -

**Orders of High Court for postponement of prejudicial publications by the media**

14A(1) In any criminal proceedings which are active, the High Court may issue a general direction *ex parte*, whenever it appears to it to be necessary, that any matter the publication of which may cause real risk of serious prejudice to the cause of such proceeding or to the administration of justice in those proceedings or in any other criminal proceedings or any part of such proceeding, active or imminent, shall not be published by the media or any person for an initial period of seven days from the date of its order or that such matter shall be published subject to conditions and the High Court may direct publication of such an order.

- (2) An order under subsection (1) may be passed by the High Court upon an application by
  - (a) the Advocate General or by a law officer referred to clause (c) of subsection (1) of section 15, or
  - (b) by a person who has been arrested or who being an accused in such criminal proceeding, a chargesheet or challan has been filed or summons or warrant has been issued by the Court against him, or
  - (c) by any person who is interested in the avoidance of the risk and prejudice referred to subsection (1).
- (3) An order of postponement of publication, with or without conditions, passed under subsection (1), may be varied or cancelled by the High Court at the instance of the representatives of the media or by any other person interested in such variation or cancellation, by the filing

of an application therefor in the High Court within the period of seven days referred to in subsection (1) or after the period of extension of such order as provided in subsection (4).

- (4) If no application is filed for such variation or cancellation within the period of seven days as stated in subsection (2) or if filed, has not been modified within the said period of seven days, the order passed under subsection (1) shall stand extended beyond seven days unless varied or cancelled in an application filed within the seven days or filed after the seven days aforesaid.

Explanation: For the purposes of this section and section 14B, the High Court shall mean a Bench of the High Court of not less than two Judges.

#### **Action for criminal contempt for violation of an order passed under section 14A**

14B. Where any person violates any order of postponement of publication or the conditions laid down in orders passed under section 14A, the High Court may initiate proceedings for criminal contempt in the High Court, in accordance with law and pass such order as to punishment as it may deem fit.

#### **Applicability of the Act**

“7. The provisions of the Principal Act as amended by this Act shall apply to publications by any person in connection with a

criminal proceeding which is active as stated in subsection (2) of section 3 of the principal Act or to criminal proceedings which are active or imminent as stated in section 14A of the principal Act.”

# HOFSTRA LAW REVIEW

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## AN ALTERNATIVE VIEW OF MEDIA/JUDICIARY RELATIONS: WHAT THE NONLEGAL EVIDENCE SUGGESTS ABOUT THE FAIR TRIAL-FREE PRESS ISSUE

Robert E. Drechsel\*

### I. INTRODUCTION

The fair trial-free press debate has long been a curious mixture of conflict and consensus. A consensus approach has been apparent in efforts by the bar, bench and media to fashion rules and guidelines governing the release and dissemination of potentially prejudicial information.<sup>1</sup> However, the genesis of the issue appears to lie in conflict, in situations where the media have been accused of conduct so extreme as to have ruined a defendant's right to an impartial jury, or where the media have been expected to behave in a manner so extreme as to ruin a defendant's right to an impartial jury.<sup>1</sup>

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1. For a useful overview of such consensus efforts, see J. GERALD, **NEWS OF CRIME: COURTS AND PRESS IN CONFLICT** (1983). Gerald's title itself suggests that conflict has characterized much of media-judiciary relations.

2. See, e.g., *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 6-13 (1986) (finding a qualified first amendment right of access to preliminary hearings in a criminal proceeding); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580-81 (1980) (holding that "the right to attend criminal trials is implicit in the guarantees of the First Amendment . . . absent overriding interests"); *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979) (holding that the sixth amendment does not give the press an affirmative right of access to pretrial suppression hear-

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The fair trial-free press issue may well have provoked more discussion among the bench, bar, and media than any other issue. However, generalizing about the nature of day-to-day judiciary-media relations on the basis of egregious situations-which, of course, constitute the basis for most of the litigation involving fair trial-free press questions-could lead to major misperceptions. If the resulting perception is that relationships are generally tense, suspicious and adversarial, and if that perception is incorrect, it could needlessly discourage journalists and judicial sources from interacting. Consequently, this Article approaches the issue of media-judiciary relations from a different perspective, that of social scientific research. It begins with a very brief overview of the historical and legal development of the fair trial-free press issue.<sup>1</sup> This Article then analyzes social scientific research bearing on such questions as how common fair trial-free press disputes actually are,<sup>1</sup> whether the fair trial-free press issue appears to be a major concern for most judicial (ings); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (finding an order restraining the press from reporting or commenting on publicly-held judicial proceedings in a widely reported murder case to be a prior restraint in violation of the first amendment); *Murphy v. Florida*, 421 U.S. 794 (1975) (finding no due process violation where petitioner contended he did not receive a fair trial because jurors had learned of prior felony convictions or facts about the crime with which he was charged from extensive press coverage); *Sheppard v. Maxwell*, 384 U.S. 333 (1966) (finding that "massive, pervasive and prejudicial" publicity that was inadequately

controlled by the trial court denied petitioner a fair trial in violation of the Due Process Clause); *Estes v. Texas*, 381 U.S. 532 (1965) (holding that television coverage of a criminal trial constitutes a due process violation); *Rideau v. Louisiana*, 373 U.S. 723 (1963) (finding a due process violation where petitioner's request for change of venue was denied after a local television station repeatedly televised petitioner's confession to sheriff on the day after his arrest for robbery, kidnapping and murder); *Irvin v. Dowd*, 366 U.S. 717 (1961) (finding a due process violation where change of venue was granted after inflammatory publicity but only to an adjoining county which was also highly prejudiced).

The secondary literature on the topic is voluminous. *See generally*, S. BARBER, *NEWS CAMERAS IN THE COURTROOM: A FREE PRESS-FAIR TRIAL DEBATE* (1987); R. DRECHSEL, *NEWS MAKING IN THE TRIAL COURTS* (1983) [hereinafter *NEWS MAKING*]; H. FELSHER & M. ROSEN, *THE PRESS IN THE JURY* Box (1966); A. FRIENDLY & R. GOLDFARB, *CRIME AND PUBLICITY* (1967); J. GERALD, *supra* note 1; D. GILLMOR, *FREE PRESS AND FAIR TRIAL* (1966); J. LOFTON, *JUSTICE AND THE PRESS* (1966); H. SULLIVAN, *TRIAL BY NEWSPAPER* (1961); J. Stanga, *The Press and the Criminal Defendant: Newsmen and Criminal Justice in Three Wisconsin Cities* (1971) (unpublished Ph.D. dissertation, available at University of Wisconsin-Madison). Virtually all of the textbooks focusing on mass media law give major attention to the fair trial-free press issue. *See, e.g.*, T. CARTER, M. FRANKLIN & J. WRIGHT, *THE FIRST AMENDMENT AND THE FOURTH ESTATE* 355-425 (4th ed. 1988); D. GILLMOR & J. BARRON, *MASS COMMUNICATION LAW* 485-557 (4th ed. 1984); K. MIDDLETON & B. CHAMBERLIN, *THE LAW OF PUBLIC COMMUNICATION* 385-434 (1988); D. PEMBER, *MASS MEDIA LAW* 350-89 (5th ed. 1990).

3. *See infra* notes 13-68 and accompanying text.

4. *See infra* notes 69-106 and accompanying text.

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sources,<sup>5</sup> what judicial sources actually mean when they complain about prejudicial publicity<sup>6</sup> and the existence of evidence that guidelines and standards are effective in resolving problems.<sup>7</sup>

The focus of this Article then shifts to the larger question of media-judiciary relations in general.<sup>8</sup> Data from a series of studies conducted by the author on the interaction between sources and journalists in trial courts is examined and analyzed.<sup>9</sup> The resulting data bear directly on questions of how routine relationships between journalists and judicial sources might best be characterized, <sup>10</sup> what factors appear most central to these relationships," and what role fair trial-free press considerations play.<sup>11</sup>

## II. THE LEGAL CONTEXT: A BRIEF SKETCH

Complaints about prejudicial publicity in America can be traced back at least as far as 1807 when Aaron Burr unsuccessfully complained that it would be difficult, if not impossible, to find an unprejudiced jury because the treason charges against him had been so widely publicized.<sup>13</sup> There are other examples of such complaints during the 19th century, although the incidents seem surprisingly isolated. For example, during the trial in 1855 of several persons involved in a riot, a defense attorney sought to have the *Chicago Tribune* cited for contempt and prohibited from further reporting on the case after the *Tribune* published allegedly false and disrespectful statements about the defendants. <sup>4</sup> Although the court declined to act against the newspaper, the judge remarked that "it was very wrong for newspapers to publish articles which may influence the result of the trial one way or another; and that it was very desirable that if any reports at all were published, that they should be simple

5. *See infra* notes 107-20 and accompanying text.

6. *See infra* notes 110-15 and accompanying text.

7. *See infra* notes 121-49 and accompanying text.

8. See *infra* notes 150-225 and accompanying text.
9. See *infra* notes 165-225 and accompanying text.
10. See *infra* notes 181-90 and accompanying text.
11. See *infra* notes 191-225 and accompanying text.
12. See *infra* notes 206-26 and accompanying text. The focus here will *not* be on evidence about whether media in fact can make a fair trial impossible. That is a separate issue, although it may be that such beliefs affect media-judiciary relationships. See generally J. GERALD, *supra* note 1, at 3-22; D. PEMBER, *supra* note 2, at 364-69.
13. For a useful discussion of the case, see J. GERALD, *supra* note 1, at 70-72 (citing 1 REPORTS OF THE TRIAL OF COLONEL AARON BURR FOR TREASON AND FOR A MISDEMEANOR (D. Robertson, rep. 1808)).
14. *Trial of the Rioters*, Chi. Tribune, June 19, 1855, at 3, col. 2.

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relations of facts as they occurred." 15 Several times during the nineteenth century, there were reports that sensational coverage of criminal cases caused courthouse violence.<sup>16</sup>

As early as 1859, an apparently angry former journalist, Lambert Wilmer, published a scathing attack on the press. Wilmer charged that

the newspapers of the United States ... make it impossible for any man charged with a criminal offense to have a fair trial; ... they have often caused the most desperate offenders to be acquitted and turned loose on society; and ... many innocent persons, by their unwise or malicious meddling, have been brought to condemnation and punishment. 17

Wilmer also charged that criminal defendants frequently bribed the press to obtain favorable publicity, but he offered no proof that this occurred.<sup>18</sup> By the middle to late nineteenth century, complaints that the press was interfering with the right to a fair trial were also appearing with increased frequency in the law journals.<sup>9</sup>

Until the 1960s, the most salient issue involving media coverage of the judiciary appears to have been the degree to which judges could use the contempt power to control media commentary about

15. *Id.*; see also *United States v. Holmes*, 26 F. Cas. 360, 363 (C.C.E.D. Pa. 1842) (No. 15,383) (court agreed to provide space in courtroom for press only after reporters agreed to publish nothing until after trial); Chi. Tribune, Aug. 8, 1875, at 16, col. 2 (reporting that prosecutor believed newspapers should be held in contempt for speculating about verdict, but apparently didn't pursue contempt citation); N.Y. Herald, Oct. 16, 1846, at 1, col. I (noting that defense counsel in murder case "intended" to seek order suppressing *ex parte* statements but didn't follow through). For research on newspaper coverage of particular cases, see Baskette, *Reporting the Webster Case, America's Classic Murder*, 24 JOURNALISM Q. 250 (1947); Eberhard, *Mr. Bennett Covers a Murder Trial*, 47 JOURNALISM Q. 457 (1970); Nordin, *The Entertaining Press: Sensationalism in Eighteenth Century Boston Newspapers*, 6 COMM. RES. 295 (1979). For an overview of the historical development of newspaper reporting of trial court proceedings and an analysis of data on newspaper reporting of trial court proceedings in Minnesota and a northeastern state, see NEWS MAKING, *supra* note 2, at 35-77 and sources cited *Infra* notes 164-224 and accompanying text.

16. A classic example is James Gordon Bennett's New York Herald coverage of a murder trial in which a mob formed at the courthouse and the defendant had to be carried out of court by the authorities. See E. EMERY & M. EMERY, *THE PRESS AND AMERICA* 123 (4th ed. 1978). For other examples of concerns about disorder resulting from highly publicized criminal cases, see N.Y. Evening Post, Feb. 12, 1872, at 3, col. 5; N.Y. Herald, Jan. 19, 1866, at 2, col. 4; Boston Transcript, Mar. 31, 1850, at 1, col. 5.

17. L. WILMER, *OUR PRESS GANG, OR, A COMPLETE EXPOSITION OF THE CORRUPTIONS AND CRIMES OF THE AMERICAN NEWSPAPERS* 52 (1859 & reprint ed. 1970).

18. *Id.* at 228.

19. See, e.g., *Trial by Newspaper*, 11 ALB. L.J. 248 (1875); W. Forrest, *Trial by Newspapers*, 14 CRIM. L. MAG. 553 (1892).

judicial action. That issue, however, seems to have dissipated after a series of Supreme Court rulings held that absent a clear and present danger that justice would be impaired, any use of the contempt power to punish out-of-court comment on pending or decided cases violates the first amendment.<sup>20</sup>

Attention then turned more directly to the impact of media coverage on defendants' fair trial rights.<sup>21</sup> In essence, the Supreme Court held that although media coverage can deny due process to a criminal defendant,<sup>22</sup> judges have a variety of tools short of prior restraint to avoid such problems.<sup>23</sup> The Court made it almost impossible for lower courts to restrain journalists from communicating what they observe in open court or otherwise obtain by lawful means.<sup>24</sup> The Court has concluded that the press and public have a qualified first amendment right to attend criminal trials,<sup>25</sup> preliminary hearings<sup>26</sup> and jury selection.<sup>27</sup>

20. *See* *Wood v. Georgia*, 370 U.S. 375 (1962) (reversing a contempt citation for sheriff's criticism of judge's handling of grand jury in absence of sufficient evidence of clear and present danger); *Craig v. Harney*, 331 U.S. 367 (1947) (reversing a contempt citation for newspaper criticism of judge's handling of case in absence of clear and present danger); *Pennekamp v. Florida*, 328 U.S. 331 (1946) (reversing a contempt citation for newspaper criticism of local judges in absence of evidence of clear and present danger); *Bridges v. California*, 314 U.S. 252 (1941) (reversing a contempt citation for newspaper comment about judge and judicial process in pending case in absence of a showing of clear and present danger).

21. *See infra* notes 22-34 (setting forth the Supreme Court cases).

22. *See, e.g., Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Rideau v. Louisiana*, 373 U.S. 723 (1963); *Irvin v. Dowd*, 366 U.S. 717 (1961).

23. *See Sheppard*, 384 U.S. at 358-62 (recommending that to avoid the "carnival atmosphere" of the trial, the court could have, *inter alia*, limited the number of reporters in the courtroom, regulated their conduct more closely, insulated the witnesses and controlled the release of information to the press by the participants).

24. *See Smith v. Daily Mail Publishing Co.*, 443 U.S. 97 (1979) (holding a statute violative of the first amendment which made it a crime to publish the name of a youth charged with a crime without written approval of the juvenile court where newspapers lawfully learned the names); *Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977) (reversing a pretrial order enjoining the media from publishing information about a juvenile obtained at court proceedings open to the public); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976) (finding prior restraint unconstitutional where court order restrained the press from reporting or commenting on publicly held judicial proceedings); *see also* *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829 (1978) (striking down a statute as violative of the first amendment which made it a crime for persons unrelated to a judicial inquiry to divulge or publish truthful information about the confidential proceeding).

25. *See Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

26. *See Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986). Seven years earlier, the Court held that the press and public did not have a sixth amendment right to attend preliminary hearings. *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979). The Reporters Committee for Freedom of the Press reported that within six months of the *Gannett* decision, there

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In **1965**, the Supreme Court held that televised coverage of pretrial and trial proceedings in a criminal case inherently violated the defendant's right to due process of law guaranteed under the fourteenth amendment.<sup>8</sup> Sixteen years later, however, the Court seemingly reversed its position and held that camera coverage of criminal trials, even over the objection of defendants, does not inherently violate

due process absent a showing of actual prejudice.<sup>2</sup>" The Court thus sanctioned decisions in a growing number of states which allow camera coverage of court proceedings.<sup>3 0</sup>

In essence, the Supreme Court has made it nearly impossible to use direct restrictions<sup>31</sup> on the news media to control possible fair

were 109 attempts to close criminal court proceedings. *Secret Court Watch*, NEWS MEDIA & THE LAW, Nov.-Dec. 1979, at 17.

27. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984).

28. *Estes v. Texas*, 381 U.S. 532 (1965).

29. *Chandler v. Florida*, 449 U.S. 560 (1981). The Court concluded that *Estes* did not announce a *per se* constitutional bar to photographic, radio, and television coverage. *Id.* at 570-74.

30. As of 1987, 45 states permitted cameras and recording equipment in trial courts to varying degrees. See T. CARTER, M. FRANKLIN & J. WRIGHT, *supra* note 2, at 422. The publicity of the Lindbergh kidnaping trial in 1935 is often credited with galvanizing opposition to camera coverage of the courts. K. MIDDLETON & B. CHAMBERLIN, *supra* note 2, at 405. *But see* S. BARBER, *supra* note 2, at 3-8 (describing the trial and stating that "the presence of cameras and news photographers inside the courtroom were not, in and of themselves, responsible for the [trial's] undecorous tone .... "). The result of the opposition movement was the drafting of ABA's Canon 35, which advised prohibition of such coverage. See *Chandler*, 449 U.S. at 562-64; S. BARBER, *supra* note 2, at 8-9. Canon 35 of the ABA's Code of Judicial Ethics became Canon 3A(7) in a revision of the code in 1972. *Chandler*, 449 U.S. at 563. Canon 3A(7), as amended August 11, 1982, states the following:

A judge should prohibit broadcasting, televising, recording or photographing in courtrooms and areas immediately adjacent thereto during sessions of court, or recesses between sessions, except that under rules prescribed by a supervising appellate court or other appropriate authority, a judge may authorize broadcasting, televising, recording and photographing of judicial proceedings in courtrooms and areas immediately adjacent thereto consistent with the right of the parties to a fair trial and subject to express conditions, limitations, and guidelines which allow such coverage in a manner that will be unobtrusive, will not distract the trial participants, and will not otherwise interfere with the administration of justice.

THE CODE OF JUDICIAL CONDUCT Canon 3A(7) (1982). For a useful historical perspective concerning the adoption of the original Canon 35, see Kielbowicz, *The Story Behind the Adoption of the Ban on Courtroom Cameras*, 63 JUDICATURE 14 (1979). Federal courts remain off-limits to cameras. See FED. R. CRIM. P. 53.

31. Direct restrictions include contempt proceedings and other express prohibitions of publication amounting to a prior restraint. See STANDING COMM. ON ASS'N COMMUNICATIONS OF THE AMERICAN BAR ASS'N, THE RIGHTS OF FAIR TRIAL AND FREE PRESS: THE AMERICAN BAR ASSOCIATION STANDARDS 19, 22 (1981) [hereinafter ABA STANDARDS]. Indirect methods include continuance of the trial until the publicity dissipates, severance of trials so that publicity regarding one defendant does not affect a co-defendant, change of venue, change of venire; intensive voir dire, the granting of additional peremptory challenges, sequestration of the jury, [Vol. 18:1

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trial problems. Even in *Sheppard v. Maxwela*<sup>2</sup>-- which presented an extreme example of outrageous behavior by the media in coverage of a criminal case--the Supreme Court's opinion was striking for its failure to suggest restraints on the media as a remedy.<sup>33</sup> Rather, the Court suggested better control of parties to the proceedings, and the use of continuance, sequestration, change of venue or even mistrial to protect the defendant's rights.<sup>3 4</sup>

Although even a cursory examination of the case law might suggest endemic conflict and hostility between trial courts and the news media, such a generalization might be exaggerated. As early as 1924, the American Bar Association (ABA) authorized appointment of a committee to work with representatives of the American Society of Newspaper Editors (ASNE) to investigate cooperative efforts to address the fair trial-free press issue.<sup>35</sup> The ASNE rejected the overture,

stating it "would not cooperate in any venture which might lead to regulation of the press." ' However, in 1937, representatives of the bar and the news media met and recommended formation of national and local committees to encourage voluntary self-restraint by the news media.<sup>37</sup> As Professor Donald Gillmor noted, however, discussions of bilateral codes of conduct "got off to a bad start" because "[t]oo much of the exchange between bar and press has depended upon invective and cliché."<sup>38</sup>

Perhaps in response to the "misbehavior" revealed in such cases as *Irvin v. Dowds*<sup>39</sup> and *Rideau v. Louisiana*,<sup>40</sup> and the manner in and stressing the importance of disregarding the media when instructing the jury. *Id.* at 19.

32. 384 U.S. 333 (1966). The Court found that the excessive pre-trial publicity surrounding defendant's prosecution for bludgeoning his pregnant wife to death prevented him from receiving a fair trial. *Id.* at 362-63.

33. The Court reversed Sheppard's murder conviction. *Id.* at 363. Justice Clark's opinion devoted 11 pages to describing the conduct that made reversal necessary. For example, front page editorials demanding Sheppard's arrest, allegations in news coverage that he was a perjurer and a liar, publication of a wide range of evidence and allegations never used at trial and failure by the judge to prevent exposure of the jury to such coverage. *Id.* at 338-49.

34. *Id.* at 357-63.

35. J. Stanga, *supra* note 2, at 8-9.

36. *Id.* at 8.

37. D. GILLMOR, *supra* note 2, at 177.

38. *Id.* at 179.

39. 366 U.S. 717 (1961). In *Dowd*, the media publicized a murder defendant's prior record, accused him of being a parole violator, revealed that he was picked out of a police lineup, characterized him as remorseless, described him as a "confessed slayer" and conducted curbside opinion polls as to how he should be punished. *Id.* at 725-26. The record showed that 90 percent of the prospective jurors suspected or believed that he was guilty. *Id.* at 727. The Supreme Court reversed his conviction on grounds that there was evidence of "a pattern of deep and bitter prejudice" against the defendant. *Id.*

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which the police and news media handled the publicity of the assassination of President John F. Kennedy,<sup>41</sup> a flurry of efforts to develop standards to protect defendants from prejudicial publicity occurred in the 1960s.<sup>42</sup> In 1964, the ABA appointed what has come to be known as the Reardon Committee to develop standards to deal with concerns about media interference with fair trials.<sup>4a</sup> The "Reardon Report" was published late in 1966.<sup>44</sup> Its most controversial recommendation was a suggestion that the power of judicial contempt be used against the media, if necessary, to safeguard fair trial rights.<sup>45</sup>

The report also recommended restricting public access to portions of

40. 373 U.S. 723 (1963). In *Rideau*, after a defendant was arrested for murder, bank robbery and kidnapping, the sheriff invited a local television station to film the sheriff's "interview" with the defendant during which the defendant confessed. *Id.* at 724. The film was then broadcast three times. A change of venue was denied and the defendant was convicted and sentenced to death. *Id.* at 724-25. The Supreme Court reversed the conviction, calling the trial a "hollow formality." *Id.* at 726.

41. See REPORT OF THE PRESIDENT'S COMM'N ON THE ASSASSINATION OF PRESIDENT JOHN F. KENNEDY 240-42 (1964) [hereinafter the WARREN COMMISSION REPORT]. Professor Gillmor provides a good summary of the fair trial issues that arose in the wake of media coverage of the assassination. D. GILLMOR, *supra* note 2, at 16-22.

42. See, e.g. ADVISORY COMM. ON FAIR TRIAL AND FREE PRESS, AMERICAN BAR ASS'N PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS (1968) [hereinafter REARDON REPORT]; SPECIAL COMM. ON RADIO, TELEVISION AND THE ADMIN. OF JUSTICE OF THE ASS'N OF THE BAR OF THE CITY OF N.Y., FREEDOM OF PRESS AND FAIR TRIAL (1967) [hereinafter MEDINA REPORT]. Such standards include, *inter alia*, the non-dissemination of information by attorneys in pending criminal trials

where there is a likelihood of interference with the due administration of justice, REARDON REPORT, *supra*, at § 1.1; the prohibition of disclosure of information relating to pending criminal trials to unauthorized persons by judicial employees, *id.* at § 2.3; and, under appropriate circumstances, the sequestration of the jury at any point during the trial, including the initial phases, *Id.* at § 3.5(b).

43. *See generally* ADVISORY COMM. ON FAIR TRIAL AND FREE PRESS, AMERICAN BAR ASS'N PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS V-X (Tent. Draft 1966) [hereinafter REARDON REPORT (TENT. DRAFT)].

44. *Id.* at v. Essentially, the committee recommended that six types of information not be made public because they may be prejudicial: a defendant's prior criminal record; admissions, confessions or statements given by the accused; results of, or refusal to submit to, examinations or tests; the identity, expected testimony or credibility of witnesses; the possibility of a guilty plea; opinions as to a defendant's guilt or innocence. *Id.* at § 1.1.

45. *See id.* at § 4.1. Such "necessary" circumstances include, but are not limited to, violations of a valid judicial order not to disseminate, and extra-judicial statements reasonably calculated to affect the outcome of the trial. *See id.*; *see also id.* at 151-54 (containing the committee's commentary about this recommendation). The language on use of the contempt power was toned down, but not eliminated, in the approved rules. For example, the "reasonably calculated" language was changed to prohibit only extra-judicial statements "willfully designed by that person" to affect the outcome of the trial. *See* REARDON REPORT, *supra* note 42 at 27-28; REARDON REPORT (TENT. DRAFT), *supra* note 43, at § 4.1.

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pre-trial hearings and trials.<sup>4</sup> Meanwhile, the Association of the Bar of the City of New York had appointed its own committee to address the fair trial-free press issue." Its report, the "Medina Report," specifically rejected use of the contempt power against journalists,<sup>4 8</sup> suggested greater restraint by participants in the criminal process,<sup>4 9</sup> and urged the media to develop voluntary codes of conduct to govern crime reporting.<sup>50</sup> The Judicial Conference also entered the debate and adopted guidelines for the federal courts that suggested limits on comment by attorneys and courthouse personnel (although not by law enforcement officials), but specifically rejected any direct controls on the news media.<sup>5</sup>

Almost simultaneously, a committee of the American Newspaper Publishers Association issued a report rejecting virtually any restrictions on judicial reporting:

This Committee, therefore, cannot recommend any covenants of control or restrictions on the accurate reporting of criminal matters, or anything that would impair such reporting.

The Committee does recommend that the press stand at any time ready to discuss these problems with any appropriate individuals or groups .... But there can be no agreement on the part of the American Press to dilute its responsibility, or to circumvent the basic rights and provisions of the Constitution. 2

Both the ABAs' and the Judicial Conference<sup>54</sup> have updated their guidelines in light of court decisions expanding the first amend-

46. REARDON REPORT (TENT. DRAFT), *supra* note 43, at §§3.1, 3.5(d). Specifically, a defendant may request that public access be restricted on the ground that evidence which would be inadmissible at trial would be disseminated, thus interfering with the defendant's right to a fair trial. *Id.* Such a request will be granted unless it is determined that there is no substantial likelihood of such interference. *Id.*

47. *See* MEDINA REPORT, *supra* note 42, at vii-xi.

48. *Id.* at 11.

49. *Id.* at 25-26, 32-35.

50. *Id.* at 67.

51. *See Report of the Comm. on the Operation of the Jury System on the "Free Press-Fair Trial" Issue*, 45 F.R.D. 391, 400-03 (1968). In addition, the U.S. Justice Department issued guidelines for the release of information by its personnel. Release of Information by

Personnel of the Department of Justice Relating to Criminal and Civil Proceedings, 28 C.F.R. §50.2 (1988).

52. AMERICAN NEWSPAPER PUBLISHERS ASS'N, FREE PRESS AND FAIR TRIAL 10 (1967).

53. See ABA STANDARDS, *supra* note 31. The revised rules also restrict use of the contempt power considerably more than the earlier rules. REARDON REPORT, *supra* note 42, at § 4.1; see also *id.* at 22.

54. Revised Report of the Judicial Conference Committee on the Operation of the Jury System on the "Free Press-Fair Trial" Issue, 87 F.R.D. 519 (1980).

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ment rights of attorneys, 55 creating barriers to orders directing the  
press not to publish material it obtained in open court proceedings,<sup>56</sup>  
and granting the press and public a first amendment right of access  
to judicial proceedings. 57

Meanwhile, lawyers, judges and editors in many states have begun  
to discuss the fair trial-free press issue.<sup>58</sup> By 1987, voluntary  
bench-bar-press guidelines had been developed in at least 28 states. 9  
Yet, such guidelines themselves have become the subject of conflict.

The most striking example to date is *Federated Publications v.*

*Swedberg* in which the Washington Supreme Court upheld the decision  
of the trial court which refused to admit reporters to a pretrial  
hearing unless they agreed in writing to abide by the state's

voluntary bench-bar-press guidelines.<sup>61</sup> Washington had been among  
the earliest and most active states to develop press-bar cooperation, 2

but in response to the *Swedberg* decision, "the state's media associations  
withdrew their support from the guidelines"<sup>63</sup> and *Nebraska*  
*Press Association v. Stuart*,<sup>64</sup> which largely freed the media from  
prior restraints in the context of reporting on the courts, stemmed.

from a state trial judge's order that made voluntary guidelines le-

55. See *Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979) (holding vague and overbroad  
portions of disciplinary rule limiting lawyers' comments on pending litigation); *Chicago Council  
of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), *cert. denied*, 427 U.S. 912 (1976)  
(holding local court rules regulating lawyers' extrajudicial comments on litigation were overbroad);  
*CBS, Inc. v. Young*, 522 F.2d 234 (6th Cir. 1975) (holding judge's order restricting  
comment by counsel, litigants and others was unconstitutional); *Chase v. Robson*, 435 F.2d  
1059 (7th Cir. 1970) (holding that judge's order prohibiting extrajudicial comment by counsel  
and criminal defendants was unconstitutional).

56. See *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

57. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

58. See *Collen & Betzold, Between the Media and the Bar . . .*, BENCH & BAR OF  
MINN., Feb. 1985, at 11 (describing the methods that the Minnesota bar and media use to  
resolve conflicts between each other); *Finch, First Amendment/Sixth Amendment  
Rights-Problems and Progress in Press-Bar Conflicts*, 36 J. Mo. BAR 362 (1980) (discussing  
*Gannett, Co. v. DePasquale*, 443 U.S. 368 (1979) and the National News Council's attempts  
to have the media and the courts cooperate voluntarily); *Niehaus, Musings of a Trial Judge*,  
14 OHIO N.U.L. REV. 203, 204-07 (1987) (discussing the controversy regarding the use cameras  
in Ohio courts); *Cooke, Press Freedom, Open Courtrooms Go Together*, N.Y.L.J., Feb.  
23, 1988, at 2, col. 3 (advocating the freedom of the press to cover a trial, except where the  
defendant's right to trial is unalterably threatened).

59. D. PEMBER, *supra* note 2, at 383.

60. 96 Wash. 2d 13, 633 P.2d 74 (1981), *cert. denied*, 456 U.S. 984 (1982).

61. *Id.* at 23, 633 P.2d at 78.

62. K. MIDDLETON & B. CHAMBERLIN, *supra* note 2, at 432.

63. *Id.* at 433.

64. 427 U.S. 539 (1976).

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gaily binding.<sup>65</sup>

To summarize, Supreme Court decisions during the past two decades have limited the options available to courts for controlling prejudicial publicity. In general, the first amendment has been held to require open criminal proceedings<sup>66</sup> and to prohibit the use of restraining orders to prevent the media from publishing information they obtain by legal means.<sup>67</sup> Although bench, bar and press have tried to agree on a voluntary solution to whatever problem there might be with prejudicial publicity, the receptiveness of the parties has varied over time.<sup>68</sup> Because of the Supreme Court's decisions in favor of the news media, self-restraint and compromise appear more than ever to be the only available appropriate action. That, in turn, makes it more important than ever to have a clearer picture of how serious and widespread a fair trial-free press problem there is, and how much of a reservoir of trust and goodwill might be available to draw upon when problems arise. We can turn, then, to the social scientific evidence bearing on this question.

### III. PREJUDICIAL PUBLICITY: HOW WIDESPREAD A PROBLEM?

#### A. *How Common Is Prejudicial Publicity?*

"There is scarcely one inmate of our fifty state penitentiaries who has had the fair and impartial trial, doubly guaranteed by our federal and state constitutions, and this because of Trial by Newspaper."

<sup>69</sup> Such was attorney Harold Sullivan's indictment of the press

<sup>65.</sup> Before *Nebraska Press* was decided by a full Supreme Court, Justice Blackmun, in a chambers opinion, concluded that state courts could legally impose voluntary guidelines on the media so long as they were pertinent to the case at hand and were adequately specific. 423 U.S. 1327, 1331 (1975). Blackmun concluded, however, that the guidelines in question were too vague to be constitutional. *Id.* at 1330-31. The full Court never had to directly confront the guidelines question because the Nebraska Supreme Court held the trial court's legal enforcement of the guidelines to be unconstitutional: "The guidelines were not intended to be contractual and cannot be enforced as if they were." *State v. Simants*, 194 Neb. 783, 801, **236** N.W.2d 794, 805 (1975), *rev'd on other grounds*, *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976); *see also* *State v. Allen*, 73 N.J. 132, 373 A.2d 377 (1977), *superseded on other grounds*, *State v. Williams*, 93 N.J. 39, 71 n.19, 459 A.2d 641, 658 n.19 (1983). In *Allen*, the New Jersey Supreme Court, vacating an order prohibiting publication of certain evidence and testimony outside the presence of a jury, rejected mandatory imposition of guidelines as an appropriate method for control of prejudicial publicity. 73 N.J. at 141, 373 A.2d at 381.

<sup>66.</sup> *See supra* notes 28-34 and accompanying text.

<sup>67.</sup> *See supra* note 24 and accompanying text.

<sup>68.</sup> *See J. Stanga, supra* note 2, at 8-9; *supra* notes 35-63 and accompanying text.

<sup>69.</sup> H. SULLIVAN, *supra* note 2, at xvii.

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in the foreword to his book, *Trial by Newspaper*.<sup>7</sup> But Sullivan would have been hard pressed to provide convincing evidence for his remarkable generalization. Even the ABA's Reardon Committee felt compelled to address the possibility that prejudicial publicity might be a trivial problem.<sup>71</sup>

The Reardon Committee admitted that "[a]ny effort to assess the magnitude of the problem—the number of cases in which serious questions of possible prejudice are raised by news coverage and public

statements-is bound ultimately to rest in some degree on inference."

72 The Committee conceded that only a small percentage of criminal cases actually go to trial and that questions of prejudicial publicity are likely to arise in connection with only a fraction of those.<sup>71</sup> But it asserted that such statistics understate the problem, since in one two-year period at least 100 reported appellate decisions raised the issue of prejudicial publicity, and these decisions undoubtedly represented only the "tip of the iceberg" of trial court experience with the problem. <sup>72</sup> The Committee also pointed to its survey of defense counsel in twenty metropolitan communities, the results of which showed that the fifty-four respondents reported 300 cases in which they "thought reporting by the news media created a significant problem of possible prejudice to the defendant. <sup>73</sup> The Committee also cited its content analysis of the leading newspaper in each of the same twenty cities.<sup>74</sup> During a one-month period, the Committee found "at least 15 and perhaps 20 or more cases in which the nature, prominence, and timing of the news coverage raised the most serious questions of potential prejudice. <sup>75</sup>

There are reasons to question the validity of the Committee's data. The fifty-four defense attorneys who responded to the survey constituted only twenty-seven percent of the 200 who received questionnaires - a very poor response rate that makes generalization risky. Nor is it clear how representative the fifty-four were or

**70. *Id.***

71. **REARDON REPORT (TENT. DRAFT)**, *supra* note 43, at 22-23.

**72. *Id.*** at 22.

**73. *Id.***

**74. *Id.*** at 23 (noting that only defendants who have had motions regarding media interference dismissed would appeal, and that the granted motions at the trial court level are not reported in published decisions).

**75. *Id.*** at 23-24.

**76. *Id.*** at 24.

**77. *Id.*** The Committee did not determine how many of those were disposed of without trial. ***Id.*** at 24 n.11.

**78. *Id.*** at 252.

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whether they may have simply represented the most disgruntled of the lawyers surveyed. Three respondents alone accounted for 186 of the 300 troublesome cases mentioned. <sup>76</sup> This might suggest exaggeration, or, at the very least, that the survey ought to have controlled for how long the attorneys had been practicing and more clearly defined what it meant by prejudicial publicity.<sup>77</sup> Further, defense attorneys would seem to be an inherently biased source on whom to base a generalization about the impact of prejudicial publicity-a possibility made even more plausible by examination of the committee's data from trial judges.<sup>78</sup>

Unfortunately, the Committee did not ask judges precisely the same questions as defense attorneys.<sup>79</sup> The judges were asked how often they had reprimanded the media about reporting that occurred before or during trial.<sup>80</sup> Thirty-nine said never, only two said occasionally,

and apparently the remainder did not respond directly.<sup>84</sup> Twenty-seven judges said they occasionally requested reporters to withhold information from publication.<sup>85</sup> Of those twenty-seven, twenty-two reported having generally or always received compliance and only one reported having such requests refused. <sup>86</sup> In other words, the picture painted by the judges-the judicial actors most likely to have an objective view of the situation-is far less severe than that painted by defense attorneys.<sup>87</sup>

The Committee's content analysis of newspapers is also less than convincing since, as the Committee conceded, it did not determine how many of the cases it considered actually went to trial., Perhaps the best argument-and one made by the Committee-is that the magnitude of the problem is qualitative rather than quantitative. In other words, even if the problem occurs in a relatively small number of situations, these are precisely the cases that most

79. *See id.* at 24.

80. *See supra* note 44 (setting forth six types of information recommended by the Reardon Committee not to be made public).

81. The response rate from the survey of trial judges was low: only 68 of 200 judges (34 percent) responded. *Id.* at 245.

82. *See id.* at 252-58, app. C (setting forth the questions asked of defense counsel and the answers).

83. *Id.* at 246.

84. *Id.* at 247.

85. *Id.*

86. *Id.*

87. *See id.* at 252-58; *supra* note 75-77 and accompanying text.

88. *See supra* note 77.

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severely test the fairness of the judicial process.<sup>88</sup>

A series of more carefully designed studies appears to confirm that the problem of prejudicial publicity is relatively small. Alfred Friendly and Ronald Goldfarb examined felony court records in Washington, D.C. for a year, read coverage of those cases in the *Washington Post*, and then followed the cases to determine their ultimate disposition.<sup>90</sup> They concluded:

A major newspaper in a major city in a recent year did not even mention with so much as a line of type 80 percent of those accused of committing major crimes in its own back yard. Of the one-fifth who were mentioned, 72 percent were written about in only one story, and with few exceptions, these appeared long before trial at the time of arrest or indictment .... Any realistic consideration of the effect of this coverage on these cases, then, can refer at most to only 2 per cent of these defendants who received enough press mention to raise even the possibility of prejudicial fallout. And that potential exists only on the artificial assumption that the printing of four or more newspaper stories about a defendant is per se prejudicial."

Shortly thereafter, Thomas Eimermann and Rita Simon published a content analysis of the coverage received by criminal cases in two newspapers in a Midwestern city.<sup>92</sup> They found a substantial number of violations of the Reardon Report's recommendations,<sup>93</sup>

and that more serious felonies received more prejudicial treatment than lesser crimes.<sup>94</sup> However, they downplayed the significance of

89. See REARDON REPORT (TENT. DRAFT), *supra* note 43, at 25.

90. A. FRIENDLY & R. GOLDFARB, *supra* note 2, at 59.

91. *Id.* at 62-63 (footnote omitted). Further analysis revealed that jury trials were more common for the heavier publicized defendants than for others, and that findings of guilt were virtually the same regardless of amount of publicity. *Id.* at 66. Friendly and Goldfarb also surveyed all state attorneys general and the district attorneys in the 50 largest American cities. *Id.* Eighty percent of the attorneys general responded. *Id.* The authors' concluded: The case where press interference with trial justice is even claimed is extraordinary. Law officials throughout the United States thus testified that the problem, assumed to be commonplace and overwhelming by most critics of the press, actually arises very infrequently-and when it is raised, the contention is seldom accepted by the courts.

*Id.*, at 68. Of course, these respondents may inherently be as unlikely to see a problem as defense attorneys. See *supra* text accompanying note 81 (arguing that defense attorneys might be an inherently biased source on the issue of prejudicial publicity).

92. Eimermann & Simon, *Newspaper Coverage of Crimes and Trials: Another Empirical Look at the Free Press-Fair Trial Controversy*, 47 JOURNALISM Q. 142 (1970).

93. See *supra* note 44 (setting forth the Reardon Committee's recommendations).

94. See Eimerman & Simon, *supra* note 92, at 143.

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these findings because they also found no correlation between guilty verdicts and prejudicial publicity. 5

John Stanga interviewed judges, prosecutors and criminal defense attorneys in three Wisconsin cities and found that none of them considered "trial by newspaper" to be a major problem in their communities. 96 Stanga also conducted a content analysis of newspaper coverage of criminal cases in the same three cities.<sup>97</sup> He found that about twenty percent of the stories contained such prejudicial information as past criminal records and confessions.<sup>98</sup> Nevertheless, he argued that it would be risky to assume that prejudicial publicity was a serious problem; many of the items appeared in routine stories that were not prominently displayed, few criminal cases ever go to trial, and most potentially prejudicial material involved a small number of criminal defendants. 99 On the other hand, Stanga speculated that the repetition in subsequent stories of prejudicial information-and even repetition of the defendant's name-could have a prejudicial impact, as could implicit suggestions of guilt (often inherently resulting from the dominance of law enforcement sources). 10

In a major study of criminal appeals from 1976 to 1980, Professor Dale Spencer found only twenty-one instances where the highest state court overturned convictions because of prejudicial news coverage.

10<sup>1</sup> He also found only 368 cases out of more than 63,000 criminal conviction appeals in which defense attorneys raised the issue of prejudicial publicity. 102 Spencer's findings are consistent with results

95. *Id.* at 143-44.

96. J. Stanga, *supra* note 2, at 240-45.

97. *Id.* at 304-11.

98. *Id.* at 304.

99. *Id.* at 307-08.

100. *Id.* at 308-10. Another way in which media coverage might shape the criminal justice process is by "setting the agenda" of prosecutors. See, e.g., J. EISENSTEIN, *POLITICS AND THE LEGAL PROCESS* 104 (1973) (stating that "[i]f a crime ... attracts great publicity, [the prosecutor] has little choice but to prosecute" in order to protect his reputation); Pritchard,

*Homicide and Bargained Justice: The Agenda-Setting Effect of Crime News on Prosecutors*, 50 **PUB. OPINION Q.** 143 (1986) (examining the relationship between newspaper coverage and whether prosecutors engage in plea bargaining); Pritchard, Dilts & Berkowitz, *Prosecutors' Use of External Agendas in Prosecuting Pornography Cases*, 64 **JOURNALISM Q.** 392 (1987) (studying factors, such as press coverage, that influenced Indiana prosecutors concerning pornography cases); J. Stanga, *supra* note 2, at 246-54 (reporting the outcome of a study where judges and defense attorneys were asked whether they believed press publicity influenced a prosecutor to file a more serious charge than if there had been no publicity). This issue is beyond the scope of this Article.

101. Spencer, *Coverage Seldom Cause for Conviction Reversal*, *Presstime*, Oct. 1982, at 16, col. 1.

102. *Id.*

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of a recent analysis by Ralph Frasca.<sup>103</sup> He drew on literature about felony case-processing, studies of press coverage of crime and research on information retention and the effectiveness of trial safeguards in an effort "to estimate how likely jurors are to obtain a bias from press coverage of a case and to retain that bias throughout the trial."<sup>104</sup> His conclusion: press-induced bias would occur in only one of every 10,000 cases.<sup>105</sup>

Taken together, the research suggests that in an absolute, quantitative sense, prejudicial publicity is a small problem. At worst, the data indicate only a potential for prejudicial impact. The quantitative research done for the Reardon Report seems to be a particularly shaky basis for generalization. <sup>06</sup> Of course, it does not follow that the problem is an unimportant one. The research also indicates what anyone who attends to the news media must intuitively feel: that prejudicial publicity is particularly likely in the most newsworthy cases. Consequently, it is useful to turn to the question of how seriously judicial actors regard the problem.

### *B. How Seriously Judicial Sources View the Issue*

The research done for the Reardon Report seemed to assume that judges, lawyers and police—the same people who are journalists' judicial sources—regard prejudicial publicity as a serious problem. The Reardon survey simply did not ask to what degree respondents perceived any problem.<sup>106</sup> Fortunately, subsequent research has more directly addressed that question.<sup>108</sup> Although the evidence is somewhat contradictory, on the whole it seems to indicate that judicial sources do not regard prejudicial publicity as a major problem.

As already noted, Stanga's study of journalists and judicial sources in three Wisconsin cities is consistent with this generalization.

<sup>109</sup> However, a study of Washington, D.C. journalists, judges and lawyers concluded that a central reason for many judges' reluc-

103. Frasca, *Estimating the Occurrence of Trials Prejudiced by Press Coverage*, 72 **JUDICATURE** 162 (1988).

104. *Id.* at 163.

105. *Id.* at 169.

106. *See supra* notes 72-89 and accompanying text.

107. **REARDON REPORT (TENT. DRAFT)**, *supra* note 43, at 228-58, app. C.

108. *See infra* notes 109-20 and accompanying text (discussing Stanga's Study).

109. J. Stanga, *supra* note 2, at 240-45 (setting forth the substance of the questionnaires and their responses); *see supra* notes 96-100 and accompanying text (discussing Stanga's

Study).  
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tance to cooperate with reporters was concern about "the dangers of 'pre-trial publicity'." 110 Such concern was apparently not an important factor for lawyers." 11 Unfortunately, the Washington, D.C. findings must be interpreted with great caution because of the impressionistic approach used by the bar association committee that generated them. Subjects were interviewed, but apparently not in any systematic manner." 2

Drechsel, however, gathered data from judicial sources in three states that suggests minimal concern about media interference with fair trials." 13 As Table 1 illustrates, judges in none of the states expressed much concern about prejudicial publicity, nor did the attorneys surveyed in Minnesota. Why more Minnesota prosecutors than defense attorneys complained about this issue is unclear; perhaps they perceive that prejudicial publicity can complicate prosecution if the defense makes an issue of it." 4

Of course, another plausible interpretation of this data is that prejudicial publicity is a multidimensional concept. 15 That is, few judges and lawyers may complain directly about media interference with fair trials, but that is what they have in mind when they complain about bias, sensationalism and even inaccuracy. Without further research, we cannot know whether this is the case and in any event, it seems surprising that so few sources would explicitly mention a problem that has received so much attention.

**110.** COMMUNITY EDUCATION COMM. OF THE YOUNG LAWYERS SECTION OF THE DISTRICT OF COLUMBIA BAR ASS'N, THE NEWS MEDIA AND THE WASHINGTON, D.C. COURTS: SOME SUGGESTIONS FOR BRIDGING THE COMMUNICATIONS GAP 14 (1972).

111. See *id.* at 15-16.

112. *Id.* at 3-5.

113. See NEWS MAKING, *supra* note 2, at 113; Drechsel, *Judges' Perceptions of Fair Trial-Free Press Issue*, 62 JOURNALISM Q. 388, 389 (1985).

114. Ironically, Drechsel also found judges and public defenders in Minnesota who complained vigorously that reporters frequently allowed themselves to be used by prosecutors.

NEWS MAKING, *supra* note 2, at 113. Drechsel also surveyed daily newspaper court reporters in Minnesota; only one of 24 mentioned feeling torn between the need to develop good stories and the possibility of interfering with a fair trial. *Id.* at 114.

115. Stanga also noted this possibility in light of some of the comments he obtained from lawyers. For example, he found one lawyer who said his client faced possible jury prejudice because of a general sentiment in the local press against junk yards given that his client was a junk dealer, although this was not germane to the issue of the case. J. Stanga, *supra* note 2, at 244-45.

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Table I

Percentage of Sources Citing "Biggest" Complaint

About Media Court Reporting

Minn. Minn.

Judges Prosecuting Defense

Type of Complaint Minn. N.E. Penn. Attys Attys

Reporters lack knowledge

about judicial system ... 15% 10% 17% 8% 6%

Inaccurate/incomplete

reporting ..... 35 53 53 25 38

Biased reporting ..... 16 10 0 4 18  
Sensationalism ..... 14 15 0 20 14  
Coverage interferes  
with fair trial ..... 1 6 0 14 6  
Miscellaneous\* ..... 18 6 30 30 18  
(n=99) (n=68) (n=30) (n=51) (n=50)

\* Includes respondents who specifically said "no complaint."

Another intriguing piece of evidence is a study by Regina Sherard of criminal defendants' perceptions of prejudicial publicity as a factor in their convictions.<sup>110</sup> Interviews were conducted with **138** male felons at the Central Missouri Correctional Center.<sup>117</sup> Fiftythree percent said they did not receive a fair trial, but of that **fiftythree** percent, only three inmates blamed media coverage.<sup>118</sup> Moreover, from the data one cannot be certain that the three even considered the publicity to have been literally prejudicial.<sup>119</sup> About half the inmates indicated that their arrests and/or trials had been covered by local news media; of those, about half said their cases received

**116.** Sherard, *Fair Press or Trial Prejudice?: Perceptions of Criminal Defendants*, 64 **JOURNALISM Q.** 337 (1987).

**117.** *Id.* at 338.

**118.** *Id.* at 339-40.

**119.** *See id.* The two most common reasons given for the perception that they did not receive fair trials were poor defense counsel and the fact that they were given what they perceived to be excessive sentences. *Id.* at 339. Sixty-nine percent of the interviewees had pleaded guilty. *Id.*

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minimal coverage. <sup>120</sup>

*C. If There Is a Problem, 'Are Guidelines Efficacious?'*

Almost since discussion of the fair trial-free press issue began—certainly since the Reardon Report and the development of bench-bar-press guidelines in various states—there has been a presumption that guidelines and standards can be an effective tool in

avoiding publication of prejudicial information. <sup>21</sup> This assumption rests on at least two premises: first, that sources and reporters will be familiar with such guidelines, and second, that they will follow them.

Two studies done in Wisconsin raise questions about the validity of the first assumption. <sup>122</sup> Dianne Hamilton surveyed county bar presidents in Wisconsin, asking them about their experience with voluntary guidelines developed jointly by the Wisconsin state bar, bench and media.<sup>123</sup> Twenty-four of fifty-six presidents responded and twenty-three of them said they didn't think most lawyers in their jurisdictions were familiar with the guidelines. <sup>24</sup> "[M]any respondents replied that 'I've never heard of this,'" Hamilton reported. <sup>25</sup>

Yet in the previous year, the Media-Law Relations Committee of the State Bar of Wisconsin had published a *Wisconsin Lawyer's Guide to the News Media* which contained the guidelines. <sup>26</sup>

Approximately six months after Hamilton's survey, Don Paley surveyed district attorneys and newspaper court reporters in thirtyone Wisconsin cities with daily newspapers.<sup>127</sup> Three-fourths of the district attorneys and two-thirds of the reporters responded.<sup>2</sup> Approximately two-thirds of the district attorney respondents reported no knowledge or familiarity with the state's fair trial-free press

guidelines; 129 of those who had some knowledge of the guidelines, only half knew that the guidelines provided specific recommenda-

120. *Id.*

121. *See supra* notes 43-57 and accompanying text (discussing various guidelines).

122. D. Hamilton, *The Evolution of Voluntary Bench-Bar-Media Agreements* (May 9, 1985) (unpublished manuscript on file at the Hofstra Law Review); D. Paley, *Free Press v. Fair Trial: Are Voluntary Guidelines a Solution?* (1985) (unpublished manuscript on file at the Hofstra Law Review).

123. D. Hamilton, *supra* note 122, at 4, app. A.

124. *Id.*

125. *Id.* at 4.

126. MEDIA-LAW RELATIONS COMM., STATE BAR OF Wis., *A WISCONSIN LAWYER'S GUIDE TO THE NEWS MEDIA* (1984) [hereinafter *LAWYER'S GUIDE*].

127. D. Paley, *supra* note 122, at 6.

128. *Id.* at 6.

129. *Id.* at 7.

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tions for courtroom behavior. 30 The newspaper reporters were more knowledgeable: seventy percent had some familiarity with the guidelines,'

131 and eighty-five percent of those respondents said journalists often referred to the guidelines while judges and attorneys did not. 3 2

On the other hand, a recent survey of judges, prosecutors, defense attorneys and reporters in the state of Washington has reached a different conclusion. Professor Val Limburg and three colleagues found the majority of superior court judges and prosecutors to be familiar with that state's bench-bar-press guidelines, although defense attorneys reported markedly less familiarity. 3 Levels of high familiarity were found more often among reporters than among the judges and lawyers. 34 However, unlike Paley-whose survey asked the respondents a series of true-false questions about the guidelines-the Limburg survey simply allowed respondents to rate their familiarity with the guidelines on a scale ranging from "not familiar" to "most familiar." 3 5

Several studies have attempted to measure the efficacy of guidelines in terms of the second premise underlying them: whether people actually follow them. In 1970, after conducting a national survey of attorneys, bar association leaders and editors, Professor J. Edward Gerald concluded that the Reardon guidelines had resulted in a lessening of prejudicial publicity by altering the behavior of both news sources and journalists. 1 6 Several years later, however, a content analysis of pre-trial crime news reporting by Tankard, Middleton and Rimmer, 13 7 found violations of the guidelines in two-thirds of the news stories in a national sample.'38 Even more sobering, their

130. *Id.*

131. *See id.* at 8.

132. *Id.*

133. *See* Limburg, Lovrich, Sheldon & Wasmann, *How Print and Broadcast Journalists Perceive Performance of Reporters in Courtroom*, 65 *Journalism Q.* 621, 623 (1988).

Sixty-two percent of the defense attorneys reported being only somewhat familiar or not familiar at all with the guidelines, compared with 12 percent of the judges and 37 percent of the prosecutors. *See id.* at 623, Table 1.

134. *Id.*

135. *Id.*

136. Gerald, *Press-Bar Relationships Progress Since Sheppard and Reardon*, 47 *JOURNALISM*

Q. 223, 232 (1970). A survey by the ABA in 1974 reached similar conclusions. See Tankard, Middleton & Rimmer, *Compliance with American Bar Association Fair Trial-Free Press Guidelines*, 56 *JOURNALISM Q.* 464, 464 (1979) (citing *LEGAL ADVISORY COMM. ON FAIR TRIAL AND FREE PRESS, AMERICAN BAR ASS'N, FAIR TRIAL FREE PRESS: VOLUNTARY AGREEMENTS* (1974)).

137. Tankard, Middleton & Rimmer, *supra* note 136, at 464.

138. See *id.* at 466. Of 167 stories examined, 113 contained a minimum of one violation. [Vol. 18:1

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research disclosed that violations were slightly more common in states with voluntary guidelines than in states without them.<sup>3</sup> The Tankard, Middleton and Rimmer findings<sup>140</sup> are consistent with the findings of a more recent study at Washington State University, which showed that most judges, lawyers and even journalists admitted relatively low rates of compliance with that state's guidelines.<sup>14</sup> Eighty-five percent of the print reporters rated their own behavior as consistent with the guidelines,<sup>42</sup> but only forty-two percent of the other respondents considered the print reporters to be in compliance with the guidelines.<sup>143</sup> Only half of the broadcast reporters and fewer than half of the defense attorneys rated themselves as generally compliant with the guidelines.<sup>1</sup> Nevertheless, the Washington study found that as prosecutors and print journalists gained more experience using the guidelines, they tended to view them more positively;<sup>45</sup> but defense attorneys, who tended to have less exposure to the guidelines,<sup>46</sup> liked the guidelines less as they gained more experience with them.<sup>4</sup> The Washington study also found that experience with the guidelines appeared to make the various occupations more tolerant of each other's major concerns.<sup>4</sup> For example, more experienced print journalists gave more weight to the values of fair trial and privacy and less to free press than print journalists with less experience with the guidelines.<sup>49</sup>

Other than to say that the state guidelines are apparently not as effective as their proponents might wish them to be, it is difficult to

*Id.*

139. *Id.* at 467.

140. *Id.* at 468 (setting forth a summary and the conclusion).

141. Sheldon, Lovrich, Limburg & Wasmann, *The Effect of Voluntary Bench-Bar-Press Guidelines on Professional Attitudes Towards Free Press, Privacy and Fair Trial Values*, 72 *JUDICATURE* 114, 116 (1988).

142. *Id.* at 116, Table 1.

143. *Id.* Sixty-nine percent of the judges and 67 percent of the prosecutors rated their own behavior as generally consistent with the bench/bar principles. Sixty percent of the other respondents gave such a rating to judges and 53 percent of the other respondents gave such a rating to prosecutors. *Id.*

144. *Id.*

145. *Id.* at 118.

146. *Id.* (referring to both public defenders and private defense attorneys).

147. *Id.* The authors concluded that the defense attorneys' reactions were a result of their perception that the media are unwilling or unable to abide by the guidelines. *Id.* at 119. Moreover, broadcast reporters were less favorably disposed toward the guidelines than print reporters. *Id.*

148. *Id.*

149. *Id.*

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generalize with confidence about this body of research. Consequently, it becomes more important to have a larger understanding of the working relationship between reporters and their judicial sources from which news of the criminal process emerges.

#### IV. NEWS MAKING IN THE JUDICIARY

##### A. Background

Despite all the attention the fair trial-free press issue received throughout the 1960s and into the 1970s, very little systematic research was done on relationships between journalists and sources in the judiciary. What scholarship there was focused on appellate courts, and primarily on the U.S. Supreme Court.<sup>150</sup> Yet, it is the journalist-source interaction in trial courts that would seem to be most relevant to the fair trial-free press issue.<sup>151</sup>

The first major theoretical, social scientific work on journalist-source interaction in the trial courts was Stanga's study of these relationships in three Wisconsin cities. <sup>152</sup> As Stanga astutely noted:

The real dynamics of the fair trial-free press issue, after all, are played out in the daily interactions between newsmen and their news sources. Accordingly, the way the newsman perceives and performs his job is important in determining the effectiveness of legal rules and norms in the "trial by newspaper" area."<sup>153</sup>

Stanga then took the role theory<sup>154</sup> and exchange theory<sup>155</sup> used in **150**. The leading work in this area is **D. GREY, THE SUPREME COURT AND THE NEWS MEDIA (1968)**.

**151.** See *supra* notes **69-106** and accompanying text (exploring and evaluating studies conducted to demonstrate the prevalence of prejudicial publicity).

**152.** J. Stanga, *supra* note 2; see *supra* notes **96-100** and accompanying text.

**153.** J. Stanga, *supra* note 2, at 342.

**154.** Role theory examines an individual's behavior "in terms of how it is shaped by the demands and rules of others, by their sanctions for his conforming and nonconforming behavior, and by the individual's own understanding and conceptions of what his behavior should be." Drechsel, *Mass Communication of the Law: Toward Theoretical Understanding of Journalists' Interaction with Judicial Sources*, *COMM. & L.*, Aug. 1986, at 25 (citing **ROLE THEORY: CONCEPTS AND RESEARCH 4** (B. Biddle & E. Thomas eds. 1966)). In the context of the fair trial-free press debate, role theory examines how reporters and sources view their own and each other's respective functions, and how these views affect their relationships. See **NEWS MAKING**, *supra* note 2, at 15-17.

**155.** Exchange theory postulates that human interaction is characterized by the exchange of something of value or utility in a social-psychological sense and in which there are rewards and costs. Drechsel, *supra* note 154, at 24. "[It] suggests that people will or will not interact depending on 1) the presence of tangible or intangible commodities to be exchanged; 2) power, which depends in part on the commodities the respective parties have; and 3) incentive." *Id.*; see *infra* text accompanying notes 159-63.

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other "news making" research <sup>156</sup> and applied it to interaction between journalists and police, judges, prosecutors and defense attorneys.

Using role theory, he recognized that some reporters fit the role of what he called "informers"-journalists who saw the press as an intermediary between policy-makers and the electorate and saw their jobs as giving the public facts on which democratic evaluations of government performance could be based. <sup>157</sup> He saw others fitting the role of "guardians"-journalists who perceived their jobs as overseeing government and guarding against government incompetence and misdeeds. <sup>158</sup>

Stanga next analyzed interactions between the journalists and

their sources in terms of an exchange model. 59 This approach seeks to explain the news making process as one in which the participants interact to the degree that each has something the other wants.', 0 He concluded that the reporters and sources exchanged such "commodities" as friendship, information and ego-massage, and he found the "informer" role orientation itself to be a commodity of exchange. 6' Although the tendency was for the reporter to operate most frequently as an "informer," 6 2 a reporter might assume informer orientations toward some sources and guardian orientations toward others. 6 3

One might logically guess that prejudicial publicity problems are most likely to be generated by "guardians," but Stanga's work suggests just the opposite:

The police reporter must rely on police to obtain most of his news. The informer is in a much better position to obtain that information than the guardian, for the informer does not approach news sources with a sense of mistrust, and even may identify with his sources. Since the reporter must rely on his news sources in order to obtain the kind of information he wants and when he wants it, there is a tendency for crime news to reflect a favorable bias toward news sources, particularly the police....

156. Stanga borrowed particularly from the work of Delmer Dunn and Bernard Cohen. See generally B. COHEN, *THE PRESS AND FOREIGN POLICY* (1963); D. DUNN, *PUBLIC OFFICIALS AND THE PRESS* (1969). Stanga was also influenced by the work of Dan Nimmo. See generally D. Nimmo, *NEWSGATHERING IN WASHINGTON* (1964).

157. J. Stanga, *supra* note 2, at 165.

158. *Id.* at 165-66.

159. *See id.* at 238-45.

160. *See id.*

161. *See id.* at 344.

162. *See id.* at 343.

163. *See id.* at 173.

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Since the police news source gives the informer-oriented reporter much potentially prejudicial information, the informer could report much more information adverse to criminal defendants than he does. But the debate over the fair trial-free press issue has made the police officer sensitive to the possible deleterious consequences, including reprimands to himself, of releasing such information *for publication*. Consequently, the informer obtains much more information than the guardian, but the price he must pay for it is the agreement not to publish everything he knows. Nonetheless, more news items potentially prejudicial to an accused should be reported by informers than guardians, simply because the informer has access to more information than the guardian."

The only other published work focusing specifically on routine interaction between journalists and sources in the trial courts has been a series of studies which this author has conducted. 106 The first of these studies was a preliminary descriptive survey of all non-metropolitan daily newspaper reporters in Minnesota."66 The study concluded that reporters relied most heavily on prosecutors, law enforcement sources, court clerks and judges as sources, and depended far less on defense attorneys; 67 the reporters rated most sources as quite

cooperative. 168 In addition, the results demonstrated that reporters pay more attention to criminal actions than to other court activity. 169

Subsequently, this study was expanded to include surveys of trial judges, court clerks, prosecutors, public defenders and private practice attorneys in Minnesota, 70 and surveys of trial judges in Wisconsin,<sup>71</sup> Pennsylvania<sup>72</sup> and a northeastern state.<sup>73</sup> The goal

164. *Id.* at 343-44 (emphasis in original) (footnote omitted).

165. See *infra* notes 166-75 and accompanying text.

166. Drechsel, *How Minnesota Newspapers Cover the Trial Courts*, 62 *JUDICATURE* 195 (1978).

167. *Id.* at 199. The defense attorneys generally provided background information. *Id.*

168. *Id.*

169. *Id.* at 198-99. Fewer than half the reporters covered miscellaneous civil cases. See *Id.* at 198. For a content analysis strongly confirming this point, see Drechsel, Netteburg & Aborisade, *Community Size and Newspaper Reporting of Local Courts*, 57 *JOURNALISM Q.* 71, 74-75 (1980).

170. *NEWS MAKING*, *supra* note 2, at 96-98.

171. Portions of the data from this study have been published in Drechsel, *Accountability, Representation and the Communication Behavior of Trial Judges*, 40 *W. POL. Q.* 685 (1987) [hereinafter *Accountability*], and Drechsel, *Uncertain Dancers: Judges and the News Media*, 70 *JUDICATURE* 264 (1987) [hereinafter *Uncertain Dancers*].

172. Drechsel, *Statistics: Pennsylvania Judges Survey 1986* (unpublished survey on file at Hofstra Law Review) [hereinafter *Judges Survey*].

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of this research was to develop a better and more theoretical understanding of how journalists and these sources interacted to generate judicial news. Certain portions of prior surveys were replicated while others were refined and expanded.<sup>174</sup> The results reported here are those most directly bearing on the concerns raised by the fair trial free press debate.<sup>175</sup>

### *B. Survey Methods and Findings*

1. The Survey Method.- In the study conducted by this author, data was collected through questionnaires administered by mail and in person from 1980 to 1986. In Minnesota, questionnaires were sent to all 207 state trial judges, to all eighty-seven county attorneys (state prosecutors) plus a dozen assistant county attorneys in the most heavily populated counties, to eighty-seven public defenders, and to all thirty-one daily newspaper reporters who covered courts.<sup>76</sup> Two-thirds of the judges and prosecutors, seventy-one percent of the public defenders and seventy-seven percent of the reporters responded. <sup>77</sup> In the northeastern state, superior court judges were surveyed during a judges' workshop in 1983 and responses were obtained from seventy-eight percent of the state's 125 judges.<sup>78</sup> In Wisconsin, all 199 circuit court judges were surveyed in late 1985 and three-fourths responded.<sup>79</sup> In Pennsylvania, surveys were administered to court of common pleas judges as part of a workshop in 1986 for president judges. Questionnaires were sent to all fifty-nine president judges expected to attend the workshop, and fifty-four percent responded. <sup>80</sup>

173. Portions of the data from this study have been published elsewhere. See Drechsel, *Judicial Selection and Trial Judge-Journalist Interaction in Two States*, 10 *JusT. SYs. J.* 6 (1985) [hereinafter *Judicial Selection*]. Due to an agreement between the author and state court administrators there, the name of the northeastern state is omitted. *Id.* at 10.

174. See *Judicial Selection*, *supra* note 173, at 9-10.

175. See *infra* notes 181-225 and accompanying text.

176. See NEWS MAKING, *supra* note 2, at 97-98. The responses from court clerks and private practice attorneys are less central to the fair trial-free press issue under consideration here and are excluded from the current analysis. This survey was conducted in late 1979 and early 1980. *Id.* at 96.

177. See *id.* at 97.

178. See *Judicial Selection*, *supra* note 173, at 10.

179. See *Accountability*, *supra* note 171, at 689; *Uncertain Dancers*, *supra* note 171, at 267.

180. See *Judges Survey*, *supra* note 172. President judges have administrative responsibilities for their judicial districts. 42 PA. CONS. STAT. ANN. § 325(e) (Purdon 1981). However, in many districts they also have full trial responsibilities; only two of the 32 respondents reported spending half or more of their time on administrative duties. See *Judges Survey*, *supra* 1989]

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## 2. Amount and Types of Interaction Between Journalist and Judicial Sources.-

As Table 2 indicates, journalists do have contact with judicial sources, particularly with prosecutors.<sup>181</sup> Although the measurements used in Minnesota and the northeastern state were rather crude, surveys in Wisconsin and Pennsylvania produced more specific results.<sup>182</sup> Wisconsin circuit court judges reported an average of about four contacts with reporters per month;<sup>183</sup> the Pennsylvania president judges reported an average of about five and one-half contacts per month.<sup>184</sup> The frequency of contact reported by Minnesota prosecutors suggests that prosecutors are in a position to influence journalists' agendas. The frequency of contact with Minnesota prosecutors versus defense attorneys suggests a prosecutorial bias that might lead to claims of prejudicial news coverage."<sup>5</sup>

Table 2

Percentage of Sources Indicating Frequency of Contact  
with Reporters During Past Six Months

Frequency of Contact

At Number

Source Type Least of

Never Once Weekly Daily Respondents

Minnesota Judges 10% 76% 13% 1% 129

Northeast Judges 21 69 9 0 75

Minnesota Prosecutors 2 58 41 0 64

Minnesota Public

Defenders 19 81 0 0 48

note 172, at 21.

181. Minnesota reporters were also asked about their frequency of contact with various other sources. The results in general resembled those reported by the sources themselves. Although the Minnesota research did not focus on law enforcement sources, fifty percent of the reporters reported weekly or daily contact with such sources. NEWS MAKING, *supra* note 2, at 101.

182. See *generally Uncertain Dancers*, *supra* note 171, at 268 (finding that ninety-seven percent of the circuit judges and all of the appeals judges surveyed in Wisconsin reported having been personally contacted by a reporter since assuming their judgeships); *Judges Survey*, *supra* note 172, at 2 (finding one hundred percent of the Pennsylvania judges surveyed reported having been personally contacted by a reporter while a judge).

183. See *Uncertain Dancers*, *supra* note 171, at 268.

184. See *Judges Survey*, *supra* note 172, at 4.

185. See *supra* note 100.

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It is also clear that judicial sources pay reasonably close attention to media coverage of cases with which they are involved. Table

**3** indicates that newspaper coverage appears to receive more attention than television coverage." This is an interesting finding in light of research suggesting that broadcast reporters are perceived to be more frequent violators of fair trial-free press guidelines than print reporters. <sup>87</sup> Of course, it may be that the judicial and legal sources responding generally read newspapers, but pay attention to television only in cases where they are concerned about the coverage.

Table 3

Who Generally Attend to Media Coverage of Cases They Handle Generally Attend to a. . .	Number
Type of Source Newspapers Television Responding	
Minnesota Judges 91% -- b 127	
N.E. Judges 70 -- b 95	
Pennsylvania Judges 72 46 32/28-	
Wisconsin Judges 71 <b>52</b> . 143/139	
Minn. Prosecutors 94 -- b 66	
Minn. Public Defenders 98 -- b 62	

aThe question was asked as either whether sources "generally read" accounts of cases they handle, or whether they "usually or always" do so.

bSource was not asked to distinguish newspaper from television.

cFirst number indicates respondents answering regarding newspapers; second number indicates respondents answering regarding television.

Further insight into the possible origins of prejudicial publicity can be gained by examining data on the types of information judicial sources give reporters. Tables 4 and **5** provide such data, with particular focus on types of information that might be problematic. The last three types of information—opinions, suggestions and guidance—are the most likely to cause prejudicial news coverage. At the very least, any sources offering opinion and speculation appear to flirt with violation of fair trial-free press guidelines. Despite this conclusion, Table 4 shows that one-fourth of the prosecutors and defense attorneys are willing to provide such information. <sup>88</sup> All of the sources, except for the northeastern judges, are quite willing to suggest stories and offer guidance on whether cases are worth coverage. The reporters' response generally parallels that of the sources.

187. Sheldon, Lovrich, Limburg & Wasmann, *supra* note 141, at 116. The research also suggested that broadcast reporters viewed themselves as behaving less consistently with the fair trial-free press guidelines than the print reporters. *See id.*

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ular focus on types of information that might be problematic. The last three types of information—opinions, suggestions and guidance—are the most likely to cause prejudicial news coverage. At the very least, any sources offering opinion and speculation appear to flirt with violation of fair trial-free press guidelines. Despite this conclusion, Table 4 shows that one-fourth of the prosecutors and defense attorneys are willing to provide such information. <sup>88</sup> All of the sources, except for the northeastern judges, are quite willing to suggest stories and offer guidance on whether cases are worth coverage.

The reporters' response generally parallels that of the sources.

Table 4

Percentage of Sources Who Have Provided or Would Provide Types of Assistance to Journalists	Minn.	N.E.	Wis.	Penn.	Public	
Type of Assistance	Judgesa	Judgesa	Judgesa	Judgesa	Prosecutorsa	Defendersa
Factual information about a case .....	<b>76%</b>	<b>30%</b>	<b>56%</b>	<b>53%</b>	<b>92%</b>	<b>71%</b>
Explanation of legal language and process	<b>95</b>	<b>59</b>	<b>88</b>	<b>91</b>	<b>95</b>	<b>89</b>
Source's opinion or speculation about case	<b>9</b>	<b>2</b>	<b>--</b>	<b>b</b>	<b>--</b>	<b>b 29 24</b>
Suggestions steering reporters to stories	46	14	47	56	62	41
Help deciding whether case is worth coverage	42	<b>11</b>	34	41	48	<b>39</b>

aNumber of respondents to each item ranged from **126** to **131** for Minnesota judges; 94 for the northeastern judges; 146 for the Wisconsin judges; **32** for the Pennsylvania judges; 61 to **63** for the prosecutors; and 61 to 62 for the public defenders.

bQuestion not included on Wisconsin and Pennsylvania surveys.

**188.** This finding is confirmed by the data from Minnesota reporters in Table 5. The reporters' response suggests that judges, too, are willing to offer opinions and speculation about cases. However, the reporters' response must be treated with some caution, because the cooperative response reported may come from a fairly small number of sources. Consequently, the response of the sources may be the more meaningful indicator. The sources' responses are also likely to be conservative, especially if one assumes that sources may be reluctant to admit the full degree of their cooperation.

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Table 5

Percentage of Minnesota Reporters

Who Have Obtained Types of Assistance from Sources\*

% of Reporters Obtaining Information

**From....**

Number

Type of Assistance Judges Prosecutors Defenders Responding

Factual information

about a case . . . . . 79% 100% 83% 24

Explanation of legal

language and process ... 83 88 58 24

Source's opinion or

speculation about case .. 35 44 39 23

Suggestions steering

reporters to stories ..... 63 54 33 24

Helping deciding whether

case is worth coverage .. 48 44 22 23

\* The reporters were asked the following question: "Again, think back over the past six months or so. This time . . . please indicate . . . those sources which, in response to your request, have supplied each type of information or assistance."

Another indicator of the nature of reporter-source interaction is the amount of unsolicited information that flows from sources to reporters.

Tables 6 and 7 provide a picture of the degree to which this occurs in the judiciary. With the exception of the northeastern judges, a considerable number of judicial sources admit having offered information to reporters.

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Table 6

Percentage of Sources

Who Have Volunteered Information to Reporters

Number

Type of Source Percentage Responding

Minnesota Judges **17%** 134

Northeastern Judges **2 95**

Wisconsin Judges **32 133**

Pennsylvania Judges 64 **28**

Minn. Prosecutors **39 66**

Minn. Public Defenders **16 63**

Table 7

Percentage of Minnesota Reporters Indicating

How Frequently Sources Have Offered Unsolicited Information

Reporters Who **Said...**

Number

Type of Source Never Rarely Occasionally Frequently Responding

Minnesota Judges **27% 32% 36% 5%** 22

Minn. Prosecutors 21 **38 25 17** 24

Minn. Public Defenders **29 52 19 0** 21

The reporters' responses, shown in Table 7, suggest that such communication may be even more common than the sources admit,

and the data, of course, says nothing about the type of information that is communicated in this manner. Nor can we tell whether this information is provided on or off the record, or whether it is ultimately published at all. Nonetheless, the reporters' response indicates that prosecutors are particularly frequent suppliers of unsolicited information and that defense attorneys are the least frequent suppliers.<sup>189</sup> Again, if there is an inherent bias in such information,

**189.** The large number of Pennsylvania judges who reported having volunteered information may be a result of their positions as president judges. See *supra* note **180** and accompanying text. In that capacity, they may frequently be offering information pertaining to the

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it would seem likely to favor the prosecution.'

3. Why Sources and Journalists Interact.- An attempt was made in the Minnesota survey to determine the degree to which the sources' cooperation with journalists might be attributed to the lawyers' desire to affect the outcome of the cases they handle."<sup>9</sup> As part of a list of possible reasons for cooperating, lawyers were asked whether they ever cooperated with journalists because they believed "publicity about a case might contribute to a just, correct result."<sup>19</sup> Seventeen percent of the prosecutors and forty percent of the public defenders said they had cooperated for that reason.<sup>93</sup> The reporters were asked a similar but not identical question: whether they believed various sources had ever cooperated with them because "they think the publicity may influence the outcome of a case to their liking."<sup>94</sup> Of the twenty-two reporters responding, only one thought judges ever did so, while four thought prosecutors did so and eight thought defense attorneys did.<sup>95</sup>

This, of course, was an indirect approach to the question of what role sources might be playing in generating potentially prejudicial publicity. A more direct approach was taken in the Wisconsin study, although lawyers and reporters were not surveyed.<sup>9</sup> Since 1969, Wisconsin has had voluntary fair trial-free press guidelines similar to those recommended by the Reardon Report.<sup>97</sup> Consequently, judges in Wisconsin were asked to rate on a scale of one to ten how likely they would be to cooperate more with journalists *but for* the guidelines.<sup>9</sup> They were also asked how likely they would be to cooperate more *but for* the fact that a reporter's questions involved a criminal rather than a civil case.<sup>99</sup> The higher the score assigned by the judge, the more the judge feels limited by the guideadministration and budget of the court system.

190. See J. Stanga, *supra* note 2, at 238-41 (examining the basic *quid pro quo* relationship between the newsman and the prosecutor); *supra* notes 181-85 and accompanying text (discussing prosecutorial influence on journalists).

**191.** See *NEW'S MAKING*, *supra* note 2, at 118-24.

192. *Id.* at 119, 123 (discussing the question asked).

193. *Id.* at 119.

194. *Id.* at 120.

195. See *id.*

196. See *Uncertain Dancers*, *supra* note 171, at 267 (stating that the survey questionnaires were sent to "circuit court and intermediate court of appeals judges ....").

197. *LAWYER'S GUIDE*, *supra* note 126; see also *supra* notes 44-66, 72-89 and accompanying

text (discussing and criticizing the Reardon Report).

198. See *Uncertain Dancers*, *supra* note 171, at 269 Table 7.

199. *Id.*

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lines or by the fact that the case is criminal.<sup>200</sup> Circuit judges gave the guidelines an average score of 4.7; they gave the criminal nature of the case an average of 4.6; they felt most limited by their general doubts about reporters' competence, giving that factor an average of 5.5.<sup>201</sup>

Such findings, though interesting, still do not help us understand the real dynamics of reporter-source interaction in the judiciary. However, the results in three of the four states suggested that many judicial sources are strikingly willing to cooperate with journalists—perhaps even more willing than journalists are to seek them out.<sup>202</sup> Consistent with this conclusion, the Minnesota survey found that reporters rated the vast majority of all judicial sources as "cooperative" or "very cooperative."<sup>203</sup> These findings suggest that "the press may find more of a reservoir of goodwill and understanding amongst bench and bar than it might expect,"<sup>204</sup> and that a conflict model is not appropriate for characterizing routine judiciary-media relations.<sup>205</sup>

How, then, might we best understand the interaction between reporters and sources that generates judicial news? As discussed earlier, Stanga placed his study of the press and criminal justice in the context of role and exchange theories.<sup>06</sup> Similarly, the Minnesota study concluded that journalists and judicial sources could be described as fitting role types and engaging in exchange behavior.<sup>07</sup>

The Minnesota study focused particularly on what might be called

200. *Id.* at 269 (indicating that judges "were directed to answer on a 10-point scale with one indicating not at all and 10 indicating a great deal.").

201. *Id.*

202. See generally **NEWS MAKING**, *supra* note 2, at 102-09; *Accountability*, *supra* note 171, at 695; *Uncertain Dancers*, *supra* note 171, at 266.

203. **NEWS MAKING**, *supra* note 2, at 109.

204. *Id.* at 139; see also J. Lipschultz, A Coorientational Analysis of Trial Lawyers and News Reporter Relationships (Aug. 11, 1989) (paper presented at the annual meeting of the Association for Education in Journalism and Mass Communication, Washington, D.C.) (on file at Hofstra Law Review) (concluding that trial lawyers and news reporters share many orientations toward news coverage of courts and see the value of cooperation).

205. The conflict model describes the relationship between reporters and sources as "competitive ... marked by a formal and untrusting atmosphere with infrequent and highly formal communication. Reporter and source disagree in their views of each other's responsibilities and on news judgment . . ." **NEWS MAKING**, *supra* note 2, at 17 (citing D. NIMMO, *supra* note 156, at 211-17).

206. See *supra* notes 154-63 and accompanying text (explaining role and exchange theories).

207. See **NEWS MAKING**, *supra* note 2, at 139.

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the "communication role orientations" of judicial sources.<sup>08</sup> It found that most judicial sources could be characterized as "informers," those who see their role in the communication process as providing information factually and without interpretation, or as "educators," those who see their role as providing interpretation expanding on the

facts to create better understanding.<sup>99</sup> Very few sources could be categorized as so called "promoters," those who see the communication process as a tool for influencing **policy**.<sup>210</sup> The only sources who showed signs of fitting that category were attorneys-particularly prosecutors.<sup>211</sup> This finding is consistent with concerns that prosecutors may be responsible for some prejudicial publicity problems, if the release of information reflecting badly on a defendant is seen as an attempt to influence the outcome of a case.<sup>212</sup> Role theory predicts that when "informer" and "educator" sources interact with reporters who see their communication roles as essentially similar to those of sources, relations between the two will be compatible-generally good and non-conflictive.<sup>213</sup> The Minnesota study validates this prediction.<sup>14</sup>

There were indications in the Minnesota data, however, that suggested other important variables. In general, the elected sources-judges and prosecutors-seemed more cooperative than those who were not elected.<sup>215</sup> Such a finding suggests that sources' public accountability might be a factor in explaining the emergence of news from the judiciary.<sup>16</sup> The study in the northeastern state presented an opportunity to explore this possibility further; trial judges in that state are appointed and never face voters.<sup>216</sup> Logic suggests that the media provide judges with a communication link to the public, and that judges who must face voters should be more likely to see a need to communicate with the public than judges who

208. *Id.* at 17-24 (discussing the roles of reporters and judicial sources).

209. *Id.* at 129.

210. *Id.*

211. *Id.*

212. *See id.*

213. Drechsel, *supra* note 154, at 27-28.

214. *See* Naws **MAKING**, *supra* note 2, at 129 (concluding that "judicial source-reporter relations should be generally compatible-relatively free of conflict.").

215. *Id.* at 109, Table 5.8 (setting forth reporters' view of judges' and prosecutors' willingness to cooperate).

216. *Cf. Judicial Selection*, *supra* note 173, at 14-16 (discussing the differing accountability of elected and non-elected judges in Minnesota and a northeastern state).

217. *Id.* at 10.

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never need face voters.<sup>21</sup> Consequently, it was hypothesized that trial judges in the northeastern state would be significantly less cooperative than those in Minnesota.<sup>19</sup> When the Minnesota survey was replicated in the northeastern state the results were precisely as hypothesized.

<sup>220</sup> As Tables 4 and 6 indicate, the non-elected judges were far less willing to provide assistance when asked and to volunteer information.

Striking though the findings were, the comparative study could not control for possible political, social, economic and other differences between the states. As a consequence, when the Wisconsin survey was undertaken, accountability variables were built into it. Since all judges in Wisconsin are elected, accountability was operationalized with a series of questions asking judges to indicate how answerable

or responsive they felt to constituents.<sup>22</sup> The Wisconsin survey results showed that accountability was not useful in explaining differences in the degree to which judges cooperated with journalists. <sup>222</sup>

It may be that accountability can be studied meaningfully only via multi-state comparison. Nevertheless, the results also showed that a number of other variables were useful in explaining judges' cooperation with journalists.<sup>223</sup> The most important was clearly the experiential variable constructed by combining judges' age, years in legal practice and years on the bench. This variable alone explained fifteen percent of the variation in cooperation. <sup>24</sup> Also important were judicial ethics and simple lack of time—each explaining six percent

<sup>218</sup>. *Id.* at 12.

<sup>219</sup>. *See id.* at 10 & n.3 (providing a full report of the aspect of the study testing this hypothesis).

<sup>220</sup>. *See id.* at 10-12.

<sup>221</sup>. *Accountability*, *supra* note 171, at 689-90; *see also* Drechsel, *supra* note 154, at

**23**, 28-30 (addressing the theory underlying accountability). In the Wisconsin study, accountability was one of several variables entered into a multiple regression equation. Regression is a statistical method that allows the researcher to see the unique contribution of each of several conceptually relevant, independent variables to variance in a dependent variable. In other words, through regression analysis, it is possible to see what percentage of the variation in judges' cooperation with reporters—the dependent variable—can be attributed to accountability and a variety of other relevant independent variables. The variables added to the multiple regression equation included the presence of local media, judges' age, years of legal and judicial experience, judges' political experience, degree of constraint by ethics and time, experience with adverse publicity, and "delegate" role orientation. *See Accountability*, *supra* note 171, at 693.

<sup>222</sup>. *See id.* at 695. Accountability was helpful in explaining judges' reliance on the news media for various purposes. *Id.* at 695-97.

<sup>223</sup>. *See id.* at 698-99.

<sup>224</sup>. *See id.* at 691. 694.

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of the variation.<sup>2</sup>

Perhaps more interesting for purposes of this Article was the finding that neither fair trial-free press guidelines nor distinction between civil and criminal cases significantly affected cooperation at all. Of course, fair trial-free press considerations may have been subsumed within the judicial ethics variable. Or it may simply be that the fair trial variable is not relevant to judges' cooperation but would be for other judicial sources. Nonetheless, the data gathered in Minnesota suggest that concerns about prejudicial publicity are unlikely to be an important factor inhibiting lawyers' cooperation either.

#### V. CONCLUSIONS

The social scientific research discussed in this Article suggests that relationships between media and judiciary cannot best be characterized by a conflict model. <sup>226</sup> This should not be particularly surprising given efforts at cooperation by bench, bar and media during the past two decades. Relationships between reporters and judicial sources are simply more compatible than competitive.

The evidence also indicates that the magnitude of the fair trial-free press issue may be overblown. Most judges and other judicial sources do not seem to perceive frequent, major problems with prejudicial publicity. <sup>227</sup> The Wisconsin study suggests that, at least

for judges, concerns about prejudicial publicity are not a significant factor in determining sources' interaction with reporters.<sup>228</sup> One could conceivably offer a negative interpretation of this finding: that judicial sources' interaction with reporters is not affected by this variable because, acting in their own or clients' self-interest, sources will not be deterred in the least by concerns about prejudicial publicity. Such an interpretation has little plausibility with respect to judges. It has more relevance with respect to lawyers. Perhaps this is one reason why, at least beginning with the Reardon Report, restrictions on would-be sources have been emphasized. Indeed, the Minnesota data showing the heavy reliance of journalists on law enforcement sources and prosecutors confirms the appropriateness of focusing attention on those sources when attempting to control pretrial publicity. <sup>29</sup>

225. *See id.* at 694.

226. *See supra* notes 204-05 and accompanying text.

227. *See supra* notes 107-13 and accompanying text.

228. *See supra* notes 198-201 and accompanying text.

229. *See supra* note 181-85 and accompanying text.

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As for fair trial-free press guidelines, the research suggests that there is little magic in them. Their chief value may be as a catalyst for judiciary-media discussion. It is at best questionable whether voluntary guidelines are widely known or followed. <sup>30</sup> Other variables, such as the role orientations of reporters and sources, <sup>31</sup> variation in the degree to which judicial sources are directly accountable to the public, <sup>232</sup> the age and experience of sources,<sup>233</sup> play a far more important role in determining the interaction between reporters and sources that generates judicial news.

After studying interaction between reporters and government agency press officers, Dan Nimmo concluded that issues involving government secrecy and news management "are as much a reflection of these relationships as they are causes of them. <sup>234</sup> Something very similar might be said of prejudicial publicity and the relationship between reporters and judicial sources. Prejudicial publicity may be not so much an indicator of poor relations between press and judiciary as it is a result of routine relationships between reporters and their judicial sources. The real key to understanding and solving any serious fair trial-free press problem lies less in developing rules and guidelines than in knowing about what animates interaction between journalists and their sources.

230. *See supra* notes 121-44 and accompanying text.

231. *See supra* notes 154-64 and accompanying text.

232. *See supra* notes 215-22 and accompanying text.

233. *See supra* notes 223-24 and accompanying text.

234. D. NINMO, *supra* note 156, at 208.

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## **MEDIA AND THE COURTS**

**Hon. Cynthia Stevens Kent (ret.)**

**Hon. Sharen Wilson**

### **[4.1.] Introduction**

Perhaps all that needs to be said on the issue of the media and the court is *People v. O.J. Simpson*. The lessons of that trial are obvious. The trial judge is directly and personally responsible for maintaining the dignity and decorum of the courtroom proceedings. The media's interests do not involve issues of fair trial and due process. Rather, the media's interests involve issues of public information, ratings, and financial benefits from coverage of a particular trial. Further, the attorney's interest in media coverage should be how media coverage might affect the resolution of his or her client's case and how he or she can appropriately deal with a capital case so as to protect his or her client and the integrity of our system of justice. Therefore, the trial judge must be aggressively involved in media management to ensure the constitutionally protected rights of the defendant to a fair trial and the societal right to justice in a properly conducted trial.

This chapter will address the legal guidelines in the area of free press and fair trial interests. Additionally, this chapter will address the pitfalls of the capital trial and what planning the justice system should take to appropriately address those concerns.

Much of the legal focus on the First Amendment versus the Sixth Amendment battle has been in the criminal law field. Judges can begin their preparation for the capital trial by studying not only the case law, but also the guidelines from the state court. Development of a trial court checklist for media intense cases can also assist the trial judge assigned to preside. Judges should also consider various security and press management issues.

### **[4.2.] Statutes and Rules for Media Issues**

The first question of the trial judge is what does the law require, prohibit, and leave to the trial judge's decision in media management of a case. Each state has some provision of law or rule which gives some guidelines for media management.

If a court, on its own motion or the motion of any party, is considering allowing broadcast of the court proceedings, a hearing on such decision is recommended in civil matters and might be considered even in a criminal case. The court can certainly consider evidence and argument of the parties on how the broadcast of these proceedings may affect the rights of the

parties or the ability of the court to provide a forum for the due and proper administration of justice in the case. The court should carefully consider the requests and objections which may be raised by the parties, witnesses, media representatives, other court personnel, and other individuals as to the inclusion or exclusion of broadcasting from the courtroom. If the broadcasting of the proceedings would interfere with the ability of the court to receive honest and complete testimony of any witness, the unfair public criticism of a witness or party, or the potential for tampering with the jury or the jury pool, such factors should carefully weigh in the court's decision on the motion. The trial judge is in charge of the courtroom and determines the extent of courtroom access to cameras and recording devices. However, the law dictates public trials. For the laws of each state visit the Radio-Television News Directors Association's website at [www.rtnda.org](http://www.rtnda.org) to find a state-by-state guide on use of cameras in the courtroom.<sup>414</sup> It cites the law in each state for media use. Some states do not allow cameras in the courtroom while others leave the decision up to the specific judge. In most cases, other recording devices and reporter attendance are not restricted. Even if a state does not allow cameras in the courtroom, there will still be media considerations in a capital case. In high profile cases, such as capital cases, the media's demands for access may be intense and the trial judge should understand the options, benefits, and pitfalls of media and capital case management.

#### **[4.3.] Court Proceedings Are Open to the Public**

There are very few cases where closing court proceedings have been allowed and the overwhelming case law provides that court proceedings are public and cannot be closed. Recently, the judge in the Martha Stewart criminal case tried closing the jury *voir dire*. This decision was vigorously challenged by the media and the appellate court ruled that such closure was improper.

As a general rule, all court proceedings should be open to the public. Most states provide for open courts. It is the best rule of thumb that all proceedings in a case will be held in open court and on the record.

There are some situations where statute or case law allows for the court proceedings to be closed. Examples of proceedings which may be closed to the public include certain juvenile proceedings and mental commitment hearings. Closing criminal proceedings should be carefully considered in light of the requirements for public trial. Criminal cases generally

protect the right to public and open proceedings. If any portion of a criminal hearing is closed, the judge should make extensive findings and have truly extenuating circumstances before closing the proceedings.

A four-part test is utilized for determining whether the right to a public trial has been violated: (1) the party seeking to close the hearing must advance an overriding interest which is likely to be prejudiced; (2) the closure must be no broader than necessary to protect that interest; (3) the court must consider reasonable alternatives; and (4) the court must make findings adequate to

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414 RTNDA, *Freedom of Information: Cameras in the Court: A State-By-State Guide*

(2009), [http://www.rtna.org/pages/media\\_items/cameras-in-the-court-a-state-by-stateguide55](http://www.rtna.org/pages/media_items/cameras-in-the-court-a-state-by-stateguide55).

[php?g=45?id=55](http://www.rtna.org/pages/media_items/cameras-in-the-court-a-state-by-stateguide55).

415 *See ABC, Inc. v. Stewart*, 360 F.3d 90 (2d Cir. 2004).

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support its action.<sup>416</sup>

In *Globe Newspaper Co. v. Superior Court for Norfolk County*,<sup>417</sup> the U.S. Supreme Court held that the protection of witnesses from extreme embarrassment or intimidation that would traumatize them or render them unable to testify is an overriding state interest sufficient to justify partial or complete exclusion of the press or public.<sup>418</sup> No state's interest, however compelling, can sustain the exclusion of press and public from part of a trial, absent findings of necessity articulated on the record.<sup>419</sup> Before closing a trial, the judge should state on the record his or her reasons for doing so to inform the public and enable the appellate court an opportunity to review the adequacy of the reasons.<sup>420</sup>

#### **[4.4.] Cameras in the Courtroom**

In 1935, a judge allowed still photography in the courtroom for the famous Lindbergh Baby Kidnapping trial.<sup>421</sup> There were about 700 reporters and 132 photographers in the courtroom during the trial, the media agreed not to show newsreels until after the trial, but during the trial they published and showed newsreels. Following this trial, the American Bar Association adopted Canon 35 of the Code of Judicial Conduct which made it unethical for a judge to allow broadcasting or still photography of courtroom proceedings.<sup>422</sup>

The trial of *Estes v. Texas*<sup>423</sup> demonstrated the problems which could occur with television coverage of a trial. During this trial, the television crews constructed a television booth in the courtroom, requiring cables to be snaked throughout the courtroom. As a result, the defendant appealed his conviction claiming a denial of due process. The U.S. Supreme Court reversed the conviction stating that the defendant's due process rights had been violated and that the defendant did not have to show actual prejudice in order to obtain a reversal. Essentially, the U.S. Supreme Court banned cameras in the courtroom except for ceremonial purposes. This was the first U.S. Supreme Court decision addressing the issue of in-court broadcasting but the numerous concurring and dissenting opinions in the plurality decision left the guidelines and full impact of this decision unclear.

In the *Estes* opinions, Justice Clark listed several ways that broadcasting

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416 *Waller v. Georgia*, 467 U.S. 39, 47 (1984) (citing *Press-Enterprise Co. v. Superior Court of California, Riverside County*, 464 U.S. 501 (1984)).

417 457 U.S. 596 (1982).

418 *Id.* at 606.

419 *Id.*

420 *Rovinsky v. McKaskle*, 722 F.2d 197, 200 (5th Cir. 1984).

421 *State v. Hauptmann*, 180 A. 809 (N.J. 1935).

422 The text of A.B.A. Canon 35 is as follows: Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom, during sessions of the court or recesses between sessions, and the broadcasting of such proceedings are calculated to detract from the essential dignity of the proceedings, degrade the court and create misconceptions with respect thereto in the mind of the public and should not be permitted. (A.B.A. 1937, pgs. 1134-1135).

423 381 U.S. 532 (1965).

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trial proceedings could influence jurors:

1. Pre-trial announcements of the intention to televise the trial could affect potential jurors;
2. Awareness of the camera's presence could distract the jury from the evidence;
3. Non-sequestered juries could be affected by the interpretation of the trial by the media coverage; and
4. Broadcast could jeopardize any retrial due to jurors' exposure to clips from the first trial.<sup>424</sup>

Further, Justice Clark expressed concern about the effect of the cameras on the witnesses and their discomfort at testifying not only before the judge and jury, but also before the entire viewing television audience, invocation of the rule of witnesses as well as a fear that individuals with evidence that would not come forward for fear of becoming famous

overnight.<sup>425</sup> He also expressed concern over the effect of broadcasting on the burden of the trial judge with the additional responsibility of supervising the cameras and the conduct of the reporters, as well as concerns about the judge and lawyers "playing" to the cameras.<sup>426</sup>

Finally, Justice Clark was concerned about the harm to the defendant in the form of mental harassment in having a trial televised and the possible creation of community bias.<sup>427</sup> Justice Clark directly held the trial judge responsible for the protection of the individual's right to a fair trial by an independent court system under the rule of law.<sup>428</sup>

Following the *Estes* trial many courts began to prohibit any cameras in the courtroom. The trial of *Sheppard v. Maxwell*<sup>429</sup> was another case where the trial judge permitted cameras in the courtroom. The situation was described as "bedlam reigned at the courthouse. People were standing on the counsel table taking photographs, defense counsel could not confer with his client without being overheard, exhibits were picked up and taken out – it was unbelievable."<sup>430</sup> This trial resulted in a ruling from the U.S. Supreme Court that defined the notion of fair trial within the context of prejudicial media coverage.

In *Chandler v. Florida*,<sup>431</sup> the U.S. Supreme Court held that permitting radio, television, and photographic coverage of criminal proceedings over the defendant's objections was constitutional absent a showing of abuse or actual prejudice. This decision has been challenged repeatedly, but the U.S. Supreme Court has consistently held that the First Amendment protection of a free press does not require unlimited access to the courtroom.

In the *Chandler* decision, the U.S. Supreme Court found that

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424 *Id.* at 545.

425 *Id.* at 547.

426 *Id.* at 548.

427 *Id.* at 549.

428 *Id.*

429 384 U.S. 333 (1966).

430 *Id.* at 355.

431 449 U.S. 560 (1981).

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broadcasting is not inherently prejudicial; rather, due to technological improvements, it is rarely prejudicial.<sup>432</sup> In fact, the U.S. Supreme Court found that camera coverage of a trial, when properly structured, does not create a significant adverse effect on the participants in the trial. The U.S. Supreme Court stated that to show a legally sufficient claim of denial of

due process caused by broadcast coverage of a trial, the complaining party must meet a high standard by demonstrating either: (1) the coverage compromised the ability of the jury to judge fairly, or (2) the coverage had an adverse impact on the trial participants sufficient to constitute a denial of due process.<sup>433</sup>

Thus, the *Chandler* court not only found that broadcast coverage was not presumptively unconstitutional or inherently prejudicial, it also reiterated the finding that a media organization does not have a First Amendment right to broadcast court proceedings. Further, the U.S. Supreme Court found that a defendant does not have a Sixth Amendment right to a publicly broadcasted trial. Rather, the U.S. Supreme Court found that the trial court had the discretion as to whether or not to allow in-court broadcast after balancing the procedure for such broadcasting and the fundamental right to a fair trial. Most state courts now allow for the broadcast of court proceedings under the discretion of the trial court. A total of 47 states now permit broadcast coverage and only three states prohibit broadcast coverage altogether.<sup>434</sup>

#### **[4.5.] Restricting Access to Jurors and Juror Information**

The courts have held that the unwarranted prior restraint on freedom of the press violates the First Amendment even when there existed a threat of harassment to the jurors if their names were disclosed during the trial.<sup>435</sup> The courts have stated that where the prohibition of the release of jurors' names is in violation of free press right and where the jury list was a public record, the prior restraint on the publication of the jury list was illegal.

However, there is case law which supports a judge's careful exercise of discretion to forbid news media from publishing the names and addresses of jurors in criminal cases. In the case of *Schuster v. Bowen*,<sup>436</sup> the U.S. District Court, District of Nevada, held, under the exceptional circumstances of that case, the prohibition on the publication of the names of jurors was necessary to protect the integrity and impartiality of the jury. The U.S. District Court, District of Nevada, held that the public's right to know was irrelevant since the names would be released on the last day of trial and the only imaginable public member who might make use of the information was the one who wished to tamper with the jury.

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432 *Id.* at 583.

433 *Id.* at 581.

434 See Todd Piccus, *Demystifying the Least Understood Branch: Opening the Supreme Court to Broadcast Media*, 71 TEX. L. REV. 1053, 1063 (1993).

435 See *Des Moines Register & Tribune Co. v. Osmundson*, 248 N.W.2d 493 (Iowa 1976);  
State ex rel. *New Mexico Press Ass'n v. Kaufman*, 648 P.2d 300 (N.M. 1982).  
436 347 F. Supp. 319 (D. Nev. 1972).

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In *U.S. v. Gurney*,<sup>437</sup> the Fifth Circuit Court of Appeals found the trial judge did not abuse his discretion in restricting the press access to the jury panel lists, since there were full findings as to a balanced use of discretion and release of those names which were called in open court.

The decisions in *Nebraska Press Ass'n v. Stuart*,<sup>438</sup> and *Nixon v. Warner Communications, Inc.*<sup>439</sup> provide guidance for entering restrictive orders dealing with the names and addresses of jurors. The U.S. Supreme Court set out the following determination to be made by the trial court:

1. The nature and extent of pre-trial news coverage;
2. Whether other measures would be likely to mitigate the effects of unrestrained pre-trial publicity; and
3. How effectively a restraining order would operate to prevent the threatened danger.<sup>440</sup>

Many states have laws which specifically provide for the confidentiality of juror information. Strict protection of this right should be provided by the courts. **[4.6.] Discharge Contact with and Instructions to Capital**

### **Jurors**

Most federal courts have local rules which severely limit, if not prohibit, post verdict contact with jurors. Before an attorney may contact a juror, counsel must file a motion with the court, show good cause, and obtain specific permission for the contact. Such permission is seldom granted. The historical purpose of these rules is to prevent the impeachment of jury verdicts and the harassment and manipulation of jurors to second guess their jury decisions. At least 51 of the 94 federal district courts "have adopted local rules governing whether and how attorneys may obtain post-verdict interviews with jurors."<sup>441</sup> Even where there is no local rule against contact with jurors, the appellate courts have restricted such contact by counsel.<sup>442</sup> The American Bar Association has also provided in its Code of Professional Conduct that a lawyer should not ask questions of or comment to a juror which might influence future jury service.<sup>443</sup> The federal courts have generally stood by their prohibition on postverdict contact with jurors, arguing that such contact could "easily lead to juror harassment, to the exploitation of their thought processes in conflict with Rule 606, and to diminished confidence in jury verdicts as well as unbalanced trial  
<sup>437</sup> 558 F.2d 1202 (5th Cir. 1977), cert. denied, 435 U.S. 968 (1978).

<sup>438</sup> 427 U.S. 539 (1976).

<sup>439</sup> 435 U.S. 589 (1977).

<sup>440</sup> *Nebraska Press Ass'n*, 423 U.S. at 562.

<sup>441</sup> Benjamin M. Lawsky, *Limitations on Attorney Post-verdict Contact with Jurors: Protecting the Criminal Jury and Its Verdict at the Expense of the Defendant*, 94 COLUM. L. REV. 1950, 1956 (1994).

442 *See Id.*

443 *See* MODEL RULES OF PROF. CONDUCT R. 3.5 (2002).

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results unduly depending on the relative resources of the party."444

Some states allow communication between the parties, counsel, and discharged jurors, provided that the communication complies with the state code of professional responsibility. Communications with jurors must not be calculated merely to harass or embarrass the juror or to influence the juror's actions in future jury service. Look to your state statutes for laws which provide for criminal penalties for tampering with a witness or informant, jury tampering, and bribery of a juror.

The trial judge may provide the jury with discharge instructions.

Variations on these instructions assist the court in protecting the jury from undue press attention or adverse public criticism. The jury members can be instructed that they are free to talk to anyone they want to about the case, but are also entitled to refuse to talk about the case and their verdict. If the jurors report any threat or other security concern, the sheriff's office stands ready to assist the jurors and their families in maintaining their privacy and peace from outside threat, harassment, or intimidation. An example of discharge instructions is located at Appendix 4.5.

#### **[4.7.] Practical Applications in a Capital Case**

The issue of the public's right to know the news and the media's job to report it, and the right of the litigants to a fair and impartial trial must be weighed and balanced carefully by the judge. The attorneys in any litigation should be focused on the actual preparation and trial of their cause of action and not on creating publicity which could influence the outcome of a particular trial.

Unfortunately, there are attorneys who believe that their cases should be tried in the court of public opinion instead of the court of law. Additionally, even in a case where the court and counsel are completely focused on the professional disposition of a case in the courtroom, the press may take an interest in a case and create a media focus which might adversely affect the due and proper administration of justice in a case.

A capital case will attract interest at the time of the alleged incident, the filing of the case, pre-trial hearings and the trial. Normally, pre-trial hearings will not attract significant media interest unless one of the parties or attorneys is improperly fanning the fire of media interest. However, capital cases are different and every hearing will generate some type of media comment or focus, particularly in smaller counties. Because of the unique attention of the media to capital cases, the trial court should carefully manage and limit the number and timing of pre-trial hearings. The trial court should enter appropriate pre-trial orders and discuss with counsel the need to limit pre-trial hearings which could unduly affect the potential jury pool.

A cautious trial court will enter a detailed pre-trial and trial management order with specific deadlines for discovery, hearings, jury selection and trial.

444 *U.S. v. McDougal*, 47 F.Supp.2d 1103 (E.D. Ark. 1999); *Haeberle v. Texas Intern. Airlines*, 739 F.2d 1019 (5th Cir. 1984).

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Some of the court's rulings can be carried until after the jury is selected to limit the effect of the publicity upon the jury pool. Once the jury is selected and placed under the court's instructions or sequestered, then the court can issue certain

rulings which might generate additional publicity or which might contain prejudicial information. The trial court should utilize its sanction authority if counsel attempts to try its case in the media or unduly prejudice the jury pool by filing pre-trial motions which try the case in the pleadings. A hearing on a pretrial matter can be set so that it does not hit the prime time media market or on the highest distribution day.

At the first hint that a case will be the focus of exceptional media attention, the trial judge should take appropriate steps to prepare the court staff to deal with the case. Development of protocols for dealing with a capital case should be addressed in the calm environment of life before the capital case. Once the case hits the press, the swirl of media attention may interfere with preparation of a capital case management plan by the court.

The trial court should promptly issue pre-trial orders, restrictive and protective orders, orders on conduct of counsel, and such other security or media orders necessary to focus counsel, the parties, and the witnesses on organization of the case for trial in a courtroom and not in the press. The entry of such orders and limitations on the number of pre-trial hearings and motions heard by the court may help protect the jury pool from damaging and prejudicial pre-trial publicity. The trial court should stand ready to enforce its orders through appropriate sanctions against the witnesses, parties, and counsel who seek to improperly influence the outcome of a case through the press.

#### **[4.8.] Restrictive and Protective Order**

The trial court should never enter a Gag Order. The very sound of the word raises an objection. However, many courts now look to appropriate restrictive and protective orders to protect a case from unfair pre-trial publicity and inappropriate comments by counsel regarding pending litigation. The use of a well drafted restrictive and protective order will set the tone of the trial. Attorneys and the public will sense that the judge is in control of the proceedings and is focused on providing the proper environment for a fair trial.

The court should consider promptly issuing a restrictive and protective order to prevent counsel, parties, and potential witnesses from adversely influencing the jury pool or impeding the due and proper administration of justice. This order should be issued timely, copies served on counsel, the parties, and witnesses and amended as needed. Copies should also be available for the media. A sample restrictive and protective order is contained in Appendix 4-1.

In *Nebraska Press Ass'n v. Stuart*,<sup>445</sup> the U.S. Supreme Court held that the state court's restraining order prohibiting the media from reporting accounts of the case was in violation of the First Amendment. These prior restraint orders are normally found to be in violation of the Constitution and should not be entered. However, the court is permitted to enter appropriate protective orders <sup>445</sup> 427 U.S. 539 (1976).

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controlling the dissemination of information from attorneys, parties, witnesses, court staff, and law enforcement agencies where the orders are necessary and appropriate for due process protection of rights.

The U.S. Supreme Court has held that the media has the same right of access to criminal trials as the public and that absent an overriding interest articulated in a finding, the trial of a criminal case must be open to the public.<sup>446</sup> Therefore, any restrictive order must be based on specific findings and articulate the overriding interest that made the basis of the restrictions.

#### **[4.9.] Court Information Officer**

In a capital case, the court may appoint a court information officer to assist the media with obtaining accurate information regarding state law and procedural matters in the case. This individual is not allowed to give opinions about the merits or demerits of the case but to assist in making sure that nonlawyer media representatives receive accurate information.

During the pre-trial hearings, the court information officer can moderate any press briefings and serve as a contact for information regarding case setting and court orders. During the trial the court information officer may hold daily press briefings, obtain public information for the press, and serve as a liaison to the press for public information about the case from the court and clerk's office. A benefit of appointing a court information officer is that he or she can become an effective presence in obtaining media compliance with the court's orders in the case. The eyes and ears in the press room allow the court to problem solve before the problem becomes serious enough to influence the trial. The court information officer should develop an open dialogue with the media to problem solve and yet maintain compliance with the court's orders. This will allow the media to obtain information and the court to maintain the proper dignity and decorum for judicial decision making.

#### **[4.10.] Retaining an Expert**

In a capital case, the court might consider retaining an expert to assist in media management. This expert can assist in pre-filing and post-filing publicity management and can assist the trial court in establishing orders and media management rules which will be effective in creating a calm, focused, and judicious atmosphere and approach to case disposition. An expert with a media and legal background will prove most effective in developing a positive media and legal approach to the case.

This expert can assist in development of a media committee to guide the court in media management and trial management issues. Working with the media through a skilled professional who is respected by the press can be the most valuable tool in management of the case. This will allow the media to express its needs, concerns, recommendations, and demands and will allow the

446 *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980).

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court to respond through the media expert. For expert assistance a good source is the Reynold's National Center for Courts and the Media.<sup>447</sup>

#### **[4.11.] Effectively Communicating and Working with the Media**

Sometimes you want the media to communicate your message, not just cover the trial. Your message is the good things you are doing or the goals you are trying to accomplish. Sometimes the media wants you to give them a story. Whatever you do, don't let the media overwhelm you – it provides you the opportunity to broadcast your message. We are all afraid of getting bad press. Your reputation and your relationship with reporters, as well as your skill in the mechanics of media, encourage them to cover your story the way you want it covered.

#### **[4.12.] Suggestions for Dealing with the Media**

Stay with your message. You should know exactly what you want the media to cover before you talk to them. It should not change. Until you have a good idea of your

message, you are not ready to talk to the media. You have many resources to assist you in preparing your message, and it's important you take the time to do it BEFORE you talk to a reporter.

- □ They can ask any question they want to ask. And you can answer any question you want to answer, even the one that "should have been asked." How often in a broadcast do you see the question being used? Look past the reporter to the public.

- □ Learn to talk in sound bites. Make a direct statement, elaborate a few key phrases and stop. The average sound bite is seven seconds.

- □ First, start with a declarative sentence. Say what you mean.

- □ Then, elaborate on your point. Add a brief explanation.

- □ Now, stop. STOP.

- □ Don't say more than you want to. Reporters have their ways of encouraging people to say more than they should. When you are finished with your answer, stop. Saying more than is necessary usually is a mistake.

- □ Don't say anything to a reporter that you don't want to see in print. There are no exceptions to this rule.

- □ Reporters are never off duty. See above.

- □ You can always call back. If a reporter asks a question that attempts to knock you off your guard, stop and

447 See <http://courtsandmedia.org>.  
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think. If you are off guard, say you need to check and call back. Whatever the question, there's one answer that works, "Let me get back to you on that one."

- □ Know the reporter's deadline. You can call the reporter back before the deadline. Make sure you know when it is. Don't miss having a good quote in the paper because you missed the deadline. If you know the deadline, you can also use that to miss a deadline, if you don't want to be quoted.

- □ Get the facts straight. Never say anything that isn't positively true. If you have made an error, call back with a correction. Reporters rely on you for correct information. Once you let them down with incorrect facts, they will be skeptical of you as a knowledgeable source.

- □ Don't let them put words in your mouth. When you get a "don't you think" question from a reporter, stop. Then repeat your own statement. Reporters will often repeat back to you something close to what you said by using a more inflammatory word. Then they attribute the inflammatory words to you.

#### **[4.13.] When the Media Calls**

Whenever a call is received from any media person, have your staff ask

the following questions:

1. Name?
2. Media organization?
3. Will Judge \_\_\_\_\_ be familiar with you?
4. What topics will you address?
5. When do you need a response?
6. Phone number?

#### **[4.14.] Building a Relationship with Reporters**

You have a professional relationship with reporters. That means they will never really be your friends. Remembering the rules of politeness will go a long way to keep them from being enemies.

Reporters are people too. Learn about their personal interests. It's safe to discuss topics you'd talk to your neighbor about. Don't tell jokes – they are rarely funny in print or broadcast. Don't say anything about politics or policy that you don't want to see in the newspaper.

Let them know on what you are working.

Give them facts they can use.

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Say thanks wherever it's warranted. Praise them for an interesting or well-researched story or mention a major piece they wrote where your name did not appear.

Don't pick a fight with someone who buys ink by the barrel and paper by the ton. Don't say anything you don't want your grandkids to see on YouTube. The media always has the last word. Even if you think you've been unfairly treated by the media, avoid making enemies. If there are serious errors in the coverage, contact the reporter who covered you to calmly discuss the story. Offer to clarify a point or fact. Ask for a correction, not a retraction. Ask for the opportunity to write or broadcast an editorial representing your viewpoint.

#### **[4.15.] Media Management Order**

A well written and edited media management order is essential to handle the press of the capital case. This order should be developed with input from the media expert, attorneys, sheriff, facility plant manager at the courthouse, court clerk, court information officer, and the trial court. The trial judge must sign the order and be willing to enforce its provisions. A model media management order is contained at Appendix 4-12.

#### **[4.16.] Media Room**

If the case is a capital case, the court should consider setting up a media room. This room may prove very useful in diverting the media professionals from the courtroom to a place more accessible to them, more convenient to conduct their writing and reporting tasks, and to a location which does not distract the court, counsel, litigants, witnesses, and most importantly, the jury from the trial focus and work in the courtroom. Many courthouses will not have adequate space for a proper media room, but if the judge looks at surrounding buildings, a media room space might be conveniently located adjacent to the courthouse. If the case is capital, many courthouses will cooperatively work to provide a media room in the courthouse with a little advanced planning. The media room should contain sufficient space, tables, chairs, telephone lines, cable access (preferably high speed), a copier, and an interview area. Most media plans will have the media committee allocate the expense of such a set up

among the media members requesting media room access passes. It is important to have the cooperation of the facility plant manager at the courthouse, the sheriff's office, and the presiding judge to set up the media room arrangements. If the court is allowing cameras in the courtroom, the designated pool television camera organization should make arrangements to provide the feed into the media room for the other media outlets. They should also arrange access for the other cameras to pool the audio and video feeds.

Organizations such as truTV448 are extremely efficient in setting up the pooling arrangements and the gavel to gavel feed to the media room. This setup 448 Formerly Court TV.

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normally will take one day of advance work by an experienced court television organization.

If the trial is not receiving gavel to gavel coverage, setting up the pool and media room feed may be a little more complicated and the media committee should take the lead in making those arrangements.

#### **[4.17.] Reserved Seating Plan**

In a capital case, there may be a large number of media representatives who want access to the courtroom during the trial, as well as members of the public, local schools, attorneys, courthouse officials and employees, and court security officers and their families. A courtroom, that is usually empty behind the bar, may be overflowing with interested persons. The court must address the seating plan and the attorneys should communicate their needs with the court. Counsel may need extra seating for their staff, co-counsel, parties, expert witnesses and room to stack the boxes of exhibits, depositions, and other documents needed for the trial. In a high-profile case, the space needs of counsel, the court, and the media may conflict. This demands early and cooperative planning.

It is important for counsel to notify the court, in writing, of any specific space and seating needs for the trial of the case. The importance of having the legal team available to assist in document handling, evidence retrieval, and production of deposition summaries during the trial is critical. Placement of these team members in a convenient location to counsel tables can assist in an orderly presentation of the case.

The court must assign seats for the general public to ensure compliance with the spirit of the open courts provisions of many state constitutions. The media will always request courtroom seating, but the media professionals seldom utilize all of the seating made available to them. This is especially true if the court is allowing gavel to gavel coverage which is delivered by closed circuit to the media room. The media will generally prefer to remain in the media room to snack, drink, work, talk, and watch the trial at the same time.

The court can assist by preparing a reserved seating chart. In a capital case, the court should issue seating passes, have a bailiff assigned outside the courtroom door to check passes before entry, and issue a public, press, student, and public information packet to give instructions to those wishing to watch the trial in the courtroom.

#### **[4.18.] Press Conferences**

If the case is extremely high profile, there will be an interest in daily press conferences or press briefings. If the trial court can limit the attorney's ability to give press conferences, the trial will progress quicker with the

attorneys, witnesses, and jurors focused on their jobs and not publicity. The appointment of a court information officer can help provide the press with accurate information on scheduling, legal terminology interpretation, and logistical information. This may help relieve the media pressure upon the

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attorneys and allow them greater freedom to focus on their cases. Following the trial verdict, the press will be extremely interested in interviewing the attorneys, witnesses, parties, and the jurors. At the conclusion of the trial, counsel should make themselves available to address questions in an ethical and professional manner. This may help foster public confidence in the justice system. Counsel should be careful not to be critical of the jurors so as not to improperly influence future jury pools.

#### **[4.19.] Media Truck Parking**

An enormous distraction to the jurors, witnesses, attorneys, and the general public is the parking of satellite trucks around the courthouse. The court should consider designated parking areas for the satellite trucks at a location which is not noticeable to jurors and others coming to the courthouse. Early direction, court orders, and constant enforcement of these parking restrictions is important to provide a quiet atmosphere and proper courthouse decorum for decision making in the case. The court's security and media order should address media truck parking. Cooperation by the local police department is needed to enforce these orders. The media will quickly forget and violate these orders unless promptly enforced by the police.

#### **[4.20.] Local versus National Media Interest and Compliance**

Generally, the court will have better success in having local media comply with the court's orders, because local media may need access to other cases in the future. Many times the national media anticipate this is the one and only time it will need access to that court and, therefore, its vested interest in compliance is directly related to how much access it is deprived of if it violates the court's order. Some organizations, such as truTV,<sup>449</sup> have developed an excellent reputation for cooperative and professional work. The key is to provide information to these media organizations about what the rules of access are and that they will be enforced.

#### **[4.21.] Courtroom and Courthouse Violations of Orders**

The trial judge must be committed to enforcing the courtroom and courthouse orders. If violators go unsanctioned, the violations will grow exponentially. Many judges will not relish the responsibility of enforcing orders against the media, but this is critical to an orderly trial. The maximum penalty is not needed for all violations; however, quick, decisive, and firm direction, correction, and response are needed when a violation occurs. The media should have a vested interest in working within the court's orders, not around them. If the media wants access to cameras in the courtroom, reserved seating, a media room, and the other arrangements which the court can provide in a carefully structured media order, then it must abide by the rules and restrictions which provide such open access.

<sup>449</sup> Formerly Court TV.

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#### **[4.22.] Jury Room and Jury Break Management**

In order to protect the jurors from the press, the court will need to provide the jurors with a safe, convenient, and secure location to assemble during breaks, in the morning before court, and during deliberations. This area should be

carefully protected from the inquiring eyes and voices of the media, witnesses, attorneys, and the parties. In extremely high profile cases, the court should consider sequestering the jurors or, at least, protecting arrival and departure from the courthouse from becoming publicly disseminated news.

Special pre-trial orders as to secure areas can help protect the jury from press exposure. The trial court should work with the local sheriff to help escort the jurors and keep others away from the jury room, break area, and ingress and egress from the courthouse. The court's bailiff should arrange snacks, drinks, and stretch breaks for the jury. Accommodations for rest rooms, smoke breaks, and meals should be planned so that the jury is not paraded in front of the press, witnesses, or litigants.

The court should give the jurors careful instructions with constant reminders regarding their duty not to talk to anyone about the case, read, listen, or watch anything discussing the case, or allow anyone to discuss the case around them. Communications with jurors during their service can result in contempt penalties, criminal punishment, and mistrials. The parties need to assist the court by carefully instructing their witnesses, litigation team, and parties not to have any contact or communication with the jury.

#### **[4.23.] Witness Ready Room and Instructions**

Another asset in protecting a case from being adversely affected by the media and public interest is to have a location for the witnesses to assemble when at the courthouse. They should receive careful instructions not to talk about the case. These instructions should also be posted in and around the witness ready room and counsel should be directed to discuss these instructions with their witnesses.

#### **[4.24.] Scheduling of Trial Day**

The trial schedule and media schedule are generally on two different planes of existence. The media's deadlines vary by media outlet and organization. The court's schedule varies depending on what other work the court has that day and the organization of counsel in having witnesses and evidence prepared for presentation. Consider clearing your calendar of other matters and devote extra ordinary time to the trial of the capital case. This will keep the lawyers working on the trial and not playing to the press. This will keep the courthouse and security personnel focused on their trial duties. This will keep the jurors in a more controlled environment, focus them on the evidence produced in the courtroom, and have them deliberating quicker, which limits opportunities for jury misconduct or tampering.

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The trial court should schedule the work day, publish that schedule, and keep the attorneys on track. Unscheduled delays are frustrating to the jury, counsel, the court's schedule, and allow the media to show a judicial system which appears unorganized and unprofessional. Keeping to a trial day schedule is difficult, but it can be accomplished by professional attorneys and an efficient and firm judge.

#### **[4.25.] Preparing the Judge and Court Staff for a Capital Case**

Remember that no matter how many capital cases you have presided over, the case which is drawing significant media attention should be carefully handled by the attorneys and the trial judge. This case is "on show" more than any others to demonstrate that our system of justice is effective or an embarrassment. A high degree of professionalism, ethics, and abilities of the

judge and staff are essential in all cases but are particularly important in a case where the public will be judging how our system of law responds to claims brought before the bar of justice. In handling a capital case, it is important that the public remain confident that the judge and attorneys are committed to fairness, justice and a scholarly application of the law.

The court's staff is an important part of the successful trial of a capital case. Before the first media event, whether pre-trial or trial, the judge and staff should review and discuss the media and trial management plan. The plan could be a formal document or a plan developed by experience in dealing with capital cases and should include procedures, schedules, and conduct. The court staff should consider the following:

- Limit casual remarks to jurors, other staff, and even friendly attorneys;
- Show no emotion or physical reaction to testimony or to events in the courtroom or to the jury at any time;
- Always be courteous and professional especially in the stress of the capital case;
- Jury panel processing and trial are open to the public even when jury empanelling is in a remote location;
- Always communicate problems and concerns to the judge as they arise; and
- Review in detail the plans for jury, media, and witness rooms and restrictive and protective orders.

#### **[4.26.] Conclusion**

This is not an all inclusive list of suggestions and thoughts, but these are some concluding thoughts to help you identify the focus and additional work that will accompany the capital case.

1. It takes a strong judge, professional and ethical attorneys, and lots of preparation and good luck to Presiding over a Capital Case • 85 provide a calm, reflective atmosphere in and around the trial proceedings to assure the proper decorum and adjudicatory environment for proper decision making.
2. The media may try hard to be responsive to the court's orders but some may try to push the limits to get the best shot, sound bite, or journalistic advantage. There will be some media members who will agree to abide by the orders and then violate them. Even when orders are specific and direct, some members of the media may read them with an eye to approving behavior in which they wish to engage and explaining away any prohibition on conduct they intend to perform irrespective of the court's orders.
3. The trial judge should communicate clearly the expectation that the attorneys will prepare their cases so that the trial of a capital case is tried in a timely and efficient manner. Delays, unnecessary recesses, hearings outside the presence of the jury, and unavailability of witnesses interrupt the trial's momentum and provide fertile ground for mistrials, jury misconduct, and media

mischief. Plan and prepare the trial court's schedule before trial and organize the work days for a smooth trial presentation flow. Encourage counsel to communicate with the court and opposing counsel regarding problems with witness availability and needed bench hearings.

Bench hearings should be held after the jury is recessed for the day. Jury work days should be full and focused.

Contested evidentiary issues should be raised before trial or the evening before that issue arises before the jury.

4. Limit press contact before the trial and during the trial.

There are situations where refusing to communicate with the media will dry up the high profile nature of the case and result in a calm forum for disposition of the factual and legal issues in the case. However, sometimes the high profile nature of the proceedings is not going away and so limited, managed, focused, and professional response regarding the case may give the media its sound bite without adversely affecting the jury pool or jury

# **Important Cases**

**Attorney-General -v- Leveller Magazine Ltd. And Others; Attorney-General -v- National Union Of Journalists; Attorney-General -v- Peace News Ltd. And Others**

**Court: House of Lords**

**Date: 1 February 1979**

**Coram: Lord Diplock, Viscount Dilhorne, Lord Edmund-Davies, Lord Russell of Killowen and Lord Scarman**

**References: [1979] 2 WLR 247**

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Cur ad vult

JUDGMENT

February 1, 1979.

LORD DIPLOCK.

My Lords. in November 1977 three defendants, two of whom were journalists, had been charged with offences under the Official Secrets Act. Committal proceedings against them were being heard before the Tottenham Magistrates' Court acting as examining justices. The proceedings extended over a considerable number of days. On the first day, on the application of counsel for the prosecution, some of the evidence was heard in camera pursuant to section 8 (4) of the Official Secrets Act 1920. On the third day, November 107 counsel for the prosecution made an application that the next witness whom he proposed to call should, for his own security and for reasons of national safety, be referred to as "Colonel A" and that his name should not be disclosed to anyone. The magistrates, upon the advice of their clerk, ruled, correctly but with expressed reluctance, that this would not be possible and that although the witness should be referred to as "Colonel A," his name would have to be written down and disclosed to the court and to the defendants and their counsel. The prosecution decided not to call that witness and the proceedings were adjourned.

The hearing was resumed four days later on November 14. The prosecution called, instead of "Colonel A," another witness. Counsel for the prosecution applied for him to be referred to as "Colonel B," and that his name be written down and shown only to the court, the defendants and their counsel. This was said to be necessary for reasons of national safety; risk to "Colonel B's" own security was not relied on. Counsel for the defendants raised no objection to the course proposed; the magistrates assented to it and the witness then gave evidence in open court. He was throughout referred to as "Colonel B"; his real name was never mentioned. For the purposes of the proceedings for contempt of court with which the Divisional Court and now your Lordships have been concerned, it must be taken, although initially there was conflicting evidence as to this, that the magistrates gave no express ruling or direction other than that the

witness was to be referred to in court as "Colonel B" and not by his real name and that his real name was to be written down and disclosed only to the court, the defendants and their counsel.

In the course of the cross-examination of "Colonel B" questions were put the effect of which was to elicit from him (1) the official name and number of the army unit to which he belonged and (2) the fact that his posting to it was recorded in a particular issue of "Wire," the magazine of the Royal Corps of Signals which is obtainable by the public. These answers enabled his identity to be discovered by anyone who cared to follow up this simple clue. The line of questioning which elicited this information was pursued without objection from counsel for the prosecution, the witness or the magistrates; and the answers which made his identity so easy to discover were included in the colonel's deposition read out to him in open court before he signed it.

In the issue of "Peace News" for November 18 these two pieces of information about "Colonel B" elicited in open court were published; and in the issue for December 16, the name of "Colonel B" was disclosed and an account was given of his military career. In the January and March 1978 issues of another magazine, "The Leveller," the name of "Colonel B" was published. Finally, in the issues of the "Journalist" for March and April 1978 published by the National Union of Journalists, "Colonel B" was again identified by name.

All this occurred before the trial of the defendants at the Central Criminal Court began.

On March 22, 1978, the Attorney-General brought in the Divisional Court proceedings for contempt of court against Peace News Ltd. and Leveller Magazine Ltd. and persons responsible for the publication in those periodicals of the articles which published the real name of "Colonel B"; and on April 18, 1978, he brought similar proceedings against the National Union of Journalists in respect of the articles appearing in the "Journalist." In each of these proceedings the statement filed pursuant to R.S.C., Ord. 52, r. 2 contained an allegation that at the committal proceedings in the Tottenham Magistrates' Court on November 14, 1978, not only had the magistrates permitted "Colonel B" not to disclose his identity but their chairman had also given an express direction in open court that no attempt should be made to disclose the identity of "Colonel B." Before the three motions, which were heard together, came on for hearing, an affidavit by the clerk to the Tottenham Magistrates' Court was filed, denying that any such explicit direction had been given by the chairman of the magistrates and stating that the reason why such a direction was not given was because he had advised the magistrates that they had no power to do so. In view of this evidence the hearing of the motions proceeded on the basis that no explicit direction had been given to those present at the hearing that no attempt should be made to disclose the identity of "Colonel B"; and that what had happened at the committal proceedings in relation to the witness being referred to only as "Colonel B" was as I have already stated it.

My Lords, it is not disputed that the disclosure of "Colonel B's" identity by the appellants was part of a campaign of protest against the Official Secrets Act. It was designed, no doubt, to ridicule the notion that national safety needed to be protected

by suppression of the colonel's name. The only question for your Lordships is whether in doing what they did the appellants were guilty of contempt of court.

The Divisional Court found contempt of court established against all appellants but made orders only against the National Union of Journalists and the two companies. The National Union of Journalists was fined £200. Peace News Ltd. and Leveller Magazine Ltd. were each fined £500. Against these orders these appeals are now brought to this House.

In the judgment of the Divisional Court delivered by Lord Widgery C.J. it is pointed out that contempt of court can take many forms. The publication by the appellants of the witness's identity after the magistrates had ruled that he should be referred to in their court only as "Colonel B" was held by the Divisional Court to fall into a class said to be exemplified in *Attorney-General v. Butterworth* [1963] 1 Q.B. 696 and *Reg. v. Socialist Worker Printers and Publishers Ltd., Ex parte Attorney-General* [1975] Q.B. 637 and variously described in the course of the judgment as "a deliberate flouting of the court's authority," "a flouting or deliberate disregard outside the court [of the court's ruling]," a "deliberate intention of frustrating the arrangement which the court had made to preserve Colonel B's anonymity" and finally a "deliberate flouting of the court's intention." I do not think that any of these ways of describing what the appellants did is sufficiently precise to lead inexorably to the conclusion that what they did amounted to contempt of court. Closer analysis is needed.

The only "ruling" that the magistrates had in fact given was that the witness should be referred to at the hearing in their court as "Colonel B" and that his name must be written down and shown to the court, the defendants and their counsel but to no one else. that it was also the only ruling that they intended to give is apparent from the fact that they had been advised by their clerk that it was the only ruling that they had power to give, however much they might have preferred to give a wider one. None of the appellants committed any breach of this ruling. What they did, and did deliberately, outside the court and after the conclusion of "Colonel B's" evidence in the committal proceedings, was to take steps to ensure that this anonymity was not preserved.

My Lords, although criminal contempts of court make take a variety of forms they all share a common characteristic: they involve an interference with the due administration of justice either in a particular case or more generally as a continuing process. It is justice itself that is flouted by contempt of court, not the individual court or judge who is attempting to administer it.

Of those contempts that can be committed outside the courtroom the most familiar consist of publishing, in connection with legal proceeding that are pending or imminent, comment or information that has a tendency to pervert the course of justice, either in those proceedings or by deterring other people from having recourse to courts of justice in the future for the vindication of their lawful rights or for the enforcement of the criminal law. In determining whether what is published has such a tendency a distinction must be drawn between reporting what actually occurred at the hearing of the proceedings and publishing other kinds of comment or information, for

prima facie the interests of justice are served by its being administered in the full light of publicity.

As a general rule the English system of administering justice does require that it be done in public: *Scott v. Scott* [1913] A.C. 417. If the way that courts behave cannot be hidden from the public ear and eye this provides a safeguard against judicial arbitrariness or idiosyncrasy and maintains the public confidence in the administration of justice. The application of this principle of open justice has two aspects: as respects proceedings in the court itself it requires that they should be held in open court to which the press and public are admitted and that, in criminal cases at any rate, all evidence communicated to the court is communicated publicly. As respects the publication to a wider public of fair and accurate reports of proceedings that have taken place in court the principle requires that nothing should be done to discourage this.

However, since the purpose of the general rule is to serve the ends of justice it may be necessary to depart from it where the nature or circumstances of the particular proceeding are such that the application of the general rule in its entirety would frustrate or render impracticable the administration of justice or would damage some other public interest for whose protection Parliament has made some statutory derogation from the rule. Apart from statutory exceptions, however, where a court in the exercise of its inherent power to control the conduct of proceedings before it departs in any way from the general rule, the departure is justified to the extent and to no more than the extent that the court reasonably believes it to be necessary in order to serve the ends of justice. A familiar instance of this is provided by the "trial within a trial" as to the admissibility of a confession in a criminal prosecution. The due administration of justice requires that the jury should be unaware of what was the evidence adduced at the "trial within a trial" until after they have reached their verdict; but no greater derogation from the general rule as to the public nature of all proceedings at a criminal trial is justified than is necessary to ensure this. So far as proceedings in the courtroom are concerned the trial within a trial is held in open court in the presence of the press and public but in the absence of the jury. So far as publishing those proceedings outside the court is concerned any report of them which might come to the knowledge of the jury must be withheld until after they have reached their verdict; but it may be published after that. Only premature publication would constitute contempt of court.

In the instant case the only statutory provisions that have any relevance are section 8 (4) of the Official Secrets Act 1920 and section 12 (1) (c) of the Administration of Justice Act 1960. Both deal with the giving of evidence before a court sitting in camera. They do not apply to the evidence given by "Colonel B" in the instant case. Their relevance is thus peripheral and I can dispose of them shortly.

Section 8 (4) of the Act of 1920 applies to prosecutions under that Act and the Official Secrets Act 1911. It empowers but it does not compel a court to sit to hear evidence in private if the Crown applies for this on the ground that national safety would be prejudiced by its publication. Section 12 (1) of the Act of 1960 defines and limits the circumstances in which the publication of information relating to proceedings before any court sitting in private is of itself contempt of court. The circumstance defined in section 12 (1) (c) is

"where the court sits in private for reasons of national security during that part of the proceedings about which the information in question is published; ..." So to report evidence in camera in a prosecution under the Official Secrets Act would be contempt of court.

In the instant case the magistrates would have had power to sit in camera to hear the whole or part of the evidence of "Colonel B" if this had been requested by the prosecution; and although they would not have been bound to accede to such a request it would naturally and properly have carried great weight with them. So would the absence of any such request. Without it the magistrates, in my opinion, would have had no reasonable ground for believing that so drastic a derogation from the general principle of open justice as is involved in hearing evidence in a criminal case in camera was necessary in the interests of the due administration of justice.

In substitution for hearing "Colonel B's" evidence in camera which it could have asked for the prosecution was content to treat a much less drastic derogation from the principle of open justice as adequate to protect the interests of national security. The witness's evidence was to be given in open court in the normal way except that he was to be referred to by the pseudonym of "Colonel B" and evidence as to his real name and address was to be written down and disclosed only to the court, the defendants and their legal representatives.

I do not doubt that, applying their minds to the matter that it was their duty to consider - the interests of the due administration of justice, the magistrates had power to accede to this proposal for the very reason that it would involve less derogation from the general principle of open justice than would result from the Crown being driven to have recourse to the statutory procedure for hearing evidence in camera under section 8 (4) of the Official Secrets Act 1920, but in adopting this particular device which on the face of it related only to how proceedings within the courtroom were to be conducted it behoved the magistrates to make it clear what restrictions, if any, were intended by them to be imposed upon publishing outside the courtroom information relating to those proceedings and whether such restrictions were to be precatory only or enforceable by the sanction of proceedings for contempt of court.

My Lords, in the argument before this House little attempt was made to analyse the juristic basis on which a court can make a "ruling," "order" or "direction" - call it what you will - relating to proceedings taking place before it which has the effect in law of restricting what may be done outside the courtroom by members of the public who are not engaged in those proceedings as parties or their legal representatives or as witnesses. The Court of Appeal of New Zealand in *Taylor v. Attorney-General* [1975] 2 N.Z.L.R. 675 was clearly of opinion that a court had power to make an explicit order directed to and binding on the public ipso jure as to what might lawfully be published outside the courtroom in relation to proceedings held before it. For my part I am prepared to leave this as an open question in the instant case. It may be that a "ruling" by the court as to the conduct of proceedings can have binding effect as such within the courtroom only, so that breach of it is not ipso facto a contempt of court unless it is committed there. Nevertheless where (1) the reason for a ruling which involves departing in some measure from the general principle of open justice within the courtroom is that the departure is necessary in the interests of the due administration of justice and (2) it would be apparent to anyone who was aware of the

ruling that the result which the ruling is designed to achieve would be frustrated by a particular kind of act done outside the courtroom, the doing of such an act with knowledge of the ruling and of its purpose may constitute a contempt of court, not because it is a breach of the ruling but because it interferes with the due administration of justice.

So it does not seem to me to matter greatly in the instant case whether or not the magistrates were rightly advised that they had in law no power to give directions which would be binding as such upon members of the public as to what information relating to the proceedings taking place before them might be published outside the courtroom. What was incumbent upon them was to make it clear to anyone present at, or reading an accurate report of, the proceedings what in the interests of the due administration of justice was the result that was intended by them to be achieved by the limited derogation from the principle of open justice within the courtroom which they had authorised, and what kind of information derived from what happened in the courtroom would if it were published frustrate that result.

There may be many cases in which the result intended to be achieved by a ruling by the court as to what is to be done in court is so obvious as to speak for itself; it calls for no explicit statement. Sending the jury out of court during a trial within a trial is an example of this; so may be the common ruling in prosecutions for blackmail that a victim called as a witness be referred to in court by a pseudonym (see *Reg. v. Socialist Worker Printers and Publishers Ltd., Ex parte Attorney-General* [1975] Q.B. 637); but, in the absence of any explicit statement by the Tottenham magistrates at the conclusion of the colonel's evidence that the purpose of their ruling would be frustrated if anything were published outside the courtroom that would be likely to lead to the identification of "Colonel B" as the person who had given evidence in the case. I do not think that the instant case falls into this class.

The ruling that the witness was to be referred to in court only as "Colonel B" was given before any of his evidence had been heard and at that stage of the proceedings it might be an obvious inference that the effect intended by the magistrates to be achieved by their ruling was to prevent his identity being publicly disclosed. As I have already pointed out however the evidence that he gave in open court in cross-examination did in effect disclose his identity to anyone prepared to take the trouble to consult a particular issue (specified in the evidence) of a magazine that was on sale to the public. This evidence was elicited without any protest from counsel for the prosecution; no application was made that this part of the evidence should be heard in camera; no suggestion, let alone request, was made to members of the press present in court that it should not be reported; and once it was reported the witness's anonymity was blown.

In these circumstances whatever may have been the effect intended to be achieved by the magistrates at the time of their initial ruling, this, as it seems to me, had been abandoned with the acquiescence of counsel for the Crown, by the time that "Colonel B's" evidence was over. I see no grounds on which a person present at or reading a report of the proceedings was bound to infer that to publish that part of the colonel's evidence in open court that disclosed his identity would interfere with the due administration of justice so as to constitute a contempt of court. Indeed the natural inference is to the contrary and it may not be without significance that no proceedings

were brought against "Peace News" in respect of the issue of November 18 in which this evidence was published, without actually stating what would be found to be the colonel's name if the particular issue of "Wire" were consulted. But if there was no reason to suppose that publication of this evidence would interfere with the due administration of justice, how could it reasonably be supposed that to take the final step of publishing the name itself made all the difference?

My Lords, I would allow these appeals upon the ground that in the particular and peculiar circumstances of this case the disclosure of "Colonel B's" identity as a witness involved no interference with the due administration of justice and was not a contempt of court.

The difficulty that has arisen, as my noble and learned friends Viscount Dilhorne and Lord Edmund-Davies point out, is because the proceedings were launched upon the basis that at the conclusion of "Colonel B's" evidence the chairman of the examining magistrates had "stressed that no attempt should be made to disclose the identity of Colonel B." At the hearing, however, the proceedings, if persisted in, had to be conducted on the basis that no such explicit statement had been made. So everything was left to implication except the actual ruling as to how the witness was to be referred to in court and as to the persons to whom alone his real name and identity were to be disclosed.

My Lords, in cases where courts, in the interests of the due administration of justice, have departed in some measure from the general principle of open justice no one ought to be exposed to penal sanctions for criminal contempt of court for failing to draw an inference or recognise an implication as to what it is permissible to publish about those proceedings, unless the inference or implication is so obvious or so familiar that it may be said to speak for itself.

Difficulties such as those that have arisen in the instant case could be avoided in future if the court, whenever in the interests of due administration of justice it made a ruling which involved some departure from the ordinary mode of conduct of proceedings in open court, were to explain the result that the ruling was designed to achieve and what kind of information about the proceedings would, if published, tend to frustrate that result and would, accordingly, expose the publisher to risk of proceedings for contempt of court.

VISCOUNT DILHORNE.

My Lords, the question to be determined in this appeal is whether the appellants were, as the Divisional Court held, guilty of contempt of court in publishing in "Peace News," "The Leveller" and the "Journalist" respectively, the identity of "Colonel B."

In the statements dated March 17 and April 17, 1978, filed pursuant to the rules of court in support of the Attorney-General's motions and which stated the grounds for the motions, it was alleged that they had revealed his identity after he had been referred to as "Colonel B" in the committal proceedings and

"(b) The said 'Colonel B' had properly been permitted not to disclose his identity when giving evidence to the said magistrates, [the chairman directing in open court

that no attempt should be made to disclose the identity of 'Colonel B']. (c) [The appellants were at all material times well aware that the aforesaid direction had been given.] (d) The said disclose of the identity of 'Colonel B' tended and as

calculated to prejudice the due administration of justice: it was intended to [flout the aforesaid direction and] make it difficult for witnesses in the position of 'Colonel B' to give evidence in open court."

The motions were supported by an affidavit sworn by Miss Anne Butler, a member of the Director of Public Prosecutions' office. In it she said that at the conclusion of the hearing on November 14, 1977, the chairman of the magistrates had "stressed that no attempt should be made to disclose the identity of 'Colonel B.'" In this, according to Mr. Pratt, the clerk to the magistrates, she was mistaken. In an affidavit sworn by him on April 27, 1978, he said that he had no recollection of that being said and in fact did not agree that it had happened. Paragraphs 3 and 4 of his affidavit read as follows:

"3. The Official Secrets Act provides for exclusion of all or part of the public and, in fact, the public was excluded during the playing of the tape but I am not aware of any other provision relevant to these proceedings enabling an order to be made such as is referred to or implied in Anne Butler's affidavit and that was the reason why the magistrates did not make any order such as she refers to - because I advised them that they had no power to do so. 4. I am not aware of any provision enabling my court to purport to impose any restriction on anything said in court in the presence of the public in the proceedings. ..."

At the hearing of the motions, the contention that the appellants had published "Colonel B's" name in breach of a direction given by the chairman was abandoned and the Crown sought leave to amend the statements filed by the deletion of the words which I have enclosed in square brackets. Leave to do so was refused.

Breach of the chairman's direction was clearly the main plank in the Crown's case when the proceedings were initiated. Abandonment of that contention meant that the Crown was consequently limited to establishing that the appellants had been guilty of contempt in publishing "Colonel B's" name after he had properly been permitted not to disclose his identity when giving evidence."

That they had done so after he had been given that permission was not in dispute. The question is whether, in all the circumstances of the case, that amounted to a contempt.

From his deposition it appears that at the commencement of his cross-examination "Colonel B" gave the following evidence:

"I have been with the Ministry of Defence for some three years. I left earlier this month. My posting was Colonel, General Staff, in the Defence Intelligence Staff. The Defence Intelligence number is D.I.24 Army. I realise that it may have been published in various publications but I am now aware it was published in 'Wire,' December 1971 - January 1975."

"Wire" is the Royal Corps of Signals magazine. Among the appointments listed in this issue was that of Colonel H. A. Johnstone M.B.E. as "Col GS DI 24 (Army) 11.74."

I do not know to what issue in the case the questions which elicited this information about "Colonel B's" career were directed. I assume that they were relevant to some issue. We were not told that any objection was made to them and it does not appear that any application was made for the hearing of his evidence in camera once the line the cross-examination was taking became apparent. However relevant the questions may have been, the answers given in open court made it possible for anyone who wished to do so to find out who "Colonel B" was. He had only to look at that issue of "Wire." In the issue of "The Leveller" of March 13, 1978, it was said that these answers given in open court enabled that paper and "Peace News" to "deduce his identity."

Unless the magistrates had power to prohibit and had prohibited it, the publication of this evidence could not be a contempt of court. It was not suggested that there had been any such prohibition or that the magistrates had power to impose one. If publication of the evidence could not be a contempt of court, was it a contempt to publish what could be deduced from that evidence, namely, the identity of "Colonel B"? In my opinion the answer is in the negative unless the magistrates had power to prohibit and had prohibited any attempt being made to ascertain his identity and the publication of his identity. The abandonment of the Crown's allegation that the chairman had given the direction alleged meant that it could not be contended that the publication of his identity by the appellants was in breach of a prohibition.

It follows that in my opinion the appellants were not guilty of contempt in disclosing his identity and on this ground I would allow these appeals.

If the magistrates had power to direct and had directed that "Colonel B's" name should not be published and such a direction was operative not only within but outside the court, then the case might be different. In *Reg. v. Socialist Worker Printers and Publishers Ltd., Ex parte Attorney-General* [1975] Q.B. 637 the Crown did not contend that the court had any power to make orders affecting the press or other media in their conduct outside the court and in the present case the Crown, rightly in my opinion, did not contend that examining magistrates had any such power. In *Taylor v. Attorney-General* [1975] 2 N.Z.L.R. 675, where the judge in a trial for offences under the Official Secrets Act 1951 of New Zealand made an order "prohibiting the publication of anything that may lead to the identification of officers of the New Zealand Security Service," the Court of Appeal of New Zealand held that he had power to make that order and that it operated outside the court. It is not necessary to express an opinion on whether that case was rightly decided. It suffices for me to say that in my opinion the courts of this country have no such power, except when expressly given by statute. Although in *Scott v. Scott* [1913] A.C. 417, 438 Lord Haldane expressed the view that in exceptional cases publication of what had occurred in camera might be prohibited for a time or altogether, that view was not endorsed by those sitting with him, Lord Loreburn saying, at p. 448, that the court did not possess any such power and Lord Shaw of Dunfermline, at p. 476, regarding its exercise as not only "an encroachment upon and suppression of private right, but the gradual invasion and undermining of constitutional security."

As there is no statutory provision which gives to a court power to make an order applying to all members of the public prohibiting the publication of information which might lead to the identification of a witness such as "Colonel B," it follows that

in my opinion the advice given by Mr. Pratt to his bench was right and that if the chairman had given any such direction, it would not have operated to convert conduct which otherwise did not constitute a contempt into one.

Were it not for the evidence given by "Colonel B" in open court from which his identity could be ascertained without difficulty, I would have been in favour of dismissing these appeals. It must have been clear to all in court and to all who learnt what had happened in court that the object sought to be achieved by the justices allowing "Colonel B" to write down his name was the preservation of his anonymity. Knowing that but believing that concealment of his name was not necessary in the national interest, the appellants disclosed his identity. But the effect of what the magistrates had permitted to be done was destroyed by "Colonel B's" evidence in open court, which, as I have said, made it possible for anyone who wished to do so to find out who he was.

If he had not given that evidence, then the appellants would have frustrated the object which the magistrates by their ruling sought to achieve. True it is that no warning was given that anyone who published his name might be proceeded against for contempt of court. In *Reg. v. Border Television Ltd. Ex parte Attorney-General The Times*, January 18, 1978, and *Reg v. Newcastle Chronicle & Journal Ltd. Ex parte Attorney-General* (unreported), heard together by the Divisional Court on January 17, 1978, it was held that in those cases no warning was necessary. While I do not think that it was strictly necessary for the magistrates to give such a warning in this case, I think it very desirable that in future cases where a court takes the course that the magistrates took in this case, a warning that publication of the witness's identity might lead to proceedings for contempt should be given. Such a warning will make it clear that it is not just a request not to publish that is being made, a request usually made when the identity of a person is inadvertently disclosed and one that is usually complied with.

In the Newcastle Journal case the fact that the defendant at a trial had pleaded guilty to four counts in an indictment was published during the course of her trial on the remaining 16 counts in that indictment. In the Border Television case there had been publication of what had happened in the course of a trial within a trial when the jury had been sent out so that they should not hear what was discussed. Each publication was held to be a contempt of court.

For conduct which frustrates what a court has done to be a contempt of court, the action taken by the court must be within its powers and the question which has troubled me is whether in this case the magistrates had jurisdiction to allow "Colonel B" to conceal his identity when the application was made on the ground that to reveal it would prejudice national safety. Section 8 (4) of the Official Secrets Act 1920 gives a court power to sit in camera if it appears that the publication of any evidence or statement would be prejudicial to national safety. This subsection does not require the application for a sitting in camera to be supported by evidence and in my opinion a court is entitled in the exercise of its discretion to make an order under it excluding the public in the light of the information given to it and the reasons advanced for taking that course. But the terms of that subsection cannot in my opinion be construed as giving power during a sitting in open court to permit or to direct that a witness's identity should not be disclosed.

Proceedings in the courts of this country are normally conducted in public. The courts have, however, inherent jurisdiction to sit in camera if that is necessary for the due administration of justice: see *Scott v. Scott* [1913] A.C. 417; *Reg v. Governor of Lewes Prison Ex parte Doyle* [1917] 2 K.B. 254, per Lord Reading C.J., at p. 271; *Attorney-General v. Times Newspapers Ltd.* [1974] A.C. 273, per Lord Reid, at p. 294. In *Scott v. Scott* Lord Loreburn said, at p. 446:

"... in all cases where the public has been excluded with admitted propriety the underlying principle, as it seems to me, is that the administration of justice would be rendered impracticable by their presence, whether because the case could not be effectively tried, or the parties entitled to justice would be reasonably deterred from seeking it at the hands of the court."

It cannot be said that disclosure of "Colonel B's" name would have rendered the trial of the three accused impracticable, nor is it in my opinion the case that its disclosure would have reasonably deterred the Crown from instituting prosecutions for offences under the Official Secrets Act which ought in the national interest to be brought. The likely result if the magistrates had refused the application made by the Crown would have been an application that the court should sit in camera for his name to be given, the rest of his evidence being given in open court, and the likely consequence in future cases that there would be more applications for sittings in camera. So in the present case the administration of justice was not rendered impracticable on either of the two grounds mentioned by Lord Loreburn. Nor do I think that it can be said that the writing down of "Colonel B's" name involved less derogation from the open administration of justice than the giving of his name in camera with the rest of his evidence being given in open court.

If the criteria which apply in relation to the exercise of the court's inherent jurisdiction to sit in camera apply in relation to allowing or directing a witness to write down his name, then I do not think that those criteria are satisfied in this case, but I have come to the conclusion that they do not apply.

Judges and justices have a wide measure of control over the conduct of proceedings in their courts. On occasions for a variety of reasons witnesses are allowed to write down a piece of evidence instead of giving it orally and I know of a number of occasions when in Official Secrets Act cases witnesses have been allowed to conceal their identity. In my opinion it is within the jurisdiction of the court to allow this in the exercise of control over the conduct of the proceedings just as a judge is entitled to send a jury out in the course of a trial and to have a trial within a trial.

In cases where a court permits this and takes every step within its power, short of sitting in camera, to preserve the anonymity of a witness, a person who seeks to frustrate what the court has done may well be guilty of contempt. The giving of evidence in open court by the unnamed witness from which his identity can be deduced is not likely to occur often and it was the giving of that evidence which frustrated the magistrates' efforts to conceal "Colonel B's" identity. As I have said it is only because that happened in this case that I think that the appeals should be allowed.

In my opinion *Reg. v. Socialist Worker Printers and Publishers Ltd. Ex parte Attorney-General* [1975] Q.B. 637 was rightly decided. There there was a deliberate

attempt to frustrate the effect of the court's direction that the names of the persons who alleged that they had been blackmailed should not be disclosed. The giving of that direction was a proper exercise by the court of its jurisdiction to control the conduct of the proceedings. It is generally, if not invariably, recognised that the disclosure of the identity of witnesses alleged to have been blackmailed is likely to deter others blackmailed from seeking the protection of the courts.

In the course of the argument section 12 (1) of the Administration of Justice Act 1960 was referred to. As that subsection deals only with the publication of information relating to proceedings in private, it has not, in my opinion, any relevance to this case.

For the reasons I have stated I would allow these appeals with costs here and in the Divisional Court.

LORD EDMUND-DAVIES.

My Lords, it is manifest that this appeal is of considerable public importance. The salient facts have been related in the speech of my noble and learned friend Lord Diplock and I shall not repeat them. Although I regard the proper outcome of these benighted proceedings as clear, the hearing in your Lordships' House has ranged over such a wide area that I do not propose to restrict myself simply to indicating how they should be disposed of. There has been much discussion of many aspects of the confused and confusing law relating to what, as the noble and learned Lord, Lord Cross of Chelsea, complained in *Attorney-General v. Times Newspapers Ltd.* [1974] A.C. 273, 322, is still unfortunately called "contempt of court" which were not touched upon when that appeal was heard in your Lordships' House. Though not strictly necessary for present purposes, in these circumstances it would, as I believe, be unfortunate if we withheld such views as we have formed regarding them, and I do not propose to do so. This seems all the more desirable in view of the fact that it was only 18 years ago that, for the first time, a general right of appeal in cases of civil or criminal contempt of court was created (see Administration of Justice Act 1960, section 13) and there has been comparatively little judicial comment on the topic meanwhile.

"The phrase 'contempt of court' does not in the least describe the true nature of the class of offence with which we are here concerned. ... The offence consists in interfering with the administration of the law; in impeding and perverting the course of justice. ... It is not the dignity of the court which is offended - a petty and misleading view of the issues involved - it is the fundamental supremacy of the law which is challenged." (*Johnson v. Grant* 1923 S.C. 789, 790, per Lord President Clyde.)

When contempt is alleged the courts have for generations found themselves called upon to tread a judicial tightrope, for, as Phillimore J. put it in *Re.r v. Blumenfeld Ex parte Tupper* (1912) 28 T.L.R. 308, 311:

"The court had to reconcile two things - namely, the right of free speech and the public advantage that a knave should be exposed, and the right of an individual suitor to have his case fairly tried. The only way in which the court could save both was to refuse an unlimited extension of either right. It became, then, a question of degree."

This dilemma most frequently arises in relation to press and other reports of court proceedings, for the public interest inherent in their being fairly and accurately reported is of great constitutional importance and should never lead to punitive action unless, despite their factual accuracy, they nevertheless threaten or prejudice the due administration of justice.

It is of paramount importance to examine at the outset the statement filed pursuant to R.S.C., Ord. 52, r. 2 in support of the present proceedings for contempt brought against Leveller Magazine Ltd., Peace News Ltd., the National Union of Journalists and various individuals. Taking as a typical example that filed on April 17, 1978, in relation to the "Journalist," we find the following assertions:

"(b) The said 'Colonel B' had properly been permitted not to disclose his identity when giving evidence by the said magistrates, the chairman directing in open court that no attempt should be made to disclose the identity of 'Colonel B.' (c) The said National Union of Journalists was at all material times well aware that the aforesaid direction had been given. (d) The said disclosure of the identity of Colonel B' tended and was calculated to prejudice the due administration of justice: it was intended to flout the aforesaid direction and make it difficult for witnesses in the position of 'Colonel B' to give evidence in open court."

The basis of these assertions unquestionably was the earlier affidavit of a Miss Butler, a member of the Director of Public Prosecutions' staff, that, the examining magistrates having ruled that "Colonel B's" name should be written down and shown only to the court, defence counsel and the defendants, on the Crown's contention that disclosure would not be in the interests of national security:

"At the conclusion of the proceedings on that day the chairman of the justices reminded the court of his earlier ruling and stressed that no attempt should be made to disclose the identity of 'Colonel B.'"

The words which I have emphasised undoubtedly constituted the "direction" relied upon by the Attorney-General in his motion to commit. But before it was heard. Mr. Pratt, the clerk to the justices, swore an affidavit in which he said:

"The Official Secrets Act provides for exclusion of all or part of the public ... but I am not aware of any other provision relevant to these proceedings enabling an order to be made such as is referred to or implied in Anne Butler's affidavit and that was the reason why the magistrates did not make any order such as she refers to - because I advised them that they had no power to do so."

Confronted by this latter affidavit, during the hearing of the motion counsel for the Attorney-General sought leave to amend his grounds by substituting the word "procedure" for the word "direction" in paragraphs (c) and (d) of the Attorney-General's statement. But the Divisional Court refused leave to amend. As I see it, it follows that the whole proceedings thereafter must be regarded as having taken place upon the basis that a committal was sought upon the single ground (a) that the magistrates had given a direction that no attempt must be made to disclose the identity of "Colonel B," and (b) that deliberate publication of his identity by the defendants sprang from their determination to disregard that direction. That, and that alone, was

the case which the respondents were called upon to meet. And, whatever view one may hold of their behaviour generally, in my judgment it is irrefutable that the respondents destroyed that case. Or perhaps it would be more accurate to say that it had already been destroyed by affidavit, for at no time during the hearing did the Attorney-General contend that the magistrates had in fact given the direction deposed to by Miss Butler. Yet the Divisional Court seemingly attached no importance to this decisive fact. Lord Widgery C.J. said [1978] 3 W.L.R. 395, 400:

"Central to all the respondents' arguments was the contention that this type of contempt requires a direction or mandatory order of a court and breach of that order, whereas here it is said that there was no order against disclosure, but merely a request."

After considering the challenge to Miss Butler's evidence, he continued, at pp. 400-401:

"In view of that conflict of evidence, counsel for the Attorney-General has not sought to rely on any disregard of such a statement, but relies on the earlier ruling in conformity with which it is said Colonel B gave his evidence. Indeed, if the chairman of the justices did say what Miss Butler says he said, its direct authority would only have gone to those within the court. The relevant ruling for present purposes was when the court gave permission for Colonel B to write down his name, in accordance with the same decision it had made for Colonel A. It is the authority of that ruling which is for consideration. If it was an effective ruling, a later so-called 'direction' would have added nothing to it, and consequently can be ignored."

A little later, dealing with the power of a court to allow a witness to write down his name, to order a witness to leave the court and so on, Lord Widgery C.J. added, at pp. 401-402:

"They are matters on which the court gives a ruling or a decision. The court may add something which can be called a formal direction, but no such formality is required. All such rulings are given, and only purported to be given, to those in court and not outside it. flouting in court of the court's ruling will be a contempt. Equally, a flouting or deliberate disregard outside the court will be a contempt if it frustrates the court's ruling. ... The fact that the justices' ruling had no direct effect outside the court does not prevent the publications here in question from being a contempt if they were made with the deliberate intention of frustrating the arrangement which the court had made to preserve Colonel B's anonymity. It is this element of flouting the court which is the real basis of the contempt here alleged. It can be sustained without proof that something like a direction or a specific order of the court has been breached."

Yet a little later, Lord Widgery C.J. added, at p. 402:

"The contempt here relied upon is the deliberate flouting of the court's intention. The public has an interest in having the courts protected from such treatment and that is the public interest on which the Attorney-General relies."

My Lords, I have to repeat with the greatest respect that the Attorney-General had moved to commit the defendants upon an entirely different basis and upon that basis

alone. The basis having in effect been abandoned by the Attorney-General in my judgment it was not open to the Divisional Court (and particularly after refusing to allow him to amend his grounds of application) to entertain an entirely different case upon which to commit the respondents for criminal contempt.

This is no mere judicial quibble. Persons charged with criminal misconduct are entitled to know with reasonable precision the basis of the charge. If proceedings such as the present were tried on indictment and the statement of the charge "Criminal Contempt," it would be impermissible to present a case wholly different from that outlined in the particulars of the charge and then to urge that the departure was immaterial, since the new misconduct relied upon was, like the old, simply another variety of criminal contempt.

Nor, my Lords, would it be acceptable were the Attorney-General to urge, in effect, that no injustice has here been done since the wishes of the court were clear and the determination of the respondents to flout or disregard those wishes equally clear. Mr. Sedley rightly observed that, if no direction was in fact given, thinking cannot have made it so, and the appellants were correct in thinking that by publishing they were breaching no ruling of the court. I have to say respectfully that I am uneasy at the view expressed by Lord Widgery C.J. that "the deliberate flouting of the court's intention" is sufficient to constitute criminal contempt, for as O'Connor J. said in *P. A. Thomas & Co. v. Mould* [1968] 2 Q.B. 913, 923:

"... where parties seek to invoke the power of the court to commit people to prison and deprive them of their liberty, there has got to be quite clear certainty about it."

In the absence of any such ruling as that deposed to by Miss Butler, but denied by the clerk of the court, was it the unmistakable intention of the magistrates in the present case that no one should behave as these defendants later did, particularly when those magistrates were specifically advised by their clerk that they had no power to make any order restricting the publication outside their court of "Colonel B's" identity. In such circumstances "intention" and "preference" seem indistinguishable. The latter would have been manifested by the expression of a mere request that no such publication should take place, and when the magistrates elected to discontinue sitting *in camera* and thereafter did no more than rule that in their court the name of the witness should be written down, their "intention" regarding what must or must not be done outside court was, in my judgment, indeterminable. Indeed, it was *ex hypothesi* non-existent, since they had been advised that they could in no way control such conduct. They might well have preferred that no publication of "Colonel B's" name should take place anywhere or at any time, but it is going too far to say that they had manifested an intention to do all they could to guard against it by ruling as they did. "No man should be condemned by an implication," observed my noble and learned friend, Lord Diplock, in the course of counsel's submissions. Condemnation is even more objectionable when the implication underlying the court's conduct is a matter of reasonable conjecture by reasonable people, and I have already indicated why I consider that such omission was fatal in the circumstances and should lead to these appeals being allowed.

I should add that I am for a like reason not wholly satisfied about the ratio decidendi of the Divisional Court in *Reg. v. Socialist Worker Printers and Publishers Ltd.*, Ex

parte Attorney-General [1975] Q.B. 637 in contempt proceedings following upon a blackmail prosecution in which the trial judge had directed that the victims who gave evidence should be referred to in court by letters, notwithstanding which the defendants proceeded to publish their names. I have ascertained that the ipsissima verba of the statement filed by the Attorney-General pursuant to R.S.C., Ord. 52, r. 2 were that:

"... the said witnesses be referred to by letters ... the said publication tended and was calculated to prejudice the due administration of justice by causing victims of blackmail to fear publicity and thus deter them from coming forward in aid of legal proceedings or from seeking the protection of the law and/or by holding up to public obloquy witnesses who had given evidence in criminal proceedings."

One of the two grounds upon which the Divisional Court granted the application to commit was (in the words of Lord Widgery C.J., at pp. 649-650):

"... that by publishing the names of these two witnesses in defiance of the judge's directions the respondents were committing [a] blatant affront to the authority of the court. ..."

If there was any "direction" it was at best implicit. And it should be observed that no publication of the victims' names took place until the judge was about to sum up, and there was accordingly no question of the administration of justice in that case being prejudiced by their being deterred from giving evidence for the prosecution. So the basis of the decision seems to be that publication was objectionable on the general ground that in any and every blackmail case the administration of justice in future prosecutions will be interfered with if victims' names are published. But, while many (and perhaps most) would accept this, is it necessarily so? I certainly recall one eminent judge (now retired) who in such cases scrutinised with very great care counsel's request that the victims should remain anonymous and emphatically rejected the idea that in every such case the administration of justice would automatically be prejudiced by publication. Counsel for two of the appellants in the present case submitted that it does not follow that everything done which had the effect of deterring possible witnesses necessarily constitutes a contempt, the proper test being whether it is a prohibited act calculated to deter. The time may yet come when this House will be called upon to adjudicate upon the point.

Neither in *Reg. v. Socialist Worker Printers and Publishers Ltd.*, *Ex parte Attorney-General* [1975] Q.B. 637 nor in the instant case did the court give any direction against publication purporting to operate outside the courtroom. It has to be said that hitherto the view seems to have been widely accepted that no such power exists. Thus, in the *Socialist Worker* case the present Attorney-General submitted, at p. 639:

"The trial judge did not give any express direction about revealing the names of the witnesses in the press. Indeed, he had no power to make orders affecting the press or other media in their conduct outside the court."

He nevertheless added:

"The direction could only protect the witnesses effectively if their names were not revealed subsequently. Hence the direction was concerned with publication outside as well as inside the court."

Defence counsel likewise submitted, at p. 640: "A trial judge has no power to order the press not to publish matters elicited at an open trial.'

In the present appeal, again, appellants and respondents alike concurred in submitting that (as, indeed, Lord Widgery C.J. had himself observed: see [1978] 3 W.L.R. 395, 401), the magistrates' court had no power to direct that there should be no publication in the press or by any other means of the identity of the "Colonel B" who had given evidence before them. Lord Rawlinson Q.C., for the Attorney-General, told your Lordships in terms that the court could not direct the outside world, but added that its ruling nevertheless extended outside its walls. For myself I found this difficult to follow, particularly as no illustrations were forthcoming of what learned counsel had in mind. After considerable reflection I have come to the conclusion that a court has no power to pronounce to the public at large such a prohibition against publication that all disobedience to it would automatically constitute a contempt. It is beyond doubt that a court has a wide inherent jurisdiction to control its own procedure. In certain circumstances it may decide to sit wholly or in part in camera. Or witnesses may be ordered to withdraw, "lest they trim their evidence by hearing the evidence of others" (as Earl Loreburn put it in *Scott v. Scott* [1913] A.C. 417, 446). Or part of a criminal trial may be ordered to take place in the absence of the jury, such as during the hearing of legal submissions or during a "trial within a trial" regarding the admissibility of an alleged confession. Or the court may direct that throughout the hearing in open court certain witnesses are to be referred to by letter or number only. But it does not follow that were a person (and even one with knowledge of the procedure which had been adopted) thereafter to make public that which had been wholly or partially concealed, he is ipso facto guilty of contempt. Nothing illustrates this more clearly than the hearing of evidence in camera,

"... it [being] plain that inherent jurisdiction exists in any court which enables it to exclude the public where it becomes necessary in order to administer justice." (*Rex v. Governor of Leazes Prison, Ex parte Doyle* [1917] 2 K.B. 254, per Viscount Reading C.J., at p. 271).

It might be thought that disclosure of that which had been divulged only in secret would in all cases constitute the clearest example of contempt. Thus we find Oliver J. saying in *Rex v. Davies, Ex parte Delbert-Evans* [1945] 1 K.B. 435, 446:

"... everything the public has a right to know about a trial ... , that is to say, everything, that has taken place in open court, may be published, and beyond that there is no need or right to go." (The italics are mine.)

But *Scott v. Scott* [1913] A.C. 417 has long established that this is not so. And the Administration of Justice Act 1960 provides in terms by section 12 (1):

"The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases ..."

Five types of proceedings are then set out, ending with

"(e) where the court (having power to do so) expressly prohibits the publication of all information relating to the proceedings or of information of the description which is published."

Section 12 (4) provides:

"Nothing in this section shall be construed as implying that any publication is punishable as contempt of court which would not be so punishable apart from this section."

I am in respectful agreement with Scarman L.J. who said in *In re F. (orse. A.) (A Minor) (Publication of Information)* [1977] Fam. 58, 99 that this last obscure subsection

"... was enacted to ensure that no one would in future be found guilty of contempt who would not also under the pre-existing law have been found guilty."

And what appears certain is that at common law the fact that a court sat wholly or partly in camera (and even where in such circumstances the court gave a direction prohibiting publication of information relating to what had been said or done behind closed doors) did not of itself and in every case necessarily mean that publication thereafter constituted contempt of court

For that to arise something more than disobedience of the court's direction needs to be established. That something more is that the publication must be of such a nature as to threaten the administration of justice either in the particular case in relation to which the prohibition was pronounced or in relation to cases which may be brought in the future. So the liability to be committed for contempt in relation to publication of the kind with which this House is presently concerned must depend upon all the circumstances in which the publication complained of took place.

It may be objected that, in an area where the boundaries of the law should be defined with precision, such a situation confronts those engaged in the public dissemination of information with perils which cannot always be foreseen or reasonably safeguarded against. To retort that this has always been so affords no comfort, but intelligent anticipation of what would be fair and what would be unfair can go a long way to ease the burden of the disseminators. They would themselves be in all probability the first to resist court "directions" as to what they may or may not publish, and I have already expressed my disbelief in their general validity. But the press and others could, as I believe, be helped were a court when sitting in public to draw express attention to any procedural decisions it had come to and implemented during the hearing. to explain that they were aimed at ensuring the due and fair administration of justice and to indicate that any who by publishing material or otherwise acting in a manner calculated to prejudice that aim would run the risk of contempt proceedings being instituted against them. Farther than that, in my judgment, the court cannot go. As far as that they could, as I believe, with advantage go. The public and the press would thereby be relieved of the burden of divining what was the court's "intention," for this would have been made clear and it would be up to them to decide whether they would

respect it or frustrate it. Even so, ignoring the warning by disobedience or otherwise would not of itself necessarily establish a case of contempt. But the knowledge that the warning had been given should prove at least a guide to possible consequences and would render it impossible for the person responsible for publication to urge (as was done in *Reg. v. Socialist Worker Printers and Publishers Ltd. Ex parte Attorney-General* [1975] Q.B. 637, 646A-B) that he was under the impression that the court had merely requested that there be no disclosure of certain specified matters, or that, as the editor of the "Journalist" said in the present case:

"... my understanding was that [Colonel B] had been permitted to write his name down rather than give it in evidence but that there was no direct [intimation] . ... that his name should not be published."

Were such intimation as I have in mind given by the court, the possible plea of a publisher that he had no knowledge of it would be of little moment. In such cases as the instant one, we are concerned not with improper publication by a private individual (as to whom nothing presently arises) but with people controlling or connected with powerful organs of publicity who, for reasons of their own (one of which may be no more than the desire to boost sales), decide to take the course of defiant dissemination of matter which ought to be kept confidential. It is incumbent upon such people to ascertain what had happened in court. They have the means of doing this, and they cannot be heard to complain that they were ignorant of what had taken place. Perhaps the time has come when heed should be paid to the view expressed in the Phillimore Report on Contempt of Court (1974) (Cmnd. 5794), at p. 60, in reference to *Reg. v. Socialist Worker Printers and Publishers Ltd., Ex parte Attorney-General* [1975] Q.B. 637:

"We incline to the view that the important question of what the press may publish concerning proceedings in open court should no longer be left to judicial requests (which may be disregarded) nor to judicial directions (which, if given, may have doubtful legal authority) but that legislation ... should provide for these specific circumstances in which a court shall be empowered to prohibit, in the public interest, the publication of names or of other matters arising at a trial."

Although it should be unnecessary, perhaps I ought to add that nothing I have said should be regarded as implying that there can be no committal for contempt unless there has been some sort of warning against publication. While, for the reasons I have indicated, it would be wise to warn, the court is under no obligation to do so. And there will remain cases where a court could not reasonably have considered a warning even desirable, such as where the later conduct complained of should not have been contemplated as likely to occur. *Reg. v. Newcastle Chronicle & Journal Ltd., Ex parte Attorney-General* (unreported), January 17, 1978, is an example of such a case. There the Divisional Court rightly held contempt proved where, during the course of a trial on an indictment containing 20 counts for dishonesty, a newspaper reported that on arraignment on the first day the defendant had pleaded guilty to four of the counts and that the trial was proceeding only on the remaining 16. Lord Widgery C.J. rightly commented:

"It is to be observed that the learned trial judge gave no sort of warning to representatives of the press in his court that the evidence would contain matter which

should not be reported. I do not think that there is any obligation on the judge to give a warning to the press, or indeed to anybody else, when the matter complained of and relied upon is so elementary and well understood as this one. ... Certainly it does not seem to me to be an unfair burden on the newspaper reporter to say that he ought to know (and, knowing, ought to practise in his profession) that any reference to additional offences committed by the accused is something which ought to be kept out of the jury's ears unless there is some clear exception which covers the matter."

My Lords, I said at the outset that I should digress, and I fear I have done so at some length, but I comfort myself by the reflection that I am not alone among your Lordships in this respect. Let me now return to the matter in hand and say that, for the reason earlier indicated, I hold that all these appeals should be allowed.

LORD RUSSELL OF KILLOWEN.

My Lords, I propose to state briefly my conclusions on the questions relevant to this case. From what happened in connection with the deposition of "Colonel B," and from the opening sentence of that deposition itself, it was clear that the examining magistrates decided that his identity should have strictly limited publication. Contempt of court in its essentials consists in interference with the due administration of justice. It is true that in this case the application by the Crown to which the magistrates acceded was based upon the suggestion that revelation of the witness's identity would be inimical to national safety, and no specific mention appears to have been made of the requirements of the due administration of justice. But this was a prosecution under the Official Secrets Act. In my opinion it really goes without saying that behind the application (and the decision) lay considerations of the due administration of justice. In the first place an alternative to the *via media* adopted would be an application that "Colonel B's" evidence be taken *in camera*, and in principle the less that evidence is taken *in camera* the better for the due administration of justice, a point with which journalists certainly no less than others would agree. In the second place a decision on anonymity - the *via media* - would obviously, and for the same reasons, be highly desirable in the interest of the due administration of justice as a continuing process in future in such cases. In the third place it appears to me that the furtherance of the due administration of justice was the only ground to support the decision of the magistrates.

I arrive therefore at the conclusion that it should have been apparent to the appellants, from the very form of the deposition of "Colonel B," that the magistrates had arrived at a decision on his anonymity designed to promote not merely national safety but the due administration of justice. (Incidentally I reject entirely the specious suggestion that there was here merely a polite request to the press not to publish the identity.)

I do not, my Lords, regard as of any relevance the question whether the magistrates had any power or authority directly to forbid all publication of "Colonel B's" identity. The field in which contempt of court, or as I prefer to describe it improper interference with the due administration of justice, may be committed is not circumscribed by the terms of an order enforceable against the accused. I find no problem in the concept that a decision or direction may have no immediate aim and no direct enforceability beyond the deciding and directing court, but yet may have such effect in connection with contempt of court. Merely to state, as is the law, that in

general contempt of court is the improper interference with the due administration of justice is to state that it need not involve disobedience to an order binding upon the alleged contemnor.

Where then, in the light of these principles, stands the present case? I dismiss at once the fact, which I am prepared to assume, that the motive which induced the appellants to publish the identity of "Colonel B" was that they considered the Crown's view that its revelation would endanger national safety to be nonsense. Their motive is irrelevant to guilt if they intended to do that which amounted in law to interference with the due administration of justice and therefore contempt.

It is at this stage that I feel great concern with this case. There can be no doubt that the publication in toto of "Colonel B's" deposition was permissible without contempt of court. In it was to be found a reference to a particular edition of the Royal Corps of Signals publication "Wire" in which "Colonel B" admitted in his deposition that his name in association with his stated then current posting was to be found. (I believe that the reference to the particular edition was due to a question by the clerk to the magistrates and not to cross-examining counsel.) This edition of "Wire" was available to the public, including anyone who read a report of the deposition, which of course was freely reportable; no doubt it was also deposited in the British Museum. No objection was raised by the prosecution to this part of the deposition, nor by the magistrates.

The position therefore was that, notwithstanding the decision of the magistrates designed to preserve the anonymity of "Colonel B," his deposition itself revealed at one simple remove his identity. Publication in full of his deposition, given as it was in open court, could not have been a contempt. It would have told the world (if interested) where to look for "Colonel B's" identity. Would it have transgressed the limits of the permissible if the publication of the deposition had been accompanied by a re-publication of the stated edition of "Wire," or the relevant extracts from it? I do not think so. The substance of the magistrates' decision would not have been breached. The gaff was already blown by the deposition, to the publication of which no objection could be taken.

For these reasons, which depend entirely upon the totally revealing content of "Colonel B's" deposition, I would allow these appeals. I see to sufficient justification for holding that the direct short cut to breach of the decided anonymity of "Colonel B" is to be regarded in the particular circumstances of this case as a contempt of court.

If, my Lords, I may summarise:

- (1) The decision of the examining magistrates should have been recognised by the appellants as one designed to preserve the anonymity of "Colonel B."
- (2) That decision should be taken as made in the interests of the due administration of justice, both in that case, and in the due administration of justice as a continuing process.
- (3) No specific warning of a risk of contempt of court by ignoring the decision should be necessary to found such a charge, though it might be useful.

(4) There was no justification for thinking that this decision involved merely a request.

(5) But for the substantially self-identifying content of "Colonel B's" legitimately reportable deposition I would have been for dismissal of these appeals.

(6) Because, and only because, the properly reportable deposition of "Colonel B" really in itself revealed his identity, without protest from either magistrates or prosecution, I would allow these appeals, with costs here and below.

LORD SCARMAN.

My Lords, when an application is made to commit for contempt of court a journalist or editor for the publication of information relating to the proceedings of a court, freedom of speech and the public nature of justice are at once put at risk. The general rule of our law is clear. No one shall be punished for publishing such information unless it can be established to the satisfaction of the court to whom the application is made that the publication constitutes an interference with the administration of justice either in the particular case to which the publication relates or generally. Parliament clearly had the general rule in mind when in 1960 it enacted that even the publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court save in specified exceptional cases: section 12 (1) of the Administration of Justice Act 1960.

The law does not treat any, or every, interference with the course or administration of justice as a contempt. The common law rule which was affirmed by this House in *Scott v. Scott* [1913] A.C. 417 is that the interference must be such as to render impracticable the administration of justice or to frustrate the attainment of justice either in the particular case or generally.

Further, since such interference is a criminal offence, the court to whom the application to commit is made must be satisfied beyond reasonable doubt that the interference is of such a character. If the court is not sure, the application must be dismissed.

Three questions arise for consideration in this appeal. (1) Did the examining justices have power to sit in private to take the evidence of the witness described in court as "Colonel B"? (2) Did they have the power, without going into private session, to require evidence as to the identity of the witness to be written down and not to be mentioned in open court? (3) If either of the first two questions be answered in the affirmative, was it a contempt of court to publish information relating to the identity of the witness?

Since the history of the case is fully set out in the speech of my noble and learned friend Lord Diplock, I propose to refer only to those facts which I consider to be critical.

This is an appeal from an order of the Divisional Court of the Queen's Bench Division (Lord Widgery C.J. presiding). The court found, upon the application of the Attorney-General, that the criminal offence of a contempt of court had been established against

the appellants. The alleged offence consisted of publication in three newspapers - "Peace News," "The Leveller" and the "Journalist" - of the true name of a witness who, using the pseudonym "Colonel B," had given evidence for the prosecution in committal proceedings against three men accused of offences under the Official Secrets Acts. His identity was not disclosed in those proceedings, though he gave his evidence orally in open court. The examining justices had ruled that his name should be written down and shown to the defence but not mentioned in court. The justices gave no direction prohibiting publication of the name, since they were advised by their clerk that they had no power to do so. In finding the contempt established the Divisional Court held that it consisted of a flouting of the authority of the court in that the appellants, with notice of the proceedings and the ruling, had caused the witness's name to be published in the three newspapers. The court, accepting that a contempt could not be shown unless the publications frustrated a decision of the court, the object of which was to avert the risk of interference with the administration of justice either in the particular case or generally, found that this was the object of the ruling and that the appellants' publications had frustrated it. In adopting this criterion for determining a contempt of court, the Divisional Court followed the decision of the Court of Appeal in *Attorney-General v. Butterworth* [1963] 1 Q.B. 696, where, however, the facts were very different.

The powers of the court - the first question

The committal proceedings being in respect of offences alleged under the Official Secrets Acts, the examining justices had power to exclude the public from any part of the hearing, if, upon the application of the prosecution, they thought a public hearing prejudicial to national safety: Official Secrets Act 1920, section 8 (4). They had exercised this power in respect of certain tape-recordings, but they did not use it (though it was open to them to do so) in respect of Colonel B's evidence. The public were not excluded when he gave evidence. The subsection, therefore, does not apply. The only relevance of the subsection is that it indicates that Parliament considered it necessary to augment, in official secrets cases, whatever common law powers a court had to sit in private by one the exercise of which would not be dependent upon the court's assessment of the danger of publicity to the administration of justice. The exercise of this power would, of course, enable contempt proceedings to be brought, if there were publication of the matter kept private: see Act of 1960, section 12 (1) (c).

Examining justices also have the power to sit in private if the "ends of justice" appear to them to require it: Criminal Justice Act 1967, section 6 (1). As they chose to sit in public, this statutory power cannot be invoked to support their ruling.

Examining justices also have the common law power, which belongs to all courts, to sit in private in the exceptional cases specified in *Scott v. Scott* [1913] A.C. 417.

In *Scott v. Scott* your Lordships' House affirmed the general rule of the common law that justice must be administered in public. Certain exceptions were, however, recognised. The interest of national security was not one of them; indeed, it was not mentioned in any of the speeches. The House was divided as to whether protection of the administration of justice from interference was an exception. A majority held that it was - though their respective formulations of the exception differed markedly in emphasis. Earl Loreburn held the underlying principle to be that the public were to be

excluded if "the administration of justice would be rendered impracticable by their presence" (p. 446). Viscount Haldane L.C. thought that

"to justify an order for hearing in camera it must be shown" (my emphasis) "that the paramount object of securing that justice is done would really be rendered doubtful of attainment if the order were not made (p. 439).

Lord Halsbury - *maxime dubitans* (p. 442) - agreed with the Lord Chancellor, while also, in effect, agreeing with Lord Shaw of Dunfermline who thought the ground put forward by the Lord Chancellor was "very dangerous ground" (p. 485).

While paying heed to the dangers of extending this sensitive branch of the law by judicial decision, I think it plain that the basis of the modern law is as Viscount Haldane declared it was. It follows: (1) that, in the absence of express statutory provision (e.g., section 8 (4) of the Act of 1920), a court cannot sit in private merely because it believes that to sit in public would be prejudicial to national safety, (2) that, if the factor of national safety appears to endanger the due administration of justice. e.g., by deterring the Crown from prosecuting in cases where it should do so, a court may sit in private, (3) that there must be material (not necessarily formally adduced evidence) made known to the court upon which it can reasonably reach its conclusion.

"The device" - the second question

In the present case the justices, instead of sitting in private, adopted the device of allowing a piece of evidence to be written down and requiring it not to be mentioned in open court. If they took this course in the interest of justice, they adopted what Lord Widgery C.J. described as a convenient device, for it achieved a result, i.e., no mention of the name in open court, which otherwise would only be achieved by the court going into camera. In other words, it was a substitute for sitting in private. I agree with Lord Widgery C.J. in believing this device to be a valuable and proper extension of the common law power to sit in private, and to be available where the court would have power at common law to sit in private but chooses not to do so. I think *Reg. v. Socialist Worker Printers and Publishers Ltd., Ex parte Attorney-General* [1975] Q.B. 637 (a blackmail case) was correctly decided.

I turn now to the third question.

The law of contempt of court has been, throughout its history, bedevilled by technicalities. One of them was raised in this appeal. Can a court make an order, or give a ruling, which is binding on persons who are neither witnesses nor parties in the proceedings before the court? It is a misconception of the nature of the criminal offence of contempt to regard it as being an offence because it is the breach of a binding order. The offence is interference, with knowledge of the court's proceedings, with the course of administration of justice: see *In re F. (orse. A.) (A Minor) (Publication of Information)* [1977] Fam. 58. It was for this reason, no doubt, that Lord Widgery C.J. in this case stressed the element of "flouting" the authority of the court. Though I would not have chosen the word, I think it does reflect the essence of the offence, namely that the conduct complained of, in this case the publication, must be a deliberate frustration of the effort of the court to protect justice from interference.

In the present case the examining justices took a course which was a substitute for sitting in private. If, as I think, the device is an acceptable extension of the common law power of a court to control its proceedings by sitting in private, where necessary, in the court's judgment, to protect the administration of justice from interference, section 12 (1) of the Administration of Justice Act 1960 is relevant. For the principle governing contempt of court when a court sits in private must also govern the situation where the common law device is used in substitute for private session. The subsection is in these terms:

"The publication of information relating to proceedings before any court sitting in private shall not of itself be contempt of court except in the following cases, that is to say - (a) where the proceedings relate to the wardship or adoption of an infant or wholly or mainly to the guardianship, custody, maintenance or upbringing of an infant, or rights of access to an infant; (b) where the proceedings are brought under Part VIII of the Mental Health Act 1959, or under any provision of that Act authorising an application or reference to be made to a Mental Health Review Tribunal or to a county court; (c) where the court sits in private for reasons of national security during that part of the proceedings about which the information in question is published; (d) where the information relates to a secret process, discovery or invention which is in issue in the proceedings; (e) where the court (having power to do so) expressly prohibits the publication of all information relating to the proceedings or of information of the description which is published."

The subsection confers no new powers upon the court. It leaves the common law and statutory powers of sitting in private exactly as they were. Paragraphs (a), (b), (d), and (e) add nothing to the common law. It would be strange if the exception stated in paragraph (c) should prove alone to have made a fundamental modification in the law. I do not so interpret it. It provides for the case where at common law or by statute the court may sit in private for reasons of national security. The statutory power which the justices had under section 8 (4) of the Act of 1920 is not relevant, because the justices chose not to sit in private. The common law power is relevant, because the device employed was within the inherent power of the court at common law.

But since the common law power to sit in private arises only if the administration of justice be threatened, the third question becomes one of fact. What was the reason for the justices' ruling? If it was to avert an interference with the administration of justice, was there material upon which the ruling could reasonably be based? The third question cannot therefore be answered without considering the facts. Here I find myself in a state of doubt.

I do not think that the Attorney-General has discharged the burden of proof upon him. Uncertainty surrounds, and continues to surround, the ruling made by the justices and its object. First, one cannot be sure that they took into account all the matters to which it was their duty to have regard if they were giving notice in open court that to protect the administration of justice the name of the witness was not to be published. The justices clearly had regard to national security, but did they understand that, in exercising their common law power, the national security risk must be shown also to be a risk to the administration of justice and assess the degree of the latter risk? Did they address themselves to that question at all? It cannot be said with any certainty that they did, or that the Crown adduced any material, by way of evidence or

otherwise, to show that the national security issue was such that publication of the colonel's name would endanger the due administration of justice.

Secondly, there was, and remains, considerable doubt as to the nature of the "ruling." Was it a decision, an indication, or only a request? As all know who have experience of the forensic process in this country, courts frequently allow a witness to write down his name or address or to give some other specified evidence (e.g., a medical or welfare report) in writing and make it clear that they do not wish the matter to be mentioned in open court. A court may do so only to save a witness or a party from distress or pain, e.g., in a personal injury or matrimonial case. On the other hand, a court may, as the Attorney-General contends in this case, have in mind that publication outside, as well as inside, the court is to be prevented as an interference with the administration of justice. Unless the ruling in this case is to be interpreted as a decision taken to prevent interference with the administration of justice, the publication of information as to "Colonel B's" identity would be no contempt. If, upon its proper interpretation, the "ruling" was no more than an indication or request, publication would be no contempt. It is only if the ruling must be read as a prohibition of publication in the interests of the administration of justice, i.e., as falling within paragraph (e) of section 12 (1) of the Act of 1960, that the appellants can, in my judgment, be found guilty of contempt. After a careful study of the case and listening to full argument, I remain unsure as to the nature and object of the ruling.

I would summarise my conclusions thus. If a court is satisfied that for the protection of the administration of justice from interference it is necessary to order that evidence either be heard in private or be written down and not given in open court, it may so order. Such an order, or ruling, may be the foundation of contempt proceedings against any person who, with knowledge of the order, frustrates its purpose by publishing the evidence kept private or information leading to its exposure. The order or ruling must be clear and can be made only if it appears to the court reasonably necessary. There must be material (not necessarily evidence) made known to the court upon which it could reasonably reach its conclusion, and those who are alleged to be in contempt must be shown to have known, or to have had a proper opportunity of knowing, of the existence of the order (see *In re F. (orse. A.) (A Minor) (Publication of Information)* [1977] Fam. 58).

Neither the Crown nor the examining justices made clear what they were seeking to do or upon what grounds the court was being asked, and decided, to act. That certainty which the criminal law requires before a man can be convicted of a criminal offence is lacking. I would, therefore, allow the appeals.

ORDER

Appeals allowed with costs.

SOLICITORS Solicitors: Vizards; Seifert, Sedley & Co.; Director of Public Prosecutions.

## **ATTORNEY-GENERAL V TIMES NEWSPAPERS LTD: HL 1973**

**December 16, 2018** [Contempt of Court, Media,](#)

**References:** [1973] 3 All ER 54, [1973] 3 WLR 298, [1974] AC 273

**Coram:** Lord Cross, Lord Reid, Lord Simon of Glaisdale

**Ratio:** The House considered the bringing of contempt proceedings by the Attorney General.

Held: The Attorney General must prove to the criminal standard of proof that the respondent had committed an act or omission calculated to interfere with or prejudice the due administration of justice; conduct is calculated to interfere with or prejudice the due administration of justice if there is a real risk, as opposed to a remote possibility, that interference or prejudice would result.

Lord Cross said: 'It is easy enough to see that any publication which prejudices an issue in pending proceedings ought to be forbidden if there is any real risk that it may influence the tribunal . . . But why, it may be said, should a publication be prohibited when there is no such risk? The reason is that one cannot deal with one particular publication in isolation. A publication prejudging an issue in pending litigation which is itself innocuous enough may provoke replies which are far from innocuous but which, as they are replies, it would seem unfair to restrain. So gradually the public would become habituated to, look forward to, and resent the absence of, preliminary discussions in the 'media' of any case which aroused widespread interest. An absolute rule, though it may seem to be unreasonable if one looks only to the particular case, is necessary in order to prevent a gradual slide towards trial by newspaper or television.'

Lord Reid said: 'I agree with your Lordships that the Attorney-General has a right to bring before the court any matter which he thinks may amount to contempt of court and which he considers should in the public interest be brought before the court. The party aggrieved has the right to bring before the court any matter which he alleges amounts to contempt but he has no duty to do so. So if the party aggrieved failed to take action either because of expense or because he thought it better not to do so, very serious contempt might escape punishment if the Attorney-General had no right to act. But the Attorney-General is not obliged to bring before the court every prima facie case of contempt reported to him. It is entirely for him to judge whether it is in the public interest that he should act.'

**Jurisdiction:** England and Wales

**This case is cited by:**

Cited – [Attorney-General v Leveller Magazine Ltd](#) HL ([lip](#), [1979] AC 440, [1978] 3 All ER 731, [1979] 2 WLR 247)

The appellants were magazines and journalists who published, after committal proceedings, the name of a witness, a member of the security services, who had been referred to as Colonel B during the hearing. An order had been made for his name not to.

- Cited – [in Re Lonrho Plc](#) HL ([1990] 2 AC 154, [1989] 3 WLR 535, [1989] 2 All ER 1100)

A jury trial procedure for contempt would never be appropriate: ‘If the trial is to be by jury, the possibility of prejudice by advance publicity directed to an issue which the jury will have to decide is obvious. The possibility that a professional.

- Cited – [Attorney General v Michael Ronald Unger; Manchester Evening News Limited and Associated Newspapers Limited](#) Admn ([Bailii](#), [1997] EWHC Admin 624, [1998] 1 Cr AR 308)

Complaint was made that the defendant newspapers had caused a serious prejudice to a trial by articles published before the trial of the defendant in criminal proceedings. The defendant pleaded guilty to theft at the magistrates’ court after she had . .

- Cited – [Jones, Re \(Alleged Contempt of Court\)](#) FD ([Bailii](#), [2013] EWHC 2579 (Fam))

The Solicitor General sought the committal of the respondent for alleged contempt of court. There had been repeated litigation between the respondent and her former husband as to whether the children should live in Spain with the father or in Wales.

Orissa High Court

Bijoyananda Patnaik vs Balakrushna Kar And Anr. on 26 March, 1953

Equivalent citations: AIR 1953 Ori 249

Author: Panigrahi

Bench: Panigrahi, Mohapatra

JUDGMENT Panigrahi, C.J.

1. These proceedings in contempt have been initiated at the instance of the petitioner Sri Bijoyananda Patnaik, who is the Chairman of the Board of Directors of Messrs. Eastern Mercantile Corporation, Ltd. Opposite Party 1 is the Editor of an Oriya newspaper called 'Matrubhumi' and opposite party 2 is its printer and publisher. On 14-6-1952 the business premises of the petitioner were searched by an Inspector of the Special Police Establishment, Government of India, Delhi, under a warrant issued by the Additional District Magistrate, Cuttack, for the recovery of certain documents and letters exchanged between the petitioners and some overseas suppliers, in respect of a license issued by the Government of India for the import of bicycles intended for internal consumption within Orissa State. On 21-6-52 the petitioner moved this Court in Original Judicial Case No. 18 of 1952 praying for the issue of a rule on the Additional District Magistrate and the Inspector, Special Police Establishment, to show cause why the search should not be declared illegal and why the order of the Additional District Magistrate refusing to grant him copies of the warrant should not be set aside. On 27-10-52 the Court granted one of the prayers of the applicant and directed that he should be granted copies of certain documents which were, in the possession of the Additional District Magistrate. The other prayer of the petitioner, however, namely, for a declaration that the search was illegal was rejected on 2-12-1952 by a Bench of this Court.

2. It is alleged that the opposite parties published certain articles in the daily and weekly issues of the Matrubhumi while proceedings were pending in this Court, vilifying the petitioner. These publications, it is contended, constitute gross contempt of Court. Altogether there were four articles published in the Matrubhumi two in the daily issues dated 17-6-52 and 13-8-52 and two in the weekly issues dated 21-7-52 and 1-9-52. The present petition was presented in Court on 24-10-52 and 20-12-52; this Court issued a rule nisi to show cause why the opposite parties should not be committed for contempt. These proceedings would, therefore, appear to be an offshoot of Original judicial Case No. 18 of 1952 which had been filed by the petitioner and the impugned articles were published when the initiation of these proceedings was either imminent or pending in this Court.

3. The first article dated 17-6-52 appeared under the caption, in bold headlines, "Extensive searches in the town of Cuttack -- Dangerous fraud and Conspiracy about to be unearthed -- Thief's house does not remain dark always". Among other matters the article says:

"It is reported that the reason for the search is that company by the name of Eastern Mercantile Corporation was formed under the leadership of Sri Bijoyanand Patnaik, and permits for importing several crores rupees worth of cement, maida, sugar, steel-

goods umbrella sticks, screws, cycles, and yarn, were obtained from the Central Government in the names of the members of this Company and illegal profits of lakhs of rupees were made by selling these to several persons outside Orissa. It is alleged that by such action they have cheated the Central Government, the State Government, and the people. From the papers it appears that the office of the company is located at Anand Bhawan, Tulsipur, but there does not appear to be any such office in Tulsipur.....

It is rumoured that there have been serious allegations that Sri Patnaik has taken lakhs of rupees from the Government for the development of industries, and has not done anything. It is learnt that the company in whose name import license has been obtained is not an established company, nor is the company assessed to income-tax. It is being seriously investigated as to how crores worth of permits were granted for transactions from the Central Secretariat to a Company consisting of private shareholders. The mysterious manner in which these permits were sold outside, in Madras and Bengal, and lakhs of rupees worth of profits were made, has already been investigated by the Central C. I.D. in those States".

The article then contains several similar allegations to the effect that fifty bales of yarn were obtained for dyeing purposes although there is no dyeing factory. It is further alleged that "permits for maida were obtained from the central Government but that there was no trace of maida". The article concludes, with the statement that "the Central C. I. D. will systematically investigate every matter and would prefer charges against some persons". It will appear from these extracts that the writer has given currency to a number of rumours that the petitioner had obtained Import licenses for several articles valued at several crores of rupees although his house was searched only for the purpose of recovering an import license connected with bicycles. The article also alleges that the petitioner had made illegal profits to the extent of lakhs of rupees by selling these import licenses in the black market to several persons outside Orissa State. It is further categorically asserted that there is no office known as Eastern Mercantile Corporation, at Tulshipur.

4. The second article, dated 21-7-52 appeared in the weekly edition of the Matrubhumi and purported to be the re-production of a statement published in another Oriya paper called 'Subrati'. The headline is:

"Mahatab is at the root of all mischief and he should be arrested with his companions at once". The article then proceeds to say:

"It is a matter of surprise that Bijoyananda Patnaik and others have not been arrested. It is alleged against these people that they floated, fake or fraudulent companies and manoeuvred to obtain from the Central Government permits for lakhs of rupees worth of maicta, cycle, thread, steel and other articles of daily use and made immense money by deals in the black-market. It is known that the name of Bijoyananda Patnaik & Co., is not even known to the Income-tax Department. The Central Government are aware of the detailed activities of these treacherous campaigns ..... If Jawaharlal's Government has actually girded up its loins to stop corruption, then, discarding all pity and compassion they should at once arrest Mahatab, Bijoy and Biren, and they should not at all consider the question of granting bail until the end of the trial".

The editorial note is as follows:

'Under the leadership of Mahatab those people collected vast wealth in this fashion and swindled lakhs of rupees from kendu leaves dealers & thereby created such an atmosphere of bitterness-in the field of politics during election time that people became perturbed with disgust and hatred. The Land Reforms (sic) which were brought through the swindling and cheating of Bijoyananda were sent to different districts as properties of the Congress" ..... "Recently sharp attention of the Central Government C. I. D. was focussed on some of the business organizations of Cuttack. It was rumoured at that time that during Mahatab's time as Industries Minister on the strength of some important permits issued from his Secretariat, lakhs worth of articles were imported and were sold outside in the blackmarket, in Madras and Calcutta. The name of Kalinga Mercantile Corporation was especially mentioned in that connection and the houses of some alleged directors of the Company were searched".

5. The third article published in the same is entitled:

"Fire is smouldering within. It will flare up one day and consume all the black-marketeers of Orissa".

That article reads as follows:

"After the Central C. I. D. left Orissa on finishing their work, it is learnt that a petition has been filed in the Orissa High Court on behalf of Sri Bijoy Patnaik alleging that such investigation and search was without jurisdiction. Whatever that may be some papers and institutions associated with Bijoyananda Patnaik are carrying on propaganda that the allegations on which the Central C. I. D. carried on investigation and; searches in Orissa have no basis whatever, and such action of theirs is totally illegal .....

But the representative of Mathrubhumi on confidential enquiry has learnt that the propaganda that the fire is extinct is totally false and baseless and that the fire is smouldering and in appropriate time it should flare up with burning flames. The profiteers of Mahatab's camp who, on the strength of import permits let loose in this country a stream of black-marketing, taking advantage of Mahatab's Ministry in the Industry Department, will be caught one by one and will be punished for their corrupt activities. The Central C. I. D. are busy in doing the preliminary works in this connection".

This article was published after the petitioner had filed O. J. C. 18/1952, and, as may be noticed, these publications called for the immediate arrest of the petitioner and alleged in no uncertain terms that the petitioner had been guilty of swindling and cheating and that he should be punished for corrupt activities.

6. The next article is dated 13-7-1952 and is a vitriolic attack on both Sri Mahatab and the petitioner and says:

"As these two are the leaders of the blackmarketeers their names alone have been mentioned. It is reliably learnt from those who are investigating that Mahatab and his associates shall be tried at the same trial and for the same kind of offence.....".

"It is needless to mention here that when Mahatab was the Commerce & Industry Minister at the Centre he used to get things done at the instrument of middleman. This middleman is Sri Bijoyananda Patnaik of Cuttack. A mere look at the documents seized by the Police would show that Bijoyananda Patnaik is concerned with all of them .....As for example, Minister Mahatab gave permission to a businessman of Calcutta, named Bhawalka, to sell to retailers products of mill cloth at a higher rate and in the said letter of permission which he gave in the month of December last year, he directed that he will have to pay Rs. 3,25,000/- to his shikhandi Sri Biju Patnaik. Except Rs. 50,000/- the rest had been paid in cash. In the first week of December last a cheque for Rs. 50,000/- had been issued on the United Bank of India. From this it is known that Mahatab after taking Rs. 2,75,000/- left Rs. 50,000/- to the share of Biju Patnaik".

Here, again is what appears to be a definite assertion of fact that documents have been seized and that these documents showed that Rs. 50,000/- had been received by Sri Bijoyananda Patnaik through, a shady transaction.

7. The last article was published in the weekly Issue of the Mathrubhumi dated 1-9-1952 and is entitled "Investigation throughout India". The article is as follows:

"Wide publicity is being given in some of the papers of Orissa with vested interests that the investigation which the Central C. I. D. carried on in Orissa regarding the Kalinga Mercantile Corporation proved a fiasco ..... It appears from the account given to the Indian Life by its special representative, that in the course of investigations by the Central C. I. D. against Sri Bijoyananda Patnaik of Orissa, Bhawalka and Purushottam Das of Calcutta, it has been known that Mahatab is involved in their shady transactions ..... So long as

Mahatab occupied the gadi of a Minister he used to carry on shady transactions, always through a middleman. The Special Representative of the Indian Life has come to know that this middleman is Sri Bijoyananda Patnaik of Cuttack. It is known that Bijoyananda Patnaik is involved in all the papers and documents which have come into the hands of the Police".

The article concludes with the following words: "Immediately on receipt of the sanction of the Home Minister they will arrest these bribe-givers and will keep them in Preventive Detention till the Preventive Detention Act receives the assent of the President".

8. The petitioner complains that these articles were intentionally published with a view to dissuade him from pursuing his legal remedy in Court and that they have had the tendency to prejudice his case pending before the Court. It is further contended

that whether they actually created any prejudice or not the articles have a tendency to prejudice him and his case and as such, constitute contempt of Court.

9. On behalf of the opposite parties it is contended that the publications had no connection with the cause pending in O.J.C. No. 18 of 1952 and as such these proceedings in contempt are not maintainable. Among other contentions raised on behalf of the opposite parties, it is said that the cause before the Court was not one which involved the taking of evidence and there can be no contempt of Court as such. It is also pointed out that since the petitioner has already started proceedings in libel and defamation against the opposite parties and the cause is pending trial this proceeding is not maintainable. At the hearing a new ground was taken and that is based on [Article 19 \(1\) \(a\) & \(2\)](#) of the Constitution.

10. I shall take up the last point first, as it relates to the maintainability of the present proceeding and is based upon the right to freedom of speech and expression guaranteed by [Article 19](#). Clauses 1 (a) and (2) of [Article 19](#) as amended by the Constitution (First Amendment) Act, 1951, read as follows:

19 (1) "All citizens shall have the right: (a) to freedom of speech and expression;

..... ..

(2) Nothing in Sub-clause (a) of clause (1) shall affect the operation of any 'existing law' or prevent the State from making any law. in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence".

The expression 'existing law' has been defined in [Article 366](#) as meaning any law, ordinance, order, bye-law, rule or regulation passed or made before the commencement of this Constitution by any legislature, authority or person having the power to make such law, ordinance, or bye-law, rule or regulation. The opening words of the article provide that the expression "existing law" shall have the same meaning assigned to it in the Constitution unless the context otherwise requires. The interpretation clause in the Constitution, therefore, should be read subject to the context, and if the context of a particular Article requires a different interpretation, the interpretation clause must be subordinated to it. In other words the interpretation of the expression "existing law" is not the same in every Article or clause of the Constitution and would depend upon the context.

11. The law relating to contempt of subordinate Courts is to be found in the [Contempt of Courts Act](#) (Act 12 of 1926 as amended by Act 12 of 1937). [Section 2](#) of that Act says that the High Courts shall have, and exercise the same jurisdiction, power, and authority in respect of Contempts of Courts subordinate to them as they have and exercise in respect of contempt of themselves. There are other provisions relating to contempt of Court committed in the view or presence of civil, criminal, or revenue Courts, and they are to be found in the Civil Procedure Code, and [the Indian Penal Code](#). But so far as contempt of the High Court is concerned, [Article 215](#) makes an express provision for punishing contempt of itself. That Article says:

"Every High Court shall be a Court of record and shall have all the powers of such Court, including the power to punish for contempt of itself."

It would thus appear that whatever meaning is attributed to the expression "existing law" occurring in [Article 365](#), the High Court as a Court of record has the inherent power to punish persons guilty of contempt of itself. This power can be traced to the earliest times since the establishment of the Supreme Courts and their successors, the High Courts, in India. That such a power is inherent in a Court of Record has been recognised from the earliest times in England and the test whether a Court is a Court of record or not, would depend upon whether it has the power to imprison and fine, whether for contempt of itself or for any other substantive offence. Courts of record are such as have been expressly made so by statute or implication of a statute, that is, by having the statutory power to fine and imprison -- See Halsbury Second Edition, Vol. 8, p. 527.

Holdsworth mentions certain instances of proceedings taken to punish a neglect of public duty in the year 1330 -- See Holdsworth's History of English Law. Vol. III page 312. Coke cited a case of Edward III's reign in which a person was punished for a writing which amounted to Contempt of Court. A Court whose record is incontrovertible is a Court of record. Sir Barnes Peacock defined the status and powers of a Court of record in India in -- *Surendranath v. Chief Justice & Judges of the High Court*, 10 Cal 109 (A) and observed;

"Contempt of Court by libel published out of Court is something more than defamation. It is an offence which by the Common Law of England was punishable by the High Court in a summary manner with fine or imprisonment or both, for part of the Common Law of England was introduced in the Presidency towns when the Supreme Courts were respectively established by the Courts of Justice. High Courts in the presidencies are superior Courts of record and the offence of contempt and the powers of the High Court for punishing it are the same in India as in England, not by virtue [of the Indian Penal Code](#) or [the Criminal Procedure Code](#) but by virtue of the Common Law of England".

Thus, the High Court's Jurisdiction to punish for contempt has been inherited from the old Supreme Court which was invested with all the powers and authority of the Court of the King's Bench. The Supreme Court was declared a Court of record by the Charter of George III in 1774. The High Courts were created Courts of record by the several Letters Patent issued by the King-in-Council. By the Government of India Act, 1935, all the High Courts were constituted Courts of Record and [Article 215](#) of the Constitution declared the Supreme Court of India and the High Courts to be Courts of record. By the very nature of our Constitution it is necessary, for the administration of justice and protection of individuals, that these Courts should be able to punish summarily for acts of contempt; because, in the words of Blackstone, this power is an "inseparable attendant upon every superior tribunal".

12. The history of the superior Courts established in this Country from the earliest times would show that this jurisdiction was inherited from the King's Bench and was of a special character. The Court's power to punish every kind of misdemeanour was recognised as it was the guardian and protector of public justice -- the 'custos morum'. Ordinarily misdemeanour was punishable by indictment or information, but

when it amounted to contempt of Court it was punishable 'brevi manu' by attachment or commitment to prison. The Constitution expressly reserves these powers in [Article 215](#) when it lays down that every High Court shall be a Court of record. It also provides that it shall have power to punish for contempt. This has been done in order to put an end to any possible argument regarding the nature of the powers of a High Court in this respect. I would, accordingly, overrule the preliminary objection raised on behalf of the opposite parties and would hold that [Article 19](#) of the Constitution does not curtail the right of the High Court to deal with contempt of Court.

13. It is necessary, however, closely to examine whether the impugned articles constitute a contempt of Court as it has been seriously urged that the writings had no relation to the subject-matter of the petition pending before this Court; and secondly, to consider whether this Court shall exercise its extraordinary power to punish the offenders summarily. On a plain reading of the publications no reasonable man can have any doubt that they constituted a gross abuse of the petitioner who has been charged with having swindled public moneys, cheated the Government, and has further been described as a leader among blackmarketeers. Anyone reading these articles cannot but have a feeling of revulsion against the object of these attacks. It is also apparent that the writer of these articles knew that the petitioner had sought relief in this Court and had complained that the search of his house was not only illegal but that it amounted also to an abuse of the powers vested in the Police. These articles certainly do not make any reflection upon the Court or upon any Judge but in order to constitute contempt of Court it is not necessary that the Court or an individual Judge should be attacked.

The very policy of the law is not that the Judges should be protected from attacks, but that the public should be protected from such attacks, so that they may have free access to the Courts for relief. The reason of the rule is that the mind of the public should not be prejudiced against the parties who resort to the Court for a remedy, before their cause is finally heard, for the effect of such attacks may be to deter persons from coming forward for protection for wrongs committed against them, or to cause them to discontinue or compromise, or to deter persons with good causes of action from coming to Court. To constitute a contempt, adverse comment on a party need not refer to the subject-matter of pending proceedings. It is sufficient if it is clear that the comment tends to prejudice the trial of the action -- 'Higgins v. Richards', (1912) 28 T. L. R. 202 (B). It must, however, amount to contempt of Court and not mere libel on the parties. If the publications do not amount to an interference with the course of justice the party attacked may be left to protect himself by a regular criminal complaint. The view has lately been expressed by Maugham J. in -- 'In re Sir Robert Thomas, (1930) 2 Ch 363 (C)', that a trial Judge approaches the question of contempt somewhat differently from an appellate Judge. When a case is pending trial, a publication may influence the parties and their witnesses from giving evidence, but where the proceeding is pending before an appellate Court the publication may amount to contempt only in the rarest possible cases. The test, in all these cases, however, is not whether the publication does interfere, but whether it tends to interfere, with the due course of justice. It is also well settled that the summary jurisdiction vested in the Court should be sparingly exercised and the Court, discountenances applications for punishment of contempt where it is slight. These, as I have been able to gather from the decisions, are the broad principles of the law relating to contempt of parties.

14. Learned counsel, however, attempted to introduce a distinction in favour of the Press and claimed that a writing in a newspaper is privileged and that it should not be made the subject of contempt proceedings. I am not aware of any such extraordinary privilege that can be claimed for the Press. In -- *Charming Arnold v. King Emperor*', AIR 1914 PC 116 (D), their Lordships of the Privy Council laid down, in the clearest possible terms that:

"The freedom of the journalist is an ordinary part of the freedom of the subject and to whatever height the subject in general may go, so also may the journalist, but apart from statute law his privilege is no better, and no higher".

On the other hand, it would appear that the responsibility attaching to the Press is greater than the responsibility of an individual, for the Press has a larger audience and enjoys a circulation far larger than the utterance of an individual. It is true that a free Press is vital to democracy and that the freedom of the Press includes the right to criticise, even the right to criticise severely. But freedom of the Press should not degenerate into a license to attack litigants and close the door of justice. Nor can it include any unrestricted liberty to damage the reputation of respectable persons. If a journalist does not take reasonable care to ascertain the accuracy of facts which he broadcasts, or if he tortures facts and vilifies an individual, he exceeds the limit of fair comment and becomes accountable to the law. The trial of a cause should be restricted only to the courts and no cause shall be permitted to be tried by newspapers.

15. In support of his contention learned counsel for the opposite parties drew our attention to an American case reported in -- *Pennekamp v. Florida*', (1946) 328 US 331 (E). That was a case in which a journal published a cartoon showing a man in the robes of a Judge labelled "The Law". He was handing a scroll inscribed "Case dismissed", to a burly fellow who seemed well-pleased, and across, on the other side of the Bench, an under-sized man acting in the public interest was exclaiming "But Judge". The supreme Court observed, that -

"The danger to fair judicial administration had not the clearness and immediacy necessary to close the door of permissible public comment. When that door was closed it closed all doors behind it. Trial by newspaper should be punished and the test is whether the Judge or Jury will be pondering a decision that the comment seeks to effect".

This case, I must say, is no authority for the very wide proposition that public comment in a newspaper can never amount to contempt of Court. It may also be pointed out that the inherent Jurisdiction of a Court of record to punish for contempt which is recognised by British jurisprudence and which is applicable to this country, has been questioned in certain cases under the American system. The American law on the subject has been well summarised in an article in the *Yale Law Journal*, Vol. 48, page 60, by Robert Hermann. The writer says:

"A few jurisdictions recognise a second class of contempt by publication and punish summarily for scandalising the Court, i.e., ridiculing particular Courts, Judges, counsel, parties, jurors, or judicial officers, or publishing matter calculated to bring the Court into disrepute."

Again, the rule applies to all publications before, during, and after trial, since the theory of contempt is that, apart from the particular suit, the resulting loss of prestige diminishes the general usefulness of the Courts and obstructs the proper conduct of their proceedings. Most of the conflict, however, centres round the publication of matter, which, regardless of whether it is false or scandalous, has a reasonable tendency to prejudice and obstruct the orderly administration of Justice. There does not appear to be any substantial difference in the American law relating to contempt so far as attacks on parties to litigation are concerned. It is not necessary that the mind of the Judge should be affected. Any step calculated to pervert the course of justice would come within the rule and this includes any writing which has the consequence of prejudicing the mind of the public against the person concerned or the parties in a cause. The stream of justice must be kept clear and pure, so that the parties may proceed with safety, both to themselves and their characters. As Maugham observed in 'In re: Sir Robert Thomas (C)', quoted:

"I must express my opinion that the jurisdiction of the Court is not confined to cases where the order of the Court, or the future orders of the Court, are likely to be directly affected in some way. If it were so confined, I doubt whether there would be any limit to what a litigant or some other person might say pending the hearing of an action in the Chancery Division, unless, indeed, it could be shown that, possibly, witnesses in the case were being interfered with. I think that, to punish injurious misrepresentation directed against party to the action especially when they are holding up that party to hatred or contempt, is liable to affect the course of justice, because it may, in the case of a plaintiff cause him to discontinue action for fear of public dislike, or it may cause the defendant to come to a compromise which he otherwise would not come to for a like reason."

On going through the authorities placed before me I am satisfied that the opposite parties freely indulged in vilification of the petitioner knowing fully well that he had come to this Court for relief, and the tendency of these articles could only be to prejudice the public against the petitioner. It would, therefore, follow that they do constitute contempt of Court by all recognised canons applied in the reported cases. To call upon the Police or the Courts to arrest the petitioner and not to grant him bail; to impute to him baseness & treachery; and to hold him up to ridicule before the public for alleged cheating & swindling, can, by no canons of the freedom of the Press, be justified. It is not a case of merely exceeding the limits of fair comment; and this Court does not concern itself with the propriety or the character of the language employed by the writer. In this case the writings are clearly such that no man of good taste can view them without a feeling of perturbation, though it should be recognised that that, again, is a matter to be judged by the reading public and not by the Court. But this Court cannot shut its eye to the fact that the litigant before it is entitled to protection from attack so long as his case awaits decision; and the Court will not hesitate to prevent any interference with the course of justice. Considered as a whole the articles doubtless constitute gross contempt of Court and the rule must be made absolute.

16. The question, however, that remains to be considered is whether this Court should take any action against the opposite parties by way of committal or fine. I have given my anxious consideration to the propriety of exercising the summary power of this Court which is, more or less, of an arbitrary character. The newspapers, particularly

the vernacular newspapers, enjoy a large latitude in the matter of comments on public men and their public activities and the language employed by them is not always apt or dignified and is sometimes derisively referred to as 'journalese'. It should not be subjected to minute scrutiny and meticulous examination by the Courts with the precision that is to be expected of a piece of legislative enactment. I am also aware of the fact that journalism in this country is not lucrative and that those who take to the profession of journalism do so with the highest motive and the purest impulse to serve a public cause. The newspaper "Mathrubhumi" is a new venture and professes to present the other side of the picture as most of the older, well-established journals belong more or less to one school of thought and run with the current. The natural tendency of a new journal is to attract a large number of subscribers by resorting to a little sensationalism in the presenting and editing of news.

I am not, therefore, disposed to take a harsh view of the publications as it is not the purpose of this Court to discourage publications made in the public interest. It must also be remembered that there is not the least danger of any Judge of this Court being influenced by the scurrilous writings appearing in the vernacular papers. I am certain that these writings would have gone unnoticed but for the fact that the petitioner has brought them up before the Court. While, therefore, I am satisfied that the opposite parties are guilty of contempt in making hostile animadversions on a litigant at a time when his cause was pending, the mischief in the instant case so far as it affects the proceedings in this Court, has been trifling. It is, therefore, not necessary to invoke the extraordinary powers of this Court and visit the opposite parties with severe punishment. It would be enough, in my opinion, -- and I hope my learned brother will agree -- if we adopt a course which will have the effect of restraining their conduct in the future. I would, accordingly, while holding the opposite parties technically guilty of contempt, express the earnest hope that the public press will not indulge in writings of this character, and would warn newspapermen that it may become the duty of this Court to act in a more severe manner than it will in the present case.

In making this order we have gone to the extreme of moderation and if, upon a future occasion a proceeding of this kind is repeated, the full power of this Court to restrain and prevent such proceedings by adequate and commensurate punishment will be exercised with a stern hand. We have been informed that the petitioner has also started a regular criminal case for alleged defamation and that case is still pending. Having regard to all the circumstances I am inclined to adopt the course taken by Jessel, M. B. in 'In re: Clements (1877) 46 LJ Ch 375 (P)' in which he made the following observations:

"Now that I apply and adopt as the principle which ought to regulate these applications --that there should be no such application made unless the thing done is of such a nature as to require the arbitrary and summary interference of the Court, in order to enable justice to be duly and properly administered, without any interruption or interference, that is what we have to consider and, in my opinion, although I say there is here that which is technically a contempt -- and may be such a contempt as to be of a serious nature -- I cannot think that there is any such interference or any such fear of interference with the due conduct of this action, or any such prejudice to the defendant who is applying here, as to Justify the Court in interfering by this summary and arbitrary process".

I think every word of this passage applies to the present case. I would, therefore, express my extreme displeasure at the conduct of the opposite parties and warn them that a repetition of such conduct in the future will be dealt with severely.

I would, therefore, make the rule absolute but would inflict no punishment beyond making the above observations. The opposite parties will however, pay the costs of the petitioner. Hearing fee Rs. 100/- (Rupees one hundred only).

Mohapatra, J.

17. I agree.

## **U.S. Supreme Court**

**Bridges v. California, 314 U.S. 252 (1941)**

**Bridges v. California**

**No. 1**

**Argued October 18, 21, 1940 (No.19, 1940 Term)**

**Reargued October 13, 1941**

**Decided December 8, 1941\***

**314 U.S. 252**

*CERTIORARI TO THE SUPREME COURT OF CALIFORNIA*

### *Syllabus*

1. In determining whether punishment for an out-of-court publication concerning a pending case, as a contempt, is consistent with guaranties of the Federal Constitution, the problem in the case of a judgment based upon a particularized statutory declaration of the policy of a State is different from that where the judgment is based upon a common law concept of a general nature. P. 314 U. S. 260.
2. The "clear and present danger" cases, decided by this Court, indicate that the substantive evil likely to result must be extremely serious, and the degree of imminence extremely high, before utterances can be punished. P. 314 U. S. 263.
3. The "clear and present danger" cases do not mark the farthest constitutional boundaries of protected expression; nor do they more than recognize a minimum compulsion of the Bill of Rights. P. 314 U. S. 263.
4. The freedom of speech and of the press secured by the First Amendment against abridgment by the United States is similarly secured to all persons by the Fourteenth against abridgment by a State. P. 314 U. S. 263, n. 6.
5. The First Amendment's prohibition of "any law abridging the freedom of speech or of the press" must be given the broadest scope that can be countenanced in an orderly society. P. 314 U. S. 265.
6. The First Amendment cannot be taken as approving all practices in respect to punishment for contempt which prevailed in England at the time of its ratification. P. 314 U. S. 265.
7. The "inherent tendency" or "reasonable tendency" of an out-of-court publication to cause disrespect for the judiciary or interfere with the orderly administration of justice in a pending case is not sufficient to establish punishable contempt. P. 314 U. S. 272.

8. Upon the facts of this case, *held* that convictions of a newspaper publisher and editor for contempt, based on the publication of editorials commenting upon cases pending in a state court, were violative

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of constitutional rights of freedom of speech and of the press. P. [314 U. S. 271](#).

9. The conviction of a labor leader for contempt of state court, based upon his publication in the press of a telegram which he had sent to the Secretary of Labor, in which he criticized the decision of a judge in a case involving a labor dispute and indicated that enforcement of the decree would result in a strike, *held* violative of constitutional rights of freedom of speech and of the press. P. [314 U. S. 275](#).

14 al.2d 464, 94 P.2d 983; 15 Gal.2d 99, 98 P.2d 1029, reversed.

CERTIORARI, 309 U.S. 649, [309 U. S. 310](#) U.S. 623, to review, in two cases, the affirmance of convictions and sentences for contempt of court.

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MR. JUSTICE BLACK delivered the opinion of the Court.

These two cases, while growing out of different circumstances and concerning different parties, both relate to the scope of our national constitutional policy safeguarding free speech and a free press. All of the petitioners were adjudged guilty and fined for contempt of court by the Superior Court of Los Angeles County. Their conviction rested upon comments pertaining to pending litigation which were published in newspapers. In the Superior Court, and later in the California Supreme Court, petitioners challenged the state's action as an abridgment, prohibited by the Federal Constitution, of freedom of

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speech and of the press; but the Superior Court overruled this contention, and the Supreme Court affirmed. [[Footnote 1](#)] The importance of the constitutional question prompted us to grant certiorari. 309 U.S. 649; 310 U.S. 623.

In brief, the state courts asserted and exercised a power to punish petitioners for publishing their views concerning cases, not in all respects finally determined, upon the following chain of reasoning: California is invested with the power and duty to provide an adequate administration of justice; by virtue of this power and duty, it can take appropriate measures for providing fair judicial trials free from coercion or intimidation; included among such appropriate measures is the common law procedure of punishing certain interferences and obstructions through contempt proceedings; this particular measure, devolving upon the courts of California by reason of their creation as courts, includes the power to punish for publications made outside the courtroom if they tend to interfere with the fair and orderly administration of justice in a pending case; the trial court having found that the publications had such a tendency, and there being substantial evidence to support the finding, the

punishments here imposed were an appropriate exercise of the state's power; insofar as these punishments constitute a restriction on liberty of expression, the public interest in that liberty was properly subordinated to the public interest in judicial impartiality and decorum. [Footnote 2]

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If the inference of conflict raised by the last clause be correct, the issue before us is of the very gravest moment. For free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them. But even if such a conflict is not actually raised by the question before us, we are still confronted with the delicate problems entailed in passing upon the deliberations of the highest court of a state. This is not, however, solely an issue between state and nation, as it would be if we were called upon to mediate in one of those troublous situations where each claims to be the repository of a particular sovereign power. To be sure, the exercise of power here in question was by a state judge. But in deciding whether or not the sweeping constitutional mandate against any law "abridging the freedom of speech or of the press" forbids it, we are necessarily measuring a power of all American courts, both state and federal, including this one.

I

It is to be noted at once that we have no direction by the legislature of California that publications outside the courtroom which comment upon a pending case in a specified manner should be punishable. As we said in *Cantwell v. Connecticut*, 310 U. S. 296, 310 U. S. 307-308, such a "declaration of the State's policy would weigh heavily in any challenge of the law as infringing constitutional limitations." But, as we also said there, the problem is different where "the judgment is based on a common law concept of the most general and undefined nature." *Id.* 310 U. S. 308. *Cf. Herndon v. Lowry*, 301 U. S. 242, 301 U. S. 261-264. For here, the legislature of California has not appraised a particular kind of situation and found a specific danger [Footnote 3] sufficiently

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imminent to justify a restriction on a particular kind of utterance. The judgments below, therefore, do not come to us encased in the armor wrought by prior legislative deliberation. Under such circumstances, this Court has said that "it must necessarily be found, as an original question," that the specified publications involved created "such likelihood of bringing about the substantive evil as to deprive [them] of the constitutional protection." *Gitlow v. New York*, 268 U. S. 652, 268 U. S. 671.

How much "likelihood" is another question, "a question of proximity and degree" [Footnote 4] that cannot be completely captured in a formula. In *Schenck v. United States*, however, this Court said that there must be a determination of whether or not

"the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils."

We recognize that this statement, however helpful, does not comprehend the whole problem. As Mr. Justice Brandeis said in his concurring opinion in *Whitney v. California*, 274 U. S. 357, 274 U. S. 374:

"This Court has not yet fixed the standard by which to determine when a danger shall be deemed clear; how remote the danger may be and yet be deemed present. "

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Nevertheless, the "clear and present danger" language [Footnote 5] of the *Schenck* case has afforded practical guidance in a great variety of cases in which the scope of constitutional protections of freedom of expression was in issue. It has been utilized by either a majority or minority of this Court in passing upon the constitutionality of convictions under espionage acts, *Schenck v. United States, supra; Abrams v. United States, 250 U. S. 616*; under a criminal syndicalism act, *Whitney v. California, supra*; under an "anti-insurrection" act, *Herndon v. Lowry, supra*, and for breach of the peace at common law, *Cantwell v. Connecticut, supra*. And, very recently, we have also suggested that "clear and present danger" is an appropriate guide in determining the constitutionality of restrictions upon expression where the substantive evil sought to be prevented by the restriction is "destruction of life or property, or invasion of the right of privacy." *Thornhill v. Alabama, 310 U. S. 88, 310 U. S. 105*.

Moreover, the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be "substantial," Brandeis, J., concurring in *Whitney v. California, supra, 274 U. S. 374*; it must be "serious," *id., 274 U. S. 376*. And

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even the expression of "legislative preferences or beliefs" cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty of expression. *Schneider v. State, 308 U. S. 147, 308 U. S. 161*.

What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious, and the degree of imminence extremely high, before utterances can be punished. Those cases do not purport to mark the furthestmost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment [Footnote 6] does not speak equivocally. It prohibits any law "abridging the freedom of speech, or of the press." It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.

## II

Before analyzing the punished utterances and the circumstances surrounding their publication, we must consider an argument which, if valid, would destroy the relevance of the foregoing discussion to this case. In brief, this argument is that the

publications here in question belong to a special category marked off by history -- a category to which the criteria of constitutional immunity from punishment used where other types of utterances are concerned are not applicable. For, the argument runs, the power of judges to punish by contempt out-of-court publications tending to obstruct the orderly and fair administration of justice in a pending case was deeply

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rooted in English common law at the time the Constitution was adopted. That this historical contention is dubious has been persuasively argued elsewhere. Fox, *Contempt of Court, passim, e.g.*, 207. See also Stansbury, *Trial of James H. Peck*, 430. In any event, it need not detain us, for to assume that English common law in this field became ours is to deny the generally accepted historical belief that "one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press." [Footnote 7] Schofield, *Freedom of the Press in the United States*, 9 *Publications Amer.Sociol.Soc.*, 67, 76.

More specifically, it is to forget the environment in which the First Amendment was ratified. In presenting the proposals which were later embodied in the Bill of Rights, James Madison, the leader in the preparation of the First Amendment, said:

"Although I know whenever the great rights, the trial by jury, freedom of the press, or liberty of conscience, come in question in that body [Parliament], the invasion of them is resisted by able advocates, yet their Magna Charta does not contain any one provision for the security of those rights respecting which the people of America are most alarmed. The freedom of the press and rights of conscience, those choicest privileges of the people, are unguarded in the British Constitution."

1 *Annals of Congress 1789-1790*, 434. And Madison elsewhere wrote that "the state of the press . . . under the common law cannot . . . be the standard of its freedom in the United States." VI *Writings of James Madison 1790-1802*, 387.

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There are no contrary implications in any part of the history of the period in which the First Amendment was framed and adopted. No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed. It cannot be denied, for example, that the religious test oath [Footnote 8] or the restrictions upon assembly [Footnote 9] then prevalent in England would have been regarded as measures which the Constitution prohibited the American Congress from passing. And since the same unequivocal language is used with respect to freedom of the press, it signifies a similar enlargement of that concept as well. [Footnote 10] Ratified as it was while the memory of many oppressive English restrictions on the enumerated liberties was still fresh, the First Amendment cannot reasonably be taken as approving prevalent English practices. On the contrary, the only conclusion supported by history is that the unqualified prohibitions laid down by the framers were intended to give to liberty of the press, as to the other liberties, the broadest scope that could be countenanced in an orderly society.

The implications of subsequent American history confirm such a construction of the First Amendment. To be sure, it occurred no more to the people who lived in the decades following Ratification than it would to us now that the power of courts to protect themselves from disturbances and disorder in the courtroom by use of contempt proceedings could seriously be challenged as conflicting with constitutionally secured guarantees of liberty. In both state and federal courts, this power has been universally recognized. *See Anderson v. Dunn*, 6 Wheat. 204, 19 U. S. 227. But attempts to expand it in the post-ratification years evoked popular reactions that bespeak a feeling of jealous solicitude for freedom of the press. In Pennsylvania and New York, for example, heated controversies arose over alleged abuses in the exercise of the contempt power, which in both places culminated in legislation practically [Footnote 11] forbidding summary punishment for publications. *See Nelles and King, Contempt by Publication*, 28 Col.L.Rev. 401, 409-422.

In the federal courts, there was the celebrated case of Judge Peck, recently referred to by this Court in *Nye v. United States*, 313 U. S. 33, 313 U. S. 45. The impeachment proceedings against him, it should be noted, and the strong feelings they engendered, were set in motion by his summary punishment of a lawyer for publishing comment on a case which was on appeal at the time of publication,

and which raised the identical issue of several other cases then pending before him. Here again, legislation was the outcome, Congress proclaiming, in a statute expressly captioned "An Act *declaratory* of the law concerning contempts of court," [Footnote 12] that the power of federal courts to inflict summary punishment for contempt

"shall not be construed to extend to any cases except the misbehaviour of . . . persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice . . ."

When recently called upon to interpret this statute, we overruled the earlier decision of this Court in *Toledo Newspaper Co. v. United States*, 247 U. S. 402, in the belief that it improperly enlarged the stated area of summary punishment. *Nye v. United States, supra*. Here, as in the *Nye* case, we need not determine whether the statute was intended to demarcate the full power permissible under the Constitution to punish by contempt proceedings. But we do find in the enactment, viewed in its historical context, a respect for the prohibitions of the First Amendment, not as mere guides to the formulation of policy, but as commands the breach of which cannot be tolerated.

We are aware that, although some states have, by statute or decision, expressly repudiated the power of judges to punish publications as contempts on a finding of mere tendency to interfere with the orderly administration of justice in a pending case, other states have sanctioned the exercise of such a power. (*See Nelles and King, loc. cit. supra*, 536-562, for a collection and discussion of state cases.) But state power in this field was not tested in this Court for more than a century. [Footnote 13] Not until 1925, with the

decision in *Gitlow v. New York*, *supra*, 268 U. S. 652, did this Court recognize in the Fourteenth Amendment the application to the states of the same standards of freedom of expression as, under the First Amendment, are applicable to the federal government. And this is the first time since 1925 that we have been called upon to determine the constitutionality of a state's exercise of the contempt power in this kind of situation. Now that such a case is before us, we cannot allow the mere existence of other untested state decisions to destroy the historic constitutional meaning of freedom of speech and of the press.

History affords no support for the contention that the criteria applicable under the Constitution to other types of utterances are not applicable, in contempt proceedings, to out-of-court publications pertaining to a pending case.

### III

We may appropriately begin our discussion of the judgments below by considering how much, as a practical matter, they would affect liberty of expression. It must be recognized that public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist. Since they punish utterances made during the pendency of a case, the judgments below therefore produce their restrictive results at the precise time when public interest in the matters discussed would naturally be at its height. Moreover, the ban is likely to fall not only at a crucial time, but upon the most important topics of discussion. Here, for example, labor controversies were the topics of some of the publications. Experience shows that, the more acute labor controversies are, the more likely

it is that, in some aspect, they will get into court. It is therefore the controversies that command most interest that the decisions below would remove from the arena of public discussion.

No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression. Yet it would follow as a practical result of the decisions below that anyone who might wish to give public expression to his views on a pending case involving no matter what problem of public interest, just at the time his audience would be most receptive, would be as effectively discouraged as if a deliberate statutory scheme of censorship had been adopted. Indeed, perhaps more so, because, under a legislative specification of the particular kinds of expressions prohibited and the circumstances under which the prohibitions are to operate, the speaker or publisher might at least have an authoritative guide to the permissible scope of comment, instead of being compelled to act at the peril that judges might find in the utterance a "reasonable tendency" to obstruct justice in a pending case.

This unfocussed threat is, to be sure, limited in time, terminating, as it does, upon final disposition of the case. But this does not change its censorial quality. An endless

series of moratoria on public discussion, even if each were very short, could hardly be dismissed as an insignificant abridgment of freedom of expression. And to assume that each would be short is to overlook the fact that the "pendency" of a case is frequently a matter of months, or even years, rather than days or weeks. [Footnote 14]

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For these reasons, we are convinced that the judgments below result in a curtailment of expression that cannot be dismissed as insignificant. If they can be justified at all, it must be in terms of some serious substantive evil which they are designed to avert. The substantive evil here sought to be averted has been variously described below. [Footnote 15] It appears to be double: disrespect for the judiciary, and disorderly and unfair administration of justice. The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind, although not always with perfect good taste, [Footnote 16] on all public institutions. And an enforced silence, however limited,

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solely in the name of preserving the dignity of the bench would probably engender resentment, suspicion, and contempt much more than it would enhance respect.

The other evil feared, disorderly and unfair administration of justice, is more plausibly associated with restricting publications which touch upon pending litigation. The very word "trial" connotes decisions on the evidence and arguments properly advanced in open court. Legal trials are not like elections, to be won through the use of the meeting hall, the radio, and the newspaper. But we cannot start with the assumption that publications of the kind here involved actually do threaten to change the nature of legal trials, and that, to preserve judicial impartiality, it is necessary for judges to have a contempt power by which they can close all channels of public expression to all matters which touch upon pending cases. We must therefore turn to the particular utterances here in question, and the circumstances of their publication, to determine to what extent the substantive evil of unfair administration of justice was a likely consequence and whether the degree of likelihood was sufficient to justify summary punishment.

*The Los Angeles Times Editorials.* The Times-Mirror Company, publisher of the Los Angeles Times, and L.D. Hotchkiss, its managing editor, were cited for contempt for the publication of three editorials. Both found by the trial court to be responsible for one of the editorials, the company and Hotchkiss were each fined \$100. The company alone was held responsible for the other two, and was fined \$100 more on account of one, and \$300 more on account of the other.

The \$300 fine presumably marks the most serious offense. The editorial thus distinguished was entitled "Probation for Gorillas?" After vigorously denouncing two members of a labor union who had previously been

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found guilty of assaulting nonunion truck drivers, it closes with the observation:

"Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes. This community needs the example of their assignment to the jute mill. [Footnote 17]"

Judge Scott had previously set a day (about a month after the publication) for passing upon the application of Shannon and Holmes for probation and for pronouncing sentence.

The basis for punishing the publication as contempt was, by the trial court, said to be its "inherent tendency," and, by the Supreme Court, its "reasonable tendency," to interfere with the orderly administration of justice in an

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action then before a court for consideration. In accordance with what we have said on the "clear and present danger" cases, neither "inherent tendency" nor "reasonable tendency" is enough to justify a restriction of free expression. But even if they were appropriate measures, we should find exaggeration in the use of those phrases to describe the facts here.

From the indications in the record of the position taken by the Los Angeles Times on labor controversies in the past, there could have been little doubt of its attitude toward the probation of Shannon and Holmes. In view of the paper's long-continued militancy in this field, it is inconceivable that any judge in Los Angeles would expect anything but adverse criticism from it in the event probation were granted. Yet such criticism after final disposition of the proceedings would clearly have been privileged. Hence, this editorial, given the most intimidating construction it will bear, did no more than threaten future adverse criticism which was reasonably to be expected anyway in the event of a lenient disposition of the pending case. [Footnote 18] To regard it, therefore, as, in itself, of substantial influence upon the course of justice would be to impute to judges a lack of firmness, wisdom, or honor -- which we cannot accept as a major premise. *Cf.* Holmes, J., dissenting in *Toledo Newspaper Co. v. United States*, 247 U. S. 402, 247 U. S. 424.

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The other two editorials publication of which was fined below are set out in the lower margin. [Footnote 19] With respect to these two editorials, there is no divergence of conclusions among the members of this Court. We are all of the opinion that, upon any fair construction, their possible influence on the course of justice can be dismissed as negligible,

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and that the Constitution compels us to set aside the convictions as unpermissible exercises of the state's power. In view of the foregoing discussion of "Probation for Gorillas?", analysis of these editorials and their setting is deemed unnecessary.

*The Bridges Telegram.* While a motion for a new trial was pending in a case involving a dispute between an

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AFL union and a CIO union of which Bridges was an officer, he either caused to be published or acquiesced in the publication of a telegram which he had sent to the Secretary of Labor. The telegram referred to the judge's decision as "outrageous"; said that attempted enforcement of it would tie up the port of Los Angeles and involve the entire Pacific Coast, and concluded with the announcement that the CIO union, representing some twelve thousand members, did

"not intend to allow state courts to override the majority vote of members in choosing its officers and representatives and to override the National Labor Relations Board. [Footnote 20] "

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Apparently, Bridges' conviction is not rested at all upon his use of the word "outrageous." The remainder of the telegram, fairly construed, appears to be a statement that, if the court's decree should be enforced, there would be a strike. It is not claimed that such a strike would have been in violation of the terms of the decree, nor that, in any other way it would have run afoul of the law of California. On no construction, therefore, can the telegram be taken as a threat either by Bridges or the union to follow an illegal course of action.

Moreover, this statement of Bridges was made to the Secretary of Labor, who is charged with official duties in connection with the prevention of strikes. Whatever the cause might be if a strike was threatened or possible, the Secretary was entitled to receive all available information. Indeed, the Supreme Court of California recognized that, publication in the newspapers aside, in sending the message to the Secretary, Bridges was exercising the right of petition to a duly accredited representative of the United States Government, a right protected by the First Amendment. [Footnote 21]

It must be recognized that Bridges was a prominent labor leader speaking at a time when public interest in the particular labor controversy was at its height. The observations we have previously made here upon the timeliness

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and importance of utterances as emphasizing, rather than diminishing, the value of constitutional protection, and upon the breadth and seriousness of the censorial effects of punishing publications in the manner followed below, are certainly no less applicable to a leading spokesman for labor than to a powerful newspaper taking another point of view.

In looking at the reason advanced in support of the judgment of contempt, we find that here, too, the possibility of causing unfair disposition of a pending case is the major justification asserted. And here again, the gist of the offense, according to the court below, is intimidation.

Let us assume that the telegram could be construed as an announcement of Bridges' intention to call a strike, something which, it is admitted, neither the general law of California nor the court's decree prohibited. With an eye on the realities of the situation, we cannot assume that Judge Schmidt was unaware of the possibility of a strike as a consequence of his decision. If he was not intimidated by the facts themselves, we do not believe that the most explicit statement of them could have sidetracked the course of justice. Again, we find exaggeration in the conclusion that the utterance even "tended" to interfere with justice. If there was electricity in the atmosphere, it was generated by the facts; the charge added by the Bridges telegram can be dismissed as negligible. The words of Mr. Justice Holmes, spoken in reference to very different facts, seem entirely applicable here:

"I confess that I cannot find in all this, or in the evidence in the case, anything that would have affected a mind of reasonable fortitude, and still less can I find there anything that obstructed the administration of justice in any sense that I possibly can give to those words."

*Toledo Newspaper Co. v. United States*, *supra*, 247 U.S. at 247 U. S. 425.

*Reversed.*

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\* Together with No. 3, *Times-Mirror Co. et al. v. Superior Court of California in and for the County of Los Angeles*, also on writ of certiorari, 310 U.S. 623, to the Supreme Court of California. Argued October 21, 1940 (No. 64, 1940 Term); reargued October 13, 14, 1941.

[Footnote 1]

*Bridges v. Superior Court*, 14 Cal.2d 464, 94 P.2d 983; *Times-Mirror Co. v. Superior Court*, 15 Cal.2d 99, 98 P.2d 1029. In the *Times-Mirror* case, the affidavits of complaint contained seven counts, each based upon the publication of a different editorial. The Superior Court for Los Angeles County sustained a demurrer to two of the counts, and, of the five remaining counts on which conviction rested, the California Supreme Court affirmed as to three, reversed as to two.

[Footnote 2]

See *Times-Mirror Co. v. Superior Court*, *supra*, 118, where the following is quoted with approval: "Liberty of the press is subordinate to the independence of the judiciary. . . ."

[Footnote 3]

Indeed, the only evidence we have of the California legislature's appraisal indicates approval of a policy directly contrary to that here followed by the California courts. For § 1209, subsection 13, of the California Code of Civil Procedure (1937 ed.) provides:

". . . no speech or publication reflecting upon or concerning any court or any officer thereof shall be treated or punished as a contempt of such court unless made in the immediate presence of such court while in session and in such a manner as to actually interfere with its proceedings."

The California Supreme Court's decision that the statute is invalid under the California constitution is an authoritative determination of that point. But the inferences as to the legislature's appraisal of the danger arise from the enactment, and are therefore unchanged by the subsequent judicial treatment of the statute.

[Footnote 4]

*Schenck v. United States*, 249 U. S. 47, 249 U. S. 52.

[Footnote 5]

Restatement of the phrase "clear and present danger" in other terms has been infrequent. *Compare, however*: ". . . the test to be applied . . . is not the remote or possible effect." Brandeis, J., dissenting in *Schaefer v. United States*, 251 U. S. 466, 251 U. S. 486.

". . . we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, *unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.*"

Holmes, J., dissenting in *Abrams v. United States*, 250 U. S. 616, 250 U. S. 630;

"To justify suppression of free speech, *there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent.*"

Brandeis, J., concurring in *Whitney v. California*, 274 U. S. 357, 274 U. S. 376. The italics are ours.

[Footnote 6]

"The freedom of speech and of the press secured by the First Amendment against abridgment by the United States is similarly secured to all persons by the Fourteenth against abridgment by a State."

*Schneider v. State*, 308 U. S. 147, 308 U. S. 160.

[Footnote 7]

*Compare* James Buchanan, quoted in Stansbury, Trial of James H. Peck, 434:

"At the Revolution, we separated ourselves from the mother country, and we have established a republican form of government, securing to the citizens of this country other and greater personal rights than those enjoyed under the British monarchy."

[Footnote 8]

16 Geo. II, c. 30. This was not repealed until 1828. 9 Geo. IV, c.17.

[Footnote 9]

1 Geo. I, stat. 2, c. 5. *Cf. also* 36 Geo. III, c. 8, and discussion in Buckle, *History of Civilization in England*, Vol. I, 351.

[Footnote 10]

*Compare* VI Writings of James Madison, 1790-1802, 389:

"To these observations one fact will be added, which demonstrates that the common law cannot be admitted as the *universal* expositor of American terms, . . . the freedom of conscience and of religion are found in the same instruments which assert the freedom of the press. It will never be admitted that the meaning of the former, in the common law of England, is to limit their meaning in the United States."

*See also* *Near v. Minnesota*, 283 U. S. 697, 283 U. S. 716-717; *Thornhill v. Alabama*, *supra*, 310 U. S. 88.

[Footnote 11]

The New York statute specifically made "the publication of a false, or grossly inaccurate report" of court proceedings punishable by contempt proceedings, however. New York Rev.Stat. 1829, Part III, c. III, tit. 2, art. 1, § 10(6). The Pennsylvania statute contained no such proviso. It explicitly stated that

"all publications out of court . . . concerning any cause pending before any court of this commonwealth shall not be construed into a contempt of the said court, so as to render the author, printer, publisher, or either of them, liable to attachment and summary punishment for the same."

Pa. Acts 1808-1809, c, 78, p. 146.

[Footnote 12]

4 Stat. 487 (1831).

[Footnote 13]

*Patterson v. Colorado*, 205 U. S. 454, the only case before this Court during that period in which a state court's power to punish out-of-court publications by contempt was in issue, cannot be taken as a decision squarely on this point. *Cf.*: "We leave undecided the question whether there is to be found in the Fourteenth Amendment a prohibition similar to that, in the First." *Id.* 205 U. S. 462.

[Footnote 14]

Compare Nelles and King, *loc. cit. supra*, 549:

"While the *Sacco-Vanzetti* case was in the courts [six years], it was not, we believe, suggested as desirable that public expressions on either side be dealt with as contempts."

In public utility rate regulation, to take one of many examples that might be given of a field in which public interest is strong and public opinion divided, cases commonly remain "pending" for several years. *See St. Joseph Stock Yards Co. v. United States*, 298 U. S. 38, 298 U. S. 88-92; *McCart v. Indianapolis Water Co.*, 302 U. S. 419, 302 U. S. 435.16

[Footnote 15]

*Cf.*:

". . . said telegram . . . had an inherent tendency . . . *to embarrass and influence the actions and decisions of the judge* before whom said action was pending."

*Bridges v. Superior Court, supra*, 14 Cal.2d at p. 471;

"The published statement was not only *a criticism of the decision of the court* in an action then pending before said court, but was *a threat* that, if an attempt was made to enforce the decision, the ports of the entire Pacific Coast would be tied up."

*Id.* 488; ". . . the test . . . is whether it had a reasonable tendency to interfere with the orderly administration of justice . . ." *Times-Mirror Co. v. Superior Court, supra*, 15 Cal.2d at 103-104; ". . . the editorial [had a] . . . reasonable tendency . . . *to interfere with the ordinary administration of justice.*" *Id.* 110. The italics are ours.

[Footnote 16]

Compare the following statements from letters of Thomas Jefferson as set out in Padover, *Democracy*, 150-151:

"I deplore . . . the putrid state into which our newspapers have passed, and the malignity, the vulgarity, and mendacious spirit of those who write them. . . . These ordures are rapidly depraving the public taste."

"It is, however, an evil for which there is no remedy; our liberty depends on the freedom of the press, and that cannot be limited without being lost."

[Footnote 17]

The whole editorial, published in The Los Angeles Times of May 5, 1938, was as follows:

"Two members of Dave Beck's wrecking crew, entertainment committee, goon squad, or gorillas, having been convicted in Superior Court of assaulting nonunion truck drivers, have asked for probation. Presumably they will say they are 'first offenders,'

or plead that they were merely indulging a playful exuberance when, with slingshots, they fired steel missiles at men whose only offense was wishing to work for a living without paying tribute to the erstwhile boss of Seattle."

"Sluggers for pay, like murderers for profit, are in a slightly different category from ordinary criminals. Men who commit mayhem for wages are not merely violators of the peace and dignity of the State; they are also conspirators against it. The man who burgles because his children are hungry may have some claim on public sympathy. He whose crime is one of impulse may be entitled to lenity. But he who hires out his muscles for the creation of disorder and in aid of a racket is a deliberate foe of organized society, and should be penalized accordingly."

"It will teach no lesson to other thugs to put these men on good behavior for a limited time. Their 'duty' would simply be taken over by others like them. If Beck's thugs, however, are made to realize that they face San Quentin when they are caught, it will tend to make their disreputable occupation unpopular. Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes. This community needs the example of their assignment to the jute mill."

[Footnote 18]

*Cf. Times-Mirror Co. v. Superior Court, supra*, 15 Cal.2d 109-110:

"The editorial may not have been intended, but it is capable of being construed, as a notice to the trial judge that no leniency should be extended to the convicted men, and, furthermore, that, should the court act contrary to the suggestions contained in the editorial, it might well expect adverse criticism in the columns of The Times."

Although the foregoing statement was made with respect to another of the editorials, the opinion of the California Supreme Court later said it was applicable to "Probation for Gorillas?" *Id.* 114-115.

[Footnote 19]

The first of these editorials, entitled "Sit-Strikers Convicted," was published in the Los Angeles Times of December 21, 1937, the day after the jury had returned a verdict that the "sit-strikers" in question were guilty, and the day before the trial judge was to hold court for the purpose of pronouncing sentence, hearing motions for a new trial, and passing upon applications for probation. The editorial follows in its entirety:

"The verdict of a jury finding guilty the twenty-two sit-strikers who led the assault on the Douglas plant last February will have reverberations up and down the Pacific Coast, and in points farther east."

"The verdict means that Los Angeles is still Los Angeles, that the city is aroused to the danger of davebeckism, and that no kind of union terrorism will be permitted here."

"The verdict may have a good deal to do with sending Dave Beck back to Seattle. For, while the United Automobile Workers have no connection with Beck, their tactics and

his are identical in motive, and if Beck can be convinced that this kind of warfare is not permitted in this area, he will necessarily abandon his dreams of conquest."

"Already the united farmers and ranchers have given Beck a severe setback. The Hynes hay market is still free, and it has been made plain that interference with milk deliveries to Los Angeles will not be tolerated."

"Dist. Atty. Fitts pledged his best efforts to prevent and punish union terrorism and racketeering in a strong radio address, and followed it up yesterday with a statement congratulating the jury that convicted the sit-downers and the community on one of the 'most far-reaching verdicts in the history of this country.'"

"In this he is correct. It is an important verdict. For the first time since the present cycle of labor disturbances began, union lawlessness has been treated as exactly what it is, an offense against the public peace punishable like any other crime."

"The seizure of property by a militant minority, which arrogated to itself the right of dictating not only to employers, but to other workers not in sympathy with it, what should be the terms and conditions of working, has proved to be within the control of local peace officers and authorities."

"Nobody ran off to Washington to get this affair handled. It was attended to right here."

"Government may have broken down in other localities; whole States may have yielded to anarchy. But Los Angeles county stands firm; it has officers who can do their duty, and courts and juries which can function."

"So long as that is the case, davebeckism cannot and will not get control here; nor johnlewisism either."

The second of these editorials, entitled "The Fall of an Ex-Queen," was published in The Los Angeles Times of April 14, 1938. Here, too, publication took place after a jury had found the subject of the editorial guilty, but before the trial judge had pronounced sentence. The editorial follows in its entirety:

"Politics as we know it is an essentially selfish business, conducted in the main for personal profit of one kind or another. When it is of the boss type, it is apt to be pretty sordid as well. Success in bosship, which is a denial of public rights, necessarily implies a kind of moral obliquity, if not an actually illegal one."

"So that it is something of a contradiction of sense, if not of terms, to express regret that the political talents of Mrs. Helen Werner were not directed to other objectives than those which, in the twilight of her active life, have brought her and her husband to disgrace. If they had been, she would not have been in politics at all, and probably would never have been heard of in a public way. Her natural flair was purely political; she would have been miscast in any other sphere of activity."

"Mrs. Werner's primary mistake seems to have been in failing to recognize that her political day was past. For years, she enjoyed the unique distinction of being the

country's only woman boss -- and did she enjoy it. In her heyday, she had a finger in every political pie, and many were the plums she was able to extract therefrom for those who played ball with her. From small beginnings, she utilized every opportunity to extend her influence and to put officeholders and promising political material under obligations to her. She became a power in the backstage councils of city and county affairs, and, from that place of strategic advantage, reached out to pull the strings on State and legislative offices as well."

"Those were the days when Mrs. Werner was 'Queen Helen,' and it is only fair to say that to her the power was much more important than the perquisites. When the inevitable turning of the political wheel brought new figures to the front and new bosses to the back, she found her grip slipping, and it was hard to take. The several cases which, in recent years, have brought her before the courts to defend her activities seem all examples of an energetic effort to regain and reassert her one-time influence in high places. That it should ultimately have landed her behind the bars as a convicted bribe-seeker is not illogical. But if there is logic in it, the money meant less to Mrs. Werner than the name of still being a political power, one who could do things with public officials that others could not do. To herself, at least, she was still Queen Helen."

[Footnote 20]

The portions of the telegram published in newspapers of general circulation in San Francisco and Los Angeles on January 24 and 25, 1938, were as follows:

"This decision is outrageous considering ILA has 15 members (in San Pedro) and the International Longshoremen-Warehousemen's Union has 3000. International Longshoremen-Warehousemen Union has petitioned the labor board for certification to represent San Pedro longshoremen with International Longshoremen Association denied representation because it represents only 15 men. Board hearing held; decision now pending. Attempted enforcement of *Schmidt* decision will tie up port of Los Angeles and involve entire Pacific Coast. International Longshoremen-Warehousemen Union, representing over 11,000 of the 12,000 longshoremen on the Pacific Coast, does not intend to allow state courts to override the majority vote of members in choosing its officers and representatives and to override the National Labor Relations Board."

[Footnote 21]

*See Bridges v. Superior Court, supra*, 14 Cal.2d at 493. *Cf. 44 U. S. Nicholls*, 3 How. 266.

MR. JUSTICE FRANKFURTER, with whom concurred the CHIEF JUSTICE, MR. JUSTICE ROBERTS and MR. JUSTICE BYRNES, dissenting.

Our whole history repels the view that it is an exercise of one of the civil liberties secured by the Bill of Rights for a leader of a large following, or for a powerful metropolitan newspaper, to attempt to overawe a judge in a matter immediately pending before him. The view of the majority deprives California of means for securing to its citizens justice according to law -- means which, since the Union was

founded, have been the possession, hitherto unchallenged, of all the states. This sudden break with the uninterrupted course of constitutional history has no constitutional warrant. To find justification for such deprivation of the historic powers of the states is to misconceive the idea of freedom of thought and speech as guaranteed by the Constitution.

Deeming it more important than ever before to enforce civil liberties with a generous outlook, but deeming it no less essential for the assurance of civil liberties that the federal system founded upon the Constitution be maintained, we believe that the careful ambiguities and silences of the majority opinion call for a full exposition of the issues in these cases.

While the immediate question is that of determining the power of the courts of California to deal with attempts to coerce their judgments in litigation immediately before them, the consequence of the Court's ruling today is a denial to the people of the forty-eight states of a right which they have always regarded as essential for the effective exercise of the judicial process, as well as a denial to the Congress of powers which were exercised from the very beginning even by the framers of the Constitution themselves. To be sure, the majority do not, in so many words, hold that trial by newspapers has constitutional

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sanctity. But the atmosphere of their opinion and several of its phrases mean that, or they mean nothing. Certainly the opinion is devoid of any frank recognition of the right of courts to deal with utterances calculated to intimidate the fair course of justice a right which hitherto all the states have, from time to time, seen fit to confer upon their courts, and which Congress conferred upon the federal courts in the Judiciary Act of 1789. If all that is decided today is that the majority deem the specific interferences with the administration of justice in California so tenuously related to the right of California to keep its courts free from coercion as to constitute a check upon free speech, rather than upon impartial justice, it would be well to say so. Matters that involve so deeply the powers of the states, and that put to the test the professions by this Court of self-restraint in nullifying the political powers of state and nation, should not be left clouded.

We are not even vouchsafed reference to the specific provision of the Constitution which renders states powerless to insist upon trial by courts, rather than trial by newspapers. So far as the Congress of the United States is concerned, we are referred to the First Amendment. That is specific. But we are here dealing with limitations upon California -- with restraints upon the states. To say that the protection of freedom of speech of the First Amendment is absorbed by the Fourteenth does not say enough. Which one of the various limitations upon state power introduced by the Fourteenth Amendment absorbs the First? Some provisions of the Fourteenth Amendment apply only to citizens, and one of the petitioners here is an alien; some of its provisions apply only to natural persons, and another petitioner here is a corporation. *See Hague v. CIO*, 307 U. S. 496, 307 U. S. 514, and cases cited. Only the Due Process Clause assures constitutional protection of civil liberties to aliens and corporations. Corporations

cannot claim for themselves the "liberty" which the Due Process Clause guarantees. That clause protects only their property. *Pierce v. Society of Sisters*, 268 U. S. 510, 268 U. S. 535. The majority opinion is strangely silent in failing to avow the specific constitutional provision upon which its decision rests.

These are not academic debating points or technical niceties. Those who have gone before us have admonished us

"that, in a free representative government, nothing is more fundamental than the right of the people, through their appointed servants, to govern themselves in accordance with their own will, except so far as they have restrained themselves by constitutional limits specifically established, and that, in our peculiar dual form of government, nothing is more fundamental than the full power of the State to order its own affairs and govern its own people, except so far as the Federal Constitution expressly or by fair implication has withdrawn that power. The power of the people of the States to make and alter their laws at pleasure is the greatest security for liberty and justice . . . We are not invested with the jurisdiction to pass upon the expediency, wisdom or justice of the laws of the States as declared by their courts, but only to determine their conformity with the Federal Constitution and the paramount laws enacted pursuant to it. Under the guise of interpreting the Constitution, we must take care that we do not import into the discussion our own personal views of what would be wise, just, and fitting rules of government to be adopted by a free people and confound them with constitutional limitations."

*Twining v. New Jersey*, 211 U. S. 78, 211 U. S. 106-107.

In a series of opinions as uncompromising as any in its history, this Court has settled that the fullest opportunities for free discussion are "implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment," protected against attempted invasion by

the states. *Palko v. Connecticut*, 302 U. S. 319, 302 U. S. 324-325. The channels of inquiry and thought must be kept open to new conquests of reason, however odious their expression may be to the prevailing climate of opinion. But liberty, "in each of its phases, has its history and connotation." Whether a particular state action violates "the essential attributes of that liberty" must be judged in the light of the liberty that is invoked and the curtailment that is challenged. *Near v. Minnesota*, 283 U. S. 697, 283 U. S. 708. For

"the recognition of a privilege does not mean that it is without conditions or exceptions. The social policy that will prevail in many situations may run foul in others of a different social policy, competing for supremacy. It is then the function of a court to mediate between them, assigning, so far as possible, a proper value to each, and summoning to it aid all the distinctions and analogies that are the tools of the judicial process."

*Clark v. United States*, 289 U. S. 1, 289 U. S. 13.

Free speech is not so absolute or irrational a conception as to imply paralysis of the means for effective protection of all the freedoms secured by the Bill of Rights. *Compare* Lincoln's Message to Congress in Special Session, July 4, 1861, 7 Richardson, Messages and Papers of the Presidents, pp. 3221-3232. In the cases before us, the claims on behalf of freedom of speech and of the press encounter claims on behalf of liberties no less precious. California asserts her right to do what she has done as a means of safeguarding her system of justice.

The administration of justice by an impartial judiciary has been basic to our conception of freedom ever since Magna Carta. It is the concern not merely of the immediate litigants. Its assurance is everyone's concern, and it is protected by the liberty guaranteed by the Fourteenth Amendment. That is why this Court has outlawed mob domination of a courtroom, *Moore v. Dempsey*, 261 U. S. 86, mental coercion of a defendant, *Chambers v.*

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*Florida*, 309 U. S. 227, a judicial system which does not provide disinterested judges, *Tumey v. Ohio*, 273 U. S. 510, and discriminatory selection of jurors, *Pierre v. Louisiana*, 306 U. S. 354; *Smith v. Texas*, 311 U. S. 128.

A trial is not a "free trade in ideas," nor is the best test of truth in a courtroom "the power of the thought to get itself accepted in the competition of the market." *Compare* Mr. Justice Holmes in *Abrams v. United States*, 250 U. S. 616, 250 U. S. 630. A court is a forum with strictly defined limits for discussion. It is circumscribed in the range of its inquiry and in its methods by the Constitution, by laws, and by age-old traditions. Its judges are restrained in their freedom of expression by historic compulsions resting on no other officials of government. They are so circumscribed precisely because judges have in their keeping the enforcement of rights and the protection of liberties which, according to the wisdom of the ages, can only be enforced and protected by observing such methods and traditions.

The dependence of society upon an unswerved judiciary is such a commonplace in the history of freedom that the means by which it is maintained are too frequently taken for granted, without heed to the conditions which alone make it possible. The role of courts of justice in our society has been the theme of statesmen and historians and constitution makers. It is perhaps best expressed in the Massachusetts Declaration of Rights:

"It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation of the laws, and administration of justice. It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit."

The Constitution was not conceived as a doctrinaire document, nor was the Bill of Rights intended as a collection of popular slogans. We are dealing with instruments

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of government. We cannot read into the Fourteenth Amendment the freedom of speech and of the press protected by the First Amendment, and, at the same time, read out age-old means employed by states for securing the calm course of justice. The Fourteenth Amendment does not forbid a state to continue the historic process of prohibiting expressions calculated to subvert a specific exercise of judicial power. So to assure the impartial accomplishment of justice is not an abridgment of freedom of speech or freedom of the press, as these phases of liberty have heretofore been conceived even by the stoutest libertarians. In fact, these liberties themselves depend upon an untrammelled judiciary whose passions are not even unconsciously aroused and whose minds are not distorted by extrajudicial considerations.

Of course, freedom of speech and of the press are essential to the enlightenment of a free people and in restraining those who wield power. Particularly should this freedom be employed in comment upon the work of courts, who are without many influences ordinarily making for humor and humility, twin antidotes to the corrosion of power. But the Bill of Rights is not self-destructive. Freedom of expression can hardly carry implications that nullify the guarantees of impartial trials. And, since courts are the ultimate resorts for vindicating the Bill of Rights, a state may surely authorize appropriate historic means to assure that the process for such vindication be not wrenched from its rational tracks into the more primitive melee of passion and pressure. The need is great that courts be criticized, but just as great that they be allowed to do their duty

The "liberty" secured by the Fourteenth Amendment summarizes the experience of history. And the power exerted by the courts of California is deeply rooted in the system of administering justice evolved by liberty-loving English-speaking peoples. From the earliest days of the

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English courts, they have encountered obstructions to doing that for which they exist, namely, to administer justice impartially and solely with reference to what comes before them. These interferences were of diverse kinds. But they were all covered by the infelicitous phrase "contempt of court," and the means for dealing with them is historically known as the power of courts to punish for contempt. As is true of many aspects of our legal institutions, the settled doctrines concerning the mode of procedure for exercising the power of contempt became established on dubious historical authority. Exact legal scholarship has controverted much pertaining to the origin of summary proceedings for contempt. *See* Sir John Fox, *The History of Contempt of Court, passim*. But there is no doubt that, since the early eighteenth century, the power to punish for contempt for intrusions into the living process of adjudication has been an unquestioned characteristic of English courts and of the courts of this country.

The judicatures of the English-speaking world, including the courts of the United States and of the forty-eight states, have from time to time recognized and exercised the power now challenged. (For partial lists of cases, *see* Nelles and King, *Contempt by Publication in the United States*, 28 Col.L.Rev. 401, 525, 554; Sullivan, *Contempts by Publication*, pp. 185 *et seq.*) A declaratory formulation of the common law was written into the Judiciary Act of 1789 (17, 1 Stat. 73, 83) by Oliver Ellsworth, one of

the framers of the Constitution, later to become Chief Justice; the power was early recognized as incidental to the very existence of courts in a succession of opinions in this Court (*United States v. Hudson*, 7 Cranch 32; *Anderson v. Dunn*, 6 Wheat. 204, 19 U. S. 227; *Ex parte Kearney*, 7 Wheat. 38); it was expounded and supported by the great Commentaries that so largely influenced the shaping of our law in the late eighteenth and early nineteenth centuries,

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those of Blackstone, Kent and Story; its historic continuity withstood attack against state action under the Due Process Clause, now again invoked, *Eilenbecker v. Plymouth County*, 134 U. S. 31, and see 86 U. S. 19 Wall. 505; *Ex parte Terry*, 128 U. S. 289; *Savin, Petitioner*, 131 U. S. 267. [Footnote 2/1]

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As in the exercise of all power, it was abused. Some English judges extended their authority for checking interferences with judicial business actually in hand to "lay by the heel" those responsible for "scandalizing the court," that is, bringing it into general disrepute. Such foolishness has long since been disavowed in England, and has never found lodgment here. But even the technical power of punishing interference with the court's business is susceptible of abuse. As early as 1809, Pennsylvania restricted the power to inflict summary punishment for contempts to a closely defined class of misconduct, and provided the ordinary criminal procedure for other forms of interferences with a pending cause. 1808-09 Pa. Acts, c. 78, p. 146. [Footnote 2/2] The flagrant case of Judge Peck [Footnote 2/3] led Congress

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to pass the Act of March 2, 1831, 4 Stat. 487, 28 U.S.C. § 385, the scope of which we recently considered. *Nye v. United States*, 313 U. S. 33. A number of states copied the federal statute. It would be pedantic to trace the course of legislation and of adjudication on this subject in our half-hundred jurisdictions. Suffice it to say that the hitherto unchallenged power of American states to clothe their courts with authority to punish for contempt was thus summarized only recently by Mr. Chief Justice Hughes in the leading case vindicating the liberty of the press against state action:

"here is also the conceded authority of courts to punish for contempt when publications directly tend to prevent the proper discharge of Judicial functions."

*Near v. Minnesota*, 283 U. S. 697, 7 283 U. S. 15. [Footnote 2/4]

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It is trifling with great issues to suggest that the question before us is whether eighteenth-century restraints upon the freedom of the press should now be revived. The question is, rather, whether nineteenth- and twentieth-century American institutions should be abrogated by judicial fiat.

That a state may, under appropriate circumstances, prevent interference with specific exercises of the process of impartial adjudication does not mean that its people lose the right to condemn decisions or the judges who render them. Judges as persons, or courts, as institutions, are entitled to no greater immunity from criticism than other persons or institutions. Just because the holders of judicial office are identified with the interests of justice they may forget their common human frailties and fallibilities. There have sometimes been martinets upon the bench, as there have also been pompous wielders of authority who have used the paraphernalia of power in support of what they called their dignity. Therefore, judges must be kept mindful of their limitations, and of their ultimate public responsibility by a vigorous stream of criticism expressed with candor, however blunt. [Footnote 2/5]

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man cannot be summarily laid by the heels because his words may make public feeling more unfavorable in case the judge should be asked to act at some later date, any more than he can for exciting public feeling against the judge for what he already has done."

Mr. Justice Holmes, in *Craig v. Hecht*, 263 U. S. 255, 263 U. S. 281-82. But the Constitution does not bar a state from acting on the theory of our system of justice, that the

"conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."

*Patterson v. Colorado*, 205 U. S. 454, 205 U. S. 462. The theory of our system of justice, as thus stated for the Court by Mr. Justice Holmes, has never been questioned by any member of the Court. It was questioned neither by Mr. Justice Harlan nor by Mr. Justice Brewer in their dissents in the *Patterson* case. The differences in that case concerned the question whether "there is to be found in the Fourteenth Amendment a prohibition . . . similar to that, in the First," and, if so, what the scope of that protection is. The first question was settled in the affirmative by a series of cases beginning with *Gitlow v. New York*, 268 U. S. 652. And that the scope of the First Amendment was broader than was intimated in the opinion in the *Patterson* case was later recognized by Mr. Justice Holmes, speaking for the Court, in *Schenck v. United States*, 249 U. S. 47. But that the conventional power to punish for contempt is not a censorship in advance, but a punishment for past conduct, and, as such, like prosecution for a criminal libel, is not offensive either to the First or to the Fourteenth Amendments, has never been doubted throughout this Court's history.

This conception of justice, the product of a long and arduous effort in the history of freedom, is one of the greatest achievements of civilization, and is not less to be cherished at a time when it is repudiated and derided by

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powerful regimes.

"The right to sue and defend in the courts is the alternative of force. In an organized society, it is the right conservative of all other rights, and lies at the foundation of orderly government."

*Chambers v. Baltimore & Ohio R. Co.*, 207 U. S. 142, 207 U. S. 148. This has nothing to do with curtailing expression of opinion, be it political, economic, or religious, that may be offensive to orthodox views. It has to do with the power of the state to discharge an indispensable function of civilized society, that of adjudicating controversies between its citizens and between citizens and the state through legal tribunals in accordance with their historic procedures. Courts and judges must take their share of the gains and pains of discussion which is unfettered except by laws of libel, by self-restraint, and by good taste. Winds of doctrine should freely blow for the promotion of good and the correction of evil. Nor should restrictions be permitted that cramp the feeling of freedom in the use of tongue or pen regardless of the temper or the truth of what may be uttered.

Comment however forthright is one thing. Intimidation with respect to specific matters still in judicial suspense, quite another. *See* Laski, Procedure for Constructive Contempt in England, 41 Harv.L.Rev. 1031, 1034; Goodhart, Newspapers and Contempt in English Law, 48 Harv.L.Rev. 885. A publication intended to teach the judge a lesson, or to vent spleen, or to discredit him, or to influence him in his future conduct, would not justify exercise of the contempt power. *Compare* Judge Learned Hand in *Ex parte Craig*, 282 F. 138, 160-61. It must refer to a matter under consideration, and constitute, in effect, a threat to its impartial disposition. It must be calculated to create an atmospheric pressure incompatible with rational, impartial adjudication. But, to interfere with justice, it need not succeed. As with other offenses, the state should be able to proscribe attempts that fail because of the danger that attempts may succeed. The purpose,

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it will do no harm to repeat, is not to protect the court as a mystical entity, or the judges as individuals or as anointed priests set apart from the community and spared the criticism to which in a democracy other public servants are exposed. The purpose is to protect immediate litigants and the public from the mischievous danger of an unfree or coerced tribunal. The power should be invoked only where the adjudicatory process may be hampered or hindered in its calm, detached, and fearless discharge of its duty on the basis of what has been submitted in court. The belief that decisions are so reached is the source of the confidence on which law ultimately rests.

It will not do to argue that a state cannot permit its judges to resist coercive interference with their work in hand because other officials of government must endure such obstructions. In such matters, "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U. S. 345, 256 U. S. 349. Presidents and governors and legislators are political officials traditionally subject to political influence and the rough and tumble of the hustings, who have open to them traditional means of self-defense. In a very immediate sense, legislators and executives express the popular will. But judges do not express the popular will in any ordinary meaning

of the term. The limited power to punish for contempt which is here involved wholly rejects any assumption that judges are superior to other officials. They merely exercise a function historically and intrinsically different. From that difference is drawn the power which has behind it the authority and the wisdom of our whole history. Because the function of judges and that of other officials in special situations may approach similarity, hard cases can be put which logically may contradict the special quality of the judicial process.

"But the provisions of the Constitution are not mathematical formulas having their essence in their form;

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they are organic living institutions transplanted from English soil. Their significance is vital, not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin, and the line of their growth."

*Gompers v. United States*, 233 U. S. 604, 233 U. S. 610.

We are charged here with the duty, always delicate, of sitting in judgment on state power. We must be fastidiously careful not to make our private views the measure of constitutional authority. To be sure, we are here concerned with an appeal to the great liberties which the Constitution assures to all our people, even against state denial. When a substantial claim of an abridgment of these liberties is advanced, the presumption of validity that belongs to an exercise of state power must not be allowed to impair such a liberty, or to check our close examination of the merits of the controversy. But the utmost protection to be accorded to freedom of speech and of the press cannot displace our duty to give due regard also to the state's power to deal with what may essentially be local situations.

Because freedom of public expression alone assures the unfolding of truth, it is indispensable to the democratic process. But even that freedom is not an absolute, and is not predetermined. By a doctrinaire overstatement of its scope, and by giving it an illusory absolute appearance, there is danger of thwarting the free choice and the responsibility of exercising it which are basic to a democratic society. While we are reviewing a judgment of the California Supreme Court, and not an act of its legislature or the voice of the people of California formally expressed in its constitution, we are, in fact, passing judgment on "the power of the State as a whole." *Rippey v. Texas*, 193 U. S. 504, 193 U. S. 509; *Skiriotes v. Florida*, 313 U. S. 69, 313 U. S. 79; *United Gas Co. v. Texas*, 303 U. S. 123, 303 U. S. 142; *Missouri v. Dockery*, 191 U. S. 165, 191 U. S. 171; *Iowa-Des Moines Bank v. Bennett*, 284 U. S. 239, 284 U. S. 244.

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By the constitution of California, as authoritatively construed by its Supreme Court, and therefore as binding upon this Court as though ratified by all the voters of California, the citizens of that state have chosen to place in its courts the power, as we have defined it, to insure impartial justice. If the citizens of California have other desires, if they want to permit the free play of modern publicity in connection with

pending litigation, it is within their easy power to say so, and to have their way. They have ready means of amending their constitution, and they have frequently made use of them. We are, after all, sitting over three thousand miles away from a great state, without intimate knowledge of its habits and its needs, in a matter which does not cut across the affirmative powers of the national government. Some play of policy must be left to the states in the task of accommodating individual rights and the overriding public wellbeing which makes those rights possible. How are we to know whether an easy-going or stiffer view of what affects the actual administration of justice is appropriate to local circumstances? How are we to say that California has no right to model its judiciary upon the qualities and standards attained by the English administration of justice, and to use means deemed appropriate to that end by English courts. [Footnote 2/6] It is surely an arbitrary judgment to say that the

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Due Process Clause denies California that right. For respect for "the liberty of the subject," though not explicitly written into a constitution, is so deeply embedded in the very texture of English feeling and conscience [Footnote 2/7] that it survives, as the pages of Hansard abundantly prove, the exigencies of the life and death struggle of the British people. *See, e.g., Carr, Concerning English Administrative Law, c. 3* ("Crisis Legislation").

The rule of law applied in these cases by the California court forbade publications having "a reasonable tendency to interfere with the orderly administration of justice in pending actions." To deny that this age-old formulation of the prohibition against interference with dispassionate adjudication is properly confined to the substantive evil is not only to turn one's back on history, but also to indulge in an idle play on words, unworthy of constitutional adjudication. It was urged before us that the words "reasonable tendency" had a fatal pervasiveness, and that their replacement by "clear and present danger" was required to state a constitutionally permissible rule of law. The Constitution, as we have recently had occasion to remark, is not a formulary. *Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 311 U. S. 444. Nor does it require displacement of an historic test by a phrase which first gained currency on March 3, 1919. *Schenck v. United States*, 249 U. S. 47. Our duty is not ended with the recitation

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of phrases that are the shorthand of a complicated historic process. The phrase "clear and present danger" is merely a justification for curbing utterance where that is warranted by the substantive evil to be prevented. The phrase itself is an expression of tendency, and not of accomplishment, and the literary difference between it and "reasonable tendency" is not of constitutional dimension.

Here, the substantive evil to be eliminated is interference with impartial adjudication. To determine what interferences may be made the basis for contempt tenders precisely the same kind of issues as that to which the "clear and present danger" test gives rise. "It is a question of proximity and degree." *Schenck v. United States*, *supra*, at 249 U. S. 52. And this, according to Mr. Justice Brandeis "is a rule of reason . . . Like many other rules for human conduct, it can be applied correctly only by the

exercise of good judgment." *Schaefer v. United States*, 251 U. S. 466, 251 U. S. 482-483. Has California's judgment here undermined liberties protected by the Constitution? In common with other questions of degree, this is to be solved not by shorthand phrases, but by consideration of the circumstances of the particular case. One cannot yell "Fire" in a crowded theater; police officers cannot turn their questioning into an instrument of mental oppression. *Chambers v. Florida*, 309 U. S. 227.

If a rule of state law is not confined to the evil which may be dealt with but places an indiscriminate ban on public expression that operates as an overhanging threat to free discussion, it must fall without regard to the facts of the particular case. This is true whether the rule of law be declared in a statute or in a decision of a court. *Thornhill v. Alabama*, 310 U. S. 88; *Cantwell v. Connecticut*, 310 U. S. 296. In the cases before us, there was no blanket or dragnet prohibition of utterance affecting courts. Freedom to criticize their work, to assail generally

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the institution of courts, to report and comment on matters in litigation but not to subvert the process of deciding -- all this freedom was respected. Only the state's interest in calm and orderly decisions, which represented also the constitutional right of the parties, led it to condemn coercive utterances directed towards a pending proceeding. California, speaking through its courts, acted because of their conclusion that such utterances undermined the conditions necessary for fair adjudication.

It is suggested that threats, by discussion, to untrammelled decisions by courts are the most natural expressions when public feeling runs highest. But it does not follow that states are left powerless to prevent their courts from being subverted by outside pressure when the need for impartiality and fair proceeding is greatest. To say that the framers of the Constitution sanctified veiled violence through coercive speech directed against those charged with adjudication is not merely to make violence an ingredient of justice; it mocks the very ideal of justice by respecting its forms while stultifying its uncontaminated exercise.

We turn to the specific cases before us:

The earliest editorial involved in No. 3, "Sit-strikers Convicted," commented upon a case the day after a jury had returned a verdict and the day before the trial judge was to pronounce sentence and hear motions for a new trial and applications for probation. On its face, the editorial merely expressed exulting approval of the verdict, a completed action of the court, and there is nothing in the record to give it additional significance. The same is true of the second editorial, "Fall of an Ex-Queen," which luridly draws a moral from a verdict of guilty in a sordid trial and which was published eight days prior to the day set for imposing sentence. In both instances, imposition of sentences was immediately pending at the time of publication, but in neither case was there any declaration,

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direct or sly, in regard to this. As the special guardian of the Bill of Rights, this Court is under the heaviest responsibility to safeguard the liberties guaranteed from any encroachment, however astutely disguised. The Due Process Clause of the Fourteenth Amendment protects the right to comment on a judicial proceeding so long as this is not done in a manner interfering with the impartial disposition of a litigation. There is no indication that more was done in these editorials; they were not close threats to the judicial function which a state should be able to restrain. We agree that the judgment of the state court in this regard should not stand.

"Probation for Gorillas?", the third editorial, is a different matter. On April 22, 1938, a Los Angeles jury found two defendants guilty of assault with a deadly weapon and of a conspiracy to violate another section of the penal code. On May 2nd, the defendants applied for probation, and the trial judge, on the same day, set June 7th as the day for disposing of this application and for sentencing the defendants. In the Los Angeles Times for May 5th appeared the following editorial entitled "Probation for Gorillas?":

"Two members of Dave Beck's wrecking crew, entertainment committee, goon squad or gorillas, having been convicted in Superior Court of assaulting nonunion truck drivers, have asked for probation. Presumably, they will say they are 'first offenders,' or plead that they were merely indulging a playful exuberance when, with slingshots, they fired steel missiles at men whose only offense was wishing to work for a living without paying tribute to the erstwhile boss of Seattle."

"Sluggers for pay, like murderers for profit, are in a slightly different category from ordinary criminals. Men who commit mayhem for wages are not merely violators of the peace and dignity of the State; they are also conspirators against it. The man who burgles because his

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children are hungry may have some claim on public sympathy. He whose crime is one of impulse may be entitled to lenity. But he who hires out his muscles for the creation of disorder and in aid of a racket is a deliberate foe of organized society, and should be penalized accordingly."

"It will teach no lesson to other thugs to put these men on good behavior for a limited time. Their 'duty' would simply be taken over by others like them. If Beck's thugs, however, are made to realize that they face San Quentin when they are caught, it will tend to make their disreputable occupation unpopular. Judge A. A. Scott will make a serious mistake if he grants probation to Matthew Shannon and Kennan Holmes. This community needs the example of their assignment to the jute mill."

This editorial was published three days after the trial judge had fixed the time for sentencing and for passing on an application for probation, and a month prior to the date set. It consisted of a sustained attack on the defendants, with an explicit demand of the judge that they be denied probation and be sent "to the jute mill." This meant, in California idiom, that, in the exercise of his discretion the judge should treat the offense as a felony, with all its dire consequences, and not as a misdemeanor. Under the California Penal Code, the trial judge had wide discretion in sentencing the

defendants: he could sentence them to the county jail for one year or less, or to the state penitentiary for two years. The editorial demanded that he take the latter alternative, and send the defendants to the "jute mill" of the state penitentiary. A powerful newspaper admonished a judge, who within a year would have to secure popular approval if he desired continuance in office, that failure to comply with its demands would be "a serious mistake." Clearly, the state court was justified in treating this as a threat to impartial adjudication. It is

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too naive to suggest that the editorial was written with feeling of impotence and an intention to utter idle words. The publication of the editorial was hardly an exercise in futility. If it is true of juries, it is not wholly untrue of judges that they too may be "impregnated by the environing atmosphere." Mr. Justice Holmes in *Frank v. Mangum*, 237 U. S. 309, 237 U. S. 349. California should not be denied the right to free its courts from such coercive, extraneous influences; it can thus assure its citizens of their constitutional right of a fair trial. Here, there was a real and substantial manifestation of an endeavor to exert outside influence. A powerful newspaper brought its full coercive power to bear in demanding a particular sentence. If such sentence had been imposed, readers might assume that the court had been influenced in its action; if lesser punishment had been imposed, at least a portion of the community might be stirred to resentment. It cannot be denied that even a judge may be affected by such a quandary. We cannot say that the state court was out of bounds in concluding that such conduct offends the free course of justice. Comment after the imposition of sentence -- criticism, however unrestrained, of its severity or lenience or disparity, *cf. Ambard v. Attorney General for Trinidad and Tobago*, [1936] A.C. 322 - - is an exercise of the right of free discussion. But to deny the states power to check a serious attempt at dictating, from without, the sentence to be imposed in a pending case is to deny the right to impartial justice as it was cherished by the founders of the Republic and by the framers of the Fourteenth Amendment. It would erect into a constitutional right opportunities for abuse of utterance interfering with the dispassionate exercise of the judicial function. *See Rex v. Daily Mail*, [1921] 2 K.B. 733, 749; *Attorney General v. Tonks*, [1939] N.Z.L.R. 533.

In *No. 1*, Harry R. Bridges challenges a judgment by the Superior Court of California fining him \$125 for contempt.

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He was president of the International Longshoremen's and Warehousemen's Union, an affiliate of the Committee for Industrial Organization, and also West Coast director for the CIO. The ILWU was largely composed of men who had withdrawn from the International Longshoremen's Association, an affiliate of the American Federation of Labor. In the fall of 1937, the rival longshoremen's unions were struggling for control of a local in San Pedro Harbor. The officers of this local, carrying most of its members with them, sought to transfer the allegiance of the local to ILWU. Thereupon, longshoremen remaining in ILA brought suit in the Superior Court of Los Angeles county against the local and its officers. On January 21, 1938, Judge Schmidt, sitting in the Superior Court, enjoined the officers from working on behalf of ILWU and appointed a receiver to conduct the affairs of the local as an affiliate of

the AFL by taking charge of the outstanding bargaining agreements of the local and of its hiring hall, which is the physical mainstay of such a union. Judge Schmidt promptly stayed enforcement of his decree, and, on January 24th, the defendants in the injunction suit moved for a new trial and for vacation of the judgment. In view of its local setting, the case aroused great public interest. The waterfront situation on the Pacific Coast was also watched by the United States Department of Labor, and Bridges had been in communication with the Secretary of Labor concerning the difficulties. On the same day that the motion for new trial was filed, Bridges sent the Secretary the following wire concerning Judge Schmidt's decree:

"This decision is outrageous considering ILA has 15 members (in San Pedro) and the International Longshoremen-Warehousemen's Union has 3,000. International Longshoremen-Warehousemen Union has petitioned the Labor Board for certification to represent San

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Pedro longshoremen with International Longshoremen Association denied representation because it represents only 15 men. Board hearing held; decision now pending. Attempted enforcement of Schmidt decision will tie up port of Los Angeles and involve entire Pacific Coast. International Longshoremen-Warehousemen Union, representing over 11,000 of the 12,000 longshoremen on the Pacific Coast, does not intend to allow state courts to override the majority vote of members in choosing its officers and representatives and to override the National Labor Relations Board."

This telegram duly found its way into the metropolitan newspapers of California. Bridges' responsibility for its publication is clear. His publication of the telegram in the Los Angeles and San Francisco papers is the basis of Bridges' conviction for contempt.

The publication of the telegram was regarded by the state supreme court as "a threat that, if an attempt was made to enforce the decision, the ports of the entire Pacific Coast would be tied up," and "a direct challenge to the court that 11,000 longshoremen on the Pacific Coast would not abide by its decision." This occurred immediately after counsel had moved to set aside the judgment which was criticized, so unquestionably there was a threat to litigation obviously alive. It would be inadmissible dogmatism for us to say that, in the context of the immediate case -- the issues at stake, the environment in which the judge, the petitioner and the community were moving, the publication here made, at the time and in the manner it was made -- this could not have dominated the mind of the judge before whom the matter was pending. Here too, the state court's judgment should not be overturned.

The fact that the communication to the Secretary of Labor may have been privileged does not constitutionally protect whatever extraneous use may have been made

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of the communication. It is said that the possibility of a strike, in case of an adverse ruling, must, in any event, have suggested itself to the private thoughts of a sophisticated judge. Therefore the publication of the Bridges telegram, we are told,

merely gave that possibility public expression. To afford constitutional shelter for a definite attempt at coercing a court into a favorable decision because of the contingencies of frustration to which all judicial action is subject is to hold, in effect, that the Constitution subordinates the judicial settlement of conflicts to the unfettered indulgence of violent speech. The mere fact that, after an unfavorable decision, men may, upon full consideration of their responsibilities as well as their rights, engage in a strike or a lockout is a poor reason for denying a state the power to protect its courts from being bludgeoned by serious threats while a decision is hanging in the judicial balance. A vague, undetermined possibility that a decision of a court may lead to a serious manifestation of protest is one thing. The impact of a definite threat of action to prevent a decision is a wholly different matter. To deny such realities is to stultify law. Rights must be judged in their context, and not *in vacuo*. Compare *Aikens v. Wisconsin*, 195 U. S. 194, 195 U. S. 205; *Badders v. United States*, 240 U. S. 391, 240 U. S. 393-94; *American Bank & Trust Co. v. Federal Bank*, 256 U. S. 350, 256 U. S. 358. "All rights are derived from the purposes of the society in which they exist; above all rights rises duty to the community." Mr. Justice Brandeis in *Duplex Co. v. Deering*, 254 U. S. 443, 254 U. S. 488.

The question concerning the narrow power we recognize always is -- was there a real and substantial threat to the impartial decision by a court of a case actively pending before it? The threat must be close and direct; it must be directed towards a particular litigation. The litigation must be immediately pending. When a case is pending is

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not a technical, lawyer's problem, but is to be determined by the substantial realities of the specific situation. [Footnote 2/8] Danger of unbridled exercise of judicial power because of immunity from speech which is coercing is a figment of groundless fears. In addition to the internal censor of conscience, professional standards, the judgment of fellow judges and the bar, the popular judgment exercised in elections, the power of appellate courts, including this Court, there is the corrective power of the press and of public comment free to assert itself fully immediately upon completion of judicial conduct. Because courts, like other agencies, may at times exercise power arbitrarily and have done so, resort to this Court is open to determine whether, under the guise of protecting impartiality in specific litigation, encroachments have been made upon the liberties of speech and press. But instances of past arbitrariness afford no justification for reversing the course of history and denying the states power to continue to use time-honored safeguards to assure unbullied adjudications. All experience justifies the states in acting upon the conviction that a wrong decision in a particular case may best be forestalled or corrected by more rational means than coercive intrusion from outside the judicial process.

Since courts, although representing the law, *United States v. Shipp*, 203 U. S. 563, 203 U. S. 574, are also sitting in judgment, as it were, on their own function in exercising their power to punish for contempt, it should be used only in flagrant cases, and with the utmost forbearance. It is always

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better to err on the side of tolerance, and even of disdainful indifference.

No objections were made before us to the procedure by which the charges of contempt were tried. But it is proper to point out that neither case was tried by a judge who had participated in the trials to which the publications referred. *Compare Cooke v. United States*, 267 U. S. 517, 267 U. S. 539. So it is clear that a disinterested tribunal was furnished, and since the Constitution does not require a state to furnish jury trials, *Maxwell v. Dow*, 176 U. S. 581; *Palko v. Connecticut*, 302 U. S. 319, 302 U. S. 324, and states have discretion in fashioning criminal remedies, *Tigner v. Texas*, 310 U. S. 141, the situation here is the same as though a state had made it a crime to publish utterance having a "reasonable tendency to interfere with the orderly administration of justice in pending actions," and not dissimilar from what the United States has done in § 135 of the Criminal Code. [Footnote 2/9]

[Footnote 2/1]

"Certain implied powers must necessarily result to our Courts of justice from the nature of their institution. . . . To fine for contempt -- imprison for contumacy -- enforce the observance of order, &c. are powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others."

*United States v. Hudson*, 7 Cranch 32, 11 U. S. 34 (1812).

"That 'the safety of the people is the supreme law,' not only comports with, but is indispensable to, the exercise of those powers in their public functionaries, without which that safety cannot be guarded. On this principle it is that Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates, and, as a corollary to this proposition, to preserve themselves and their officers from the approach and insults of pollution."

"It is true, that the Courts of justice of the United States are vested, by express statute provision, with power to fine and imprison for contempts; but it does not follow from this circumstance that they would not have exercised that power without the aid of the statute, or not in cases, if such should occur, to which such statute provision may not extend; on the contrary, it is a legislative assertion of this right as incidental to a grant of judicial power, and can only be considered either as an instance of abundant caution or a legislative declaration, that the power of punishing for contempt shall not extend beyond its known and acknowledged limits of fine and imprisonment."

*Anderson v. Dunn*, 6 Wheat. 204, 19 U. S. 227-28 (1821).

"The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power."

*Ex parte Robinson*, 19 Wall. 505, 86 U. S. 510 (1874).

"The act of 1789 did not define what were contempts of the authority of the courts of the United States, in any cause or hearing before them, nor did it prescribe any special

procedure for determining a matter of contempt. Under that statute, the question whether particular acts constituted a contempt, as well as the mode of proceeding against the offender, was left to be determined according to such established rules and principles of the common law as were applicable to our situation."

*Savin, Petitioner*, 131 U. S. 267, 131 U. S. 275-76 (1889).

[Footnote 2/2]

For the history leading up to the Pennsylvania legislation, *See Respublica v. Oswald*, 1 Dall. 319 (1788), particularly note beginning at p. 1 U. S. 329; *Respublica v. Passmore*, 3 Yeates (Pa.) 441; Hamilton, Report of the Trial and Acquittal of Justices of the Supreme Court of Pennsylvania (1805). *Cf. Hollingsworth v. Duane*, Wall. Sr. 77, Fed. Cas. No. 6616; *United States v. Duane*, Wall. Sr. 102, Fed. Cas. No. 14997.

[Footnote 2/3]

The charge against Judge Peck was that he punished counsel for contempt after the final decree of the particular litigation had been rendered and the necessary steps for an appeal had been taken, and after the judge had published his opinion in a newspaper and plaintiff, in reply had, submitted to the public "a concise statement of some of the principal errors into which your petitioner [the accused counsel] had fallen." Stansbury, Report of the Trial of James H. Peck (1833). In view of their immediate professional responsibility, the eminent lawyers who had charge of the impeachment proceedings against Judge Peck would naturally take the least tolerant view of the power of courts to punish for contempt. Yet all the managers of the House of Representatives (James Buchanan of Pennsylvania, George E. McDuffie of South Carolina, Ambrose Spencer and Henry Storrs of New York, Charles E. Wickliffe of Kentucky) acknowledged the historic power to punish interferences calculated to obstruct the exercise of the judicial function in a pending cause. They did so substantially in the terms now here challenged. *Ibid.*, pp. 91, 291, 293, 382, 400. The following from Mr. Storrs' argument is a fair sample:

"The law of contempts, when confined to the protection of the courts in their proper constitutional action and duties, and to the punishment of every direct or indirect interference with the exercise of their powers and the protection of those who are concerned in them as parties, jurors, witnesses and officers of justice in aid of the administration of their functions, was too well established and too well sustained by principle, as well as positive law, to be doubted or disturbed, and, confined to its proper limits, admitted of all reasonable certainty in its definitions of crime. But, if extended to the case of general libel, there was no security for personal liberty but the discretion or feeling of a judge."

*Ibid.*, p. 400.

[Footnote 2/4]

It is relevant to add that this expressed the view of Mr. Justice Holmes and Mr. Justice Brandeis, whose opinions have had such a powerful influence in pressing the Due

Process Clause to the service of freedom of speech and of the press. In two earlier cases of summary punishment for contempt, they strongly dissented because they found that the limits set by the Act of 1831 had been exceeded. *Toledo Newspaper Co. v. United States*, 247 U. S. 402, and *Craig v. Hecht*, 263 U. S. 255. But in neither case did they suggest any constitutional difficulty in the exercise of the contempt power arising from the prohibition of the First Amendment.

[Footnote 2/5]

See the Lincoln Day, 1898, address of Mr. Justice Brewer, *Government by Injunction*, 15 Nat.Corp.Rep. 848, 849:

"It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. On the contrary, the life and character of its justices should be the objects of constant watchfulness by all, and its judgments subject to the freest criticism. The time is past in the history of the world when any living man or body of men can be set on a pedestal and decorated with a halo. True, many criticisms may be, like their authors, devoid of good taste, but better all sorts of criticism than no criticism at all. The moving waters are full of life and health; only in the still waters is stagnation and death."

[Footnote 2/6]

"It is most important that the administration of justice in this country should not be hampered, as it is hampered in some other countries, and it is not enlarging the jurisdiction of this court -- it is refusing to narrow the jurisdiction of this court -- when we say that we are determined while we are here to do nothing to substitute in this country trial by newspaper for trial by jury, and those who attempt to introduce that system in this country, even in its first beginnings, must be prepared to suffer for it. Probably the proper punishment -- and it is one which this court may yet have to award if the punishment we are about to award proves insufficient -- will be imprisonment in cases of this kind. There is no question about that, because we cannot shut our eyes to the fact that newspapers are owned by wealthy people, and it may even happen that they will take the chances of the fine and pay it cheerfully, and will not feel that they have then paid too much for the advertisement."

*Rex v. Clarke*, 103 L.T.R. (N.S.) 636, 640.

[Footnote 2/7]

Thus, in England, the "third degree" never gained a foothold, and its emergence was impressively resisted long before it was outlawed here. See 217 Parl.Deb. (Commons) cols. 1303 *et seq.* (May 17, 1928); Inquiry in regard to the Interrogation by the Police of Miss Savidge, Cmd. 3147 (1928); Report of the Royal Commission on Police Powers and Procedure, Cmd. 3297 (1929).

[Footnote 2/8]

The present cases are very different from the situation that evoked dissent in *Craig v. Hecht*, 263 U. S. 255, 263 U. S. 281:

"It is not enough that somebody may hereafter move to have something done. There was nothing then awaiting decision when the petitioner's letter was published."

*And see Glasgow Corporation v. Hedderwick & Sons* (1918) Sess. Cas. 639. *Compare State ex rel. Pulitzer Pub. Co. v. Coleman*, 152 S.W.2d 640 (Mo.1941).

[Footnote 2/9]

35 Stat. 1113, 18 U.S.C. § 241.

"Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than one thousand dollars, or imprisoned not more than one year, or both."

In Re: Harijai Singh And Anr.; In ... vs Unknown on 17 September, 1996

Equivalent citations: AIR 1997 SC 73, 1996 (2) ALD Cri 906, 1997 (1) ALT Cri 148, 1997 (1) BLJR 907, 1997 CriLJ 58, JT 1996 (8) SC 332, 1996 (6) SCALE 728, (1996) 6 SCC 466, 1996 Supp 6 SCR 411, (1996) 4 UPLBEC 2787

Author: F Uddin

Bench: K Singh, F Uddin

JUDGMENT Faizan Uddin, J.

1. When this Court was seized of Writ Petition filed by the "Common Cause, A Registered Society" with regard to the alleged misuse and arbitrary exercise of discretionary power by the Petroleum and Natural Gas Ministry in relation to the allotment of retail outlets for Petroleum products and L.P.G. Dealership, from discretionary quota, a news item in box with a caption "Pumps for all" was published in the daily newspaper "The Sunday Tribune" dated March 10, 1996 which is reproduced hereunder:

Pumps for all! Believe it or not, Petroleum Minister Satish Sharma has made 17 allotments of petrol pumps and gas agencies to relatives of Prime Minister Narasimha Rao out of his discretionary quota. Allotments in this category can only be made to members of the weaker sections of society and war widows. Yet five of the Prime Minister's grandchildren have been favoured as have been five of his nephews from the family of V. Rajeshwar Rao, MP Besides, three wards of his brother Manohar Rao, two relatives of P. Venkata Rao and the son of AVR Krishnamurthy whose family lives with the Prime Minister have been allocated petrol pumps and gas agencies. Similarly, Rao's daughter, Vani Devi, who is the official hostess has a petrol pump allotted in the name of her daughter, Jyotiriyal. She was also favoured by the Airport Authority of India which released a prime piece of land located in Begumpet area to her for just Rs. 3 lakh. The market value is sated to be over Rs. 1 crore. It has been registered in the name of Shri Jai Balaji Agency. However, the Prima Minister's kin are not the only ones who have benefited from these allotments. Two children of Lok Sabha Speaker Shivraji Patil have also been favoured as have the two sons of a senior judge of the Supreme Court. Interestingly; the Supreme Court had recently asked the government to supply a list of all discretionary allotments made by the Ministry. However, the Minister has so far managed to withhold this crucial document. But it has hardly helped as the list has been leaked by Sharma's own men.

2. A similar news item was also published in the Hindi newspaper "Punjab Kesari" dated March 10, 1996, the English translation of which is as follows :

17 Poor Members of the family of the Prime Minister Out of the short out ways of becoming rich, one way is to obtain Petrol Pump or Gas Agency. But the power to allot the same lies with the Petroleum Minister. He has the discretionary powers to allot petrol pump or gas agencies in charity. This power of doing such charities has been entrusted in some special cases which include the people belonging to the poor, backward classes and the wives of those who were killed in the war. But all those persons to whom these agencies have been allotted by the Petroleum Minister Capt. Satish Sharma turned out to be a scam in itself. The matter was referred to the Supreme Court in which the Government was directed to submit a list. The Petroleum Minister suppressed the list. The list was demanded in the Parliament. But the list was

not presented. Now the list has been leaked out from the Petroleum Ministry. Believe it, there are 17 relatives of the Prime Minister Narsimha Rao in that list. Five persons are his grand-sons and grand-daughters. Five others are the members of the family of V. Rajeshwar Rao. He is a Member of Parliament and the relative of the Prime Minister. Manohar Rao is the brother of Narasimha Rao. These agencies were also allotted to his three children. There is one more relative - P. Venkatrao. Two allottees have been found in his family. One is A.V.R. Krishna Murty who resides in the residence of the Prime Minister. He has also been allotted the Agency at the Bolaram Road at Sikandrabad. But the most interested story is of Jyotirmal, Narasimha Rao is his real grand maternal father. The authorised hostess of the Prime Minister's residence is Vani Devi who is the daughter of the Prime Minister and mother of Jyotirmal. Their agency is situated at Begumpet under the name and style "Sri Sai Balaji Agency". The land of 2000 Sq.M. of the Indian Aviation Authority was given to Sri Sai Balaji Agency merely for rupees three lakhs. Presently, the cost of this land is more than one crore. The Petroleum Minister also allotted the agencies to the two children of Shivraj Patil, Speaker of the Lok Sabha. You should not be astonished if you find the names of two sons of Mr. Ahmadi, Chief Justice of India in the list of the discretionary quota. Otherwise the names of such poor and backward persons are also available in this list.

3. Since, the aforesaid news items contained an allegation that two sons of a senior judge of the Supreme Court and two sons of the Chief Justice of India were also favoured with the allotments of petrol outlets form the discretionary quota of Ministry and, therefore, by our Order dated March 13, 1996, we issued a notice to the Secretary, Ministry of Petroleum and Natural Gas to file an affidavit offering his comments and response to the facts stated in the aforesaid two news items. Pursuant to the said notice, Shri Vijay L. Kelkar, Secretary in the Ministry of Petroleum and Natural Gas, Government of India, filed his affidavit dated March 20, 1996 stating that since the allegation regarding allotment under the discretionary quota in favour of two sons of a senior judge of the Supreme Court are vague and in the absence of specific names, it is difficult to deal with the same. Thereafter when the matter again came up before this Court on March 21, 1996, Shri Altaf Ahmad, learned Additional Solicitor General stated that he would look into the records and file further affidavit of a responsible officer giving response to the other allegations regarding relationship of VIPs. We, therefore, granted time for the purpose and at the same time directed the relevant files to be produced in Court. It was thereafter that Shri Devi Dayal, Joint Secretary in the Ministry of Petroleum and Natural Gas, Government of India filed his affidavit dated March 28, 1996. In paragraph 5 of his affidavit, he made a categorical statement that there is no allotment in favour of son/sons of any Supreme Court Judge. After verification of records and affidavits referred to above, we found that the news items referred to above were patently false and, therefore, by our Order dated March 27, 1996,, we initiated contempt proceedings against the Editors and Publishers of the daily "The Sunday Tribune", Chandigarh and "The Punjab Kesari", Jalandhar and issued notices to them to show cause why they may not be punished for the contempt of this Court.

4. In response to the contempt notice, Shri Hari Jaising, the Editor of "The Sunday Tribune" filed an affidavit dated June 24, 1996 admitting that the news item published in "The Sunday Tribune" dated March 10, 1996 with regard to the allotment of petrol outlets to the sons of a senior Judge of the Supreme Court was not correct and,

therefore, tendered unqualified apology and has prayed for mercy and pardon. He has stated that it was an inadvertent publication made bonafide on the faith that the item supplied by an experienced journalist. Shri Dina Nath Misra, who is generally reliable would not be factually incorrect. It has been stated that Dina Nath Misra is a journalist of standing for over 30 years and there have been no complaints about the correctness of the material contributed by him and believing the said item of news to be correct it was published without any further scrutiny in a good faith. He has submitted that he has the highest respect for the judiciary in general and to this Court in particular and tendered his unqualified apology with a feeling of remorse. He has submitted that since it was noticed that the news item was not correct, an apology was already published by him in the Tribune dated May 12, 1996 and necessary instructions to all members of the editorial staff were issued to be careful and assuring the factual accuracy of all legal reports.

5. Lt. Col. S.L. Dheer (Retd.), the Publisher of "The Tribune", in response to the contempt notice has also filed his affidavit dated June 27, 1996 more or less in the same terms as the one filed by Shri Hari Jaising and has tendered his apology and prayed for mercy and pardon due to the bonafide mistake.

6. In response to the contempt notice, Shri Vijay Kumar Chopra, Editor and Publisher of daily "Punjab Kesari" Jalandhar has also filed his affidavit dated June 29, 1996 stating that the news item in the daily "Punjab Kesari" referred to above was published on the basis of the news report sent by a senior journalist which due to inadvertence escaped the attention of the Editor. He has stated that immediately after the incorrectness of the news item was noticed a contradiction and apology was carried out prominently in the issue of the Paper dated April 7, 1996. He has stated that the said news item was not actuated by any malice towards the judiciary and that the mistake was bonafide. He has also tendered his unconditional and unqualified apology.

7. On being apprised that the news items referred to above found to be false which were published on the basis of the information and material supplied by the journalist/reporter Dina Nath Misra to "The Sunday Tribune" and "Punjab Kesari", we issued a similar contempt notice to Dina Nath Misra by our Order dated July 9, 1996. The journalist Dina Nath Misra in his affidavit dated August 1, 1996 admitted to have written a capsule item about the allotment of petrol pumps to the sons of a senior Judge of the Supreme Court which was not factually correct and he has, therefore, tendered his unqualified apology for the lapse that he had committed. He has stated that he has been a journalist for about 4 decades and is known for his integrity and commitment towards the professionalism. He has further stated that a highly reliable source who had earlier given many reliable informations to the deponent gave this information also which was believed by him to be true, but it turned out to be incorrect. He has stated various other facts to show that the mistake was bonafide, but we find the said excuses and explanations to be not acceptable at all. He has, however, expressed his deep repentance and tendered unqualified apology and seeks forgiveness for this honest and inadvertent blunder. In yet another additional affidavit dated August 29, 1996, he has reiterated the said facts and admitted that he has committed a grievous error in writing news items which have absolutely no basis, and has again offered unconditional apology to Hon'ble the Chief Justice as well as to this Court.

8. It may be relevant here to recall that the freedom of Press has always been regarded as an essential pre-requisite of a Democratic form of Government. It has been regarded as a necessity for the mental health and the well being of the society. It is also considered necessary for the full development of the personality of the individual. It is said that without the freedom of press truth cannot be attained. The freedom of press is a part of the freedom of the speech and expression as envisaged in [Article 19\(1\)\(a\)](#) of the Constitution of India. Thus, the freedom of the press is included

in the fundamental right of freedom of expression. The freedom of Press is regarded as "the mother of all other liberties" in a democratic society. Further, the importance and the necessity of having a free press in a democratic Constitution like ours was immensely stressed in several landmark judgments of this Court. The case of [Indian Express Newspaper v. Union of India](#), is one of such judgments rendered by Venkataramiah, J. (as he then was). Again in another case of [Indian Express Newspaper v. Union of India](#) A.P. Sen, J. (as he then was) described the right to freedom of the press as a pillar of individual liberty which has been unflinchingly guarded by the Courts.

9. It is thus needless to emphasize that a free and healthy press is indispensable to the functioning of a true democracy. In a democratic set-up, there has to be an active and intelligent participation of the people in all spheres and affairs of their community as well as the State. It is their right to be kept informed about current political, social,

economic and cultural life as well as the burning topics and important issues of the day in order to enable them to consider and form broad opinion about the same and the way in which they are being managed, tackled and administered by the Government and its functionaries. To achieve this objective the people need a clear and truthful account of events, so that they may form their own opinion and offer their own comments and view points on such matters and issues and select their further course of action. The primary function, therefore, of the press is to provide comprehensive and objective information of all aspects of the country's political, social, economic and cultural life. It has an educative and mobilising role to play. It plays an important role in moulding public opinion and can be an instrument of social change. It may be pointed out here that Mahatma Gandhi in his autobiography has stated that one of the objectives of the newspaper is to understand the proper feelings of the people and give expression to it; another is to arouse among the people certain desirable sentiments; and the third to fearlessly express popular defects. It, therefore, turns out that the press should have the right to present anything which it thinks fit for publication.

10. But it has to be remembered that this freedom of press is not absolute, unlimited and unfettered at all times and in all circumstances as giving an unrestricted freedom of the speech and expression would amount to an uncontrolled licence. If it were wholly free even from reasonable restraints it would lead to disorder and anarchy. The freedom is not to be mis-understood as to be a press free to disregard its duty to be responsible. Infact, the element of responsibility must be present in the conscience of the journalists. In an organised society, the rights of the press have to be recognised

with its duties and responsibilities towards the society. Public order, decency, morality and such other things must be safeguarded. The protective cover of press freedom must not be thrown open for wrong doings. If a newspaper publishes what is improper, mischievously false or illegal and abuses its liberty it must be punished by Court of Law. The Editor of a Newspaper or a journal has a greater responsibility to guard against untruthful news and publications for the simple reason that his utterances have a far greater circulation and impact than the utterances of an individual and by reason of their appearing in print, they are likely to be believed by the ignorant. That being so, certain restrictions are essential even for preservation of the freedom of the press itself. To quote from the report of Mons Lopez to the Economic and Social Council of the United Nations "If it is true that human progress is impossible without freedom, then it is no less true that ordinary human progress is impossible without a measure of regulation and discipline". It is the duty of a true and responsible journalist to strive to inform the people with accurate and impartial presentation of news and their views after dispassionate evaluation of the facts and information received by them and to be published as a news item. The presentation of the news should be truthful, objective and comprehensive without any false and distorted expression.

11. In the present case, as we have noticed above, neither printer, publisher nor the editor and reporter took the necessary care in evaluating the correctness and credibility of the information published by them as the news items in the newspapers referred to above in respect of an allegation of a very serious nature having great repercussion causing an embarrassment to this Court. An Editor is a person who controls the selection of the matter which is to be published in a particular issue of the newspaper. The Editor and Publisher are liable for illegal and false matter which is published in their newspaper. Such an irresponsible conduct and attitude on the part of the editor, publisher and the reporter cannot be said to be done in good faith, but distinctly opposed to the high professional standards as even a slightest enquiry or a simple verification of the alleged statement about grant of Petrol outlets to the two sons of a senior Judge of the Supreme Court, out of discretionary quota, which is found to be patently false would have revealed the truth. But it appears that even the ordinary care was not resorted to by the contemners in publishing such a false news items. This cannot be regarded as a public service, but a disservice to the public by misguiding them with a false news. Obviously, this cannot be regarded as something done in good faith.

12. But it may be pointed out that various judgments and pronouncements of this Court, bear testimony to the fact that this Court is not hypersensitive in matters relating to contempt of Courts and has always shown magnanimity in accepting the apology on being satisfied that the error made in the publication was without any malice or without any intention of dis-respect towards the Courts or towards any member of the judiciary. This Court has always entertained fair criticism of the judgments and orders or about the person of a Judge. Fair criticism within the parameters of law is always welcome in a democratic system. But the news items with which we are concerned can neither be said to be fair or made in good faith but wholly false and the explanation given is far from satisfactory. Shri Hari Jaisingh, Editor of the Sunday Tribune and Lt. Col. H.L. Dheer, Publisher as well as Vijay Kumar Chopra, Editor and Publisher of daily Punjab Kesari have taken the stand that they had taken the news items to be correct on the basis of the information supplied

by a very senior journalist of long standing Dina Nath Misra. But this cannot be accepted as a valid excuse. It may be stated that at common Law, absence of intention or knowledge about the correctness of the contents of the matter published (for example as in the present case, on the basis of information received from the journalist/reporter) will be of no avail for the editors and publishers for contempt of Court but for determining the quantum of punishment which may be awarded. Thus they cannot escape the responsibility for being careless in publishing it without caring to verify the correctness. However, since they have not only expressed repentance on the incident but have expressed their sincere written unconditional apology, we accept the same with the warning that they should be very careful in future. As regards the case of Dina Nath Misra, we find he acted in gross carelessness. Being a very experienced journalist of long standing it was his duty while publishing the news item relating to the members of the apex Court, to have taken extra care to verify the correctness and if he had done so, we are sure there would not have been any difficulty in coming to know that the information supplied to him had absolutely no legs to stand and was patently false and the publication would have been avoided which not only caused great embarrassment to this Court but conveyed a wrong message to the public at large jeopardizing the faith of the illiterate masses in our judiciary. Shri Dina Nath Misra has no doubt committed a serious mistake but he has realised his mistake and expressed sincere repentance and has tendered unconditional apology for the same. He was present in the Court and virtually looked to be gloomy and felt repentant of what he had done. We think this sufferance itself is sufficient punishment for him. He being a senior journalist and an aged person and, therefore, taking a lenient view of the matter, we accept his apology also. We, however, direct that the contemnors will publish in the front page of their respective newspapers within a box their respective apologies specifically mentioning that the said news items were absolutely incorrect and false. This may be done within two weeks. The Contempt Petition Nos. 206-207 of 1996 are disposed of accordingly.

**U.S. Supreme Court**

**Near v. Minnesota, 283 U.S. 697 (1931)**

**Near v. Minnesota**

**No. 91**

**Argued January 30, 1931**

**Decided June 1, 1931**

**283 U.S. 697**

*APPEAL FROM THE SUPREME COURT OF MINNESOTA*

*Syllabus*

1. A Minnesota statute declares that one who engages "in the business of regularly and customarily producing, publishing," etc., "a malicious, scandalous and defamatory newspaper, magazine or other periodical," is guilty of a nuisance, and authorizes suits, in the name of the State, in which such periodicals may be abated and their publishers enjoined from future violations. In such a suit, malice may be inferred from the fact of publication. The defendant is permitted to prove, as a defense, that his publications were true and published "with good motives and for justifiable ends." Disobedience of an injunction is punishable as a contempt. *Held* unconstitutional, as applied to publications charging neglect of duty and corruption upon the part of law-enforcing officers of the State. Pp. [283 U. S. 704](#), [283 U. S. 709](#), [283 U. S. 712](#), [283 U. S. 722](#).

2. Liberty of the press is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. P. [283 U. S. 707](#).

3. Liberty of the press is not an absolute right, and the State may punish its abuse. P. [283 U. S. 708](#).

4. In passing upon the constitutionality of the statute, the court has regard for substance, and not for form; the statute must be tested by its operation and effect. P. [283 U. S. 708](#).

[Page 283 U. S. 698](#)

5. Cutting through mere details of procedure, the operation and effect of the statute is that public authorities may bring a publisher before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter -- in particular, that the matter consists of charges against public officials of official dereliction -- and, unless the publisher is able and disposed to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is the essence of censorship. P. 283 U. S. 713.

6. A statute authorizing such proceedings in restraint of publication is inconsistent with the conception of the liberty of the press as historically conceived and guaranteed. P. 283 U. S. 713.

7. The chief purpose of the guaranty is to prevent previous restraints upon publication. The libeler, however, remains criminally and civilly responsible for his libels. P. 283 U. S. 713.

8. There are undoubtedly limitations upon the immunity from previous restraint of the press, but they are not applicable in this case. P. 283 U. S. 715.

9. The liberty of the press has been especially cherished in this country as respects publications censuring public officials and charging official misconduct. P. 283 U. S. 716.

10. Public officers find their remedies for false accusations in actions for redress and punishment under the libel laws, and not in proceedings to restrain the publication of newspapers and periodicals. P. 283 U. S. 718.

11. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity from previous restraint in dealing with official misconduct. P. 283 U. S. 720.

12. Characterizing the publication of charges of official misconduct as a "business," and the business as a nuisance, does not avoid the constitutional guaranty; nor does it matter that the periodical is largely or chiefly devoted to such charges. P. 283 U. S. 720.

13. The guaranty against previous restraint extends to publications charging official derelictions that amount to crimes. P. 283 U. S. 720.

14. Permitting the publisher to show in defense that the matter published is true and is published with good motives and for justifiable ends does not justify the statute. P. [283 U. S. 721](#).

15. Nor can it be sustained as a measure for preserving the public peace and preventing assaults and crime. Pp. [283 U. S. 721](#), [283 U. S. 722](#).

179 Minn. 40; 228 N.W. 326, reversed.

[Page 283 U. S. 699](#)

APPEAL from a decree which sustained an injunction abating the publication of a periodical as malicious, scandalous and defamatory, and restraining future publication. The suit was based on a Minnesota statute. *See also* s.c., 174 Minn. 457, 219 N.W. 770.

[Page 283 U. S. 701](#)

MR. CHIEF JUSTICE HUGHES delivered the opinion of the Court.

Chapter 285 of the Session Laws of Minnesota for the year 1925 [[Footnote 1](#)] provides for the abatement, as a public nuisance, of a "malicious, scandalous and defamatory newspaper,

[Page 283 U. S. 702](#)

magazine or other periodical." Section one of the Act is as follows:

"Section 1. Any person who, as an individual, or as a member or employee of a firm, or association or organization, or as an officer, director, member or employee of a corporation, shall be engaged in the business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away"

"(a) an obscene, lewd and lascivious newspaper, magazine, or other periodical, or"

"(b) a malicious, scandalous and defamatory newspaper, magazine or other periodical,"

is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined, as hereinafter provided.

"Participation in such business shall constitute a commission of such nuisance and render the participant liable and subject to the proceedings,

orders and judgments provided for in this Act. Ownership, in whole or in part, directly or indirectly, of any such periodical, or of any stock or interest in any corporation or organization which owns the same in whole or in part, or which publishes the same, shall constitute such participation."

"In actions brought under (b) above, there shall be available the defense that the truth was published with good motives and for justifiable ends and in such actions the plaintiff shall not have the right to report (*sic*) to issues or editions of periodicals taking place more than three months before the commencement of the action."

Section two provides that, whenever any such nuisance is committed or exists, the County Attorney of any county where any such periodical is published or circulated, or, in case of his failure or refusal to proceed upon written request in good faith of a reputable citizen, the Attorney General, or, upon like failure or refusal of the latter, any citizen of the county may maintain an action in the district court of the county in the name of the State to enjoin

[Page 283 U. S. 703](#)

perpetually the persons committing or maintaining any such nuisance from further committing or maintaining it. Upon such evidence as the court shall deem sufficient, a temporary injunction may be granted. The defendants have the right to plead by demurrer or answer, and the plaintiff may demur or reply as in other cases.

The action, by section three, is to be " governed by the practice and procedure applicable to civil actions for injunctions," and, after trial, the court may enter judgment permanently enjoining the defendants found guilty of violating the Act from continuing the violation, and, "in and by such judgment, such nuisance may be wholly abated." The court is empowered, as in other cases of contempt, to punish disobedience to a temporary or permanent injunction by fine of not more than \$1,000 or by imprisonment in the county jail for not more than twelve months.

Under this statute, clause (b), the County Attorney of Hennepin County brought this action to enjoin the publication of what was described as a " malicious, scandalous and defamatory newspaper, magazine and periodical" known as " The Saturday Press," published by the defendants in the city of Minneapolis. The complaint alleged that the defendants, on September 24, 1927, and on eight subsequent dates in October and November, 1927, published and circulated editions of that periodical

which were "largely devoted to malicious, scandalous  
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*Nebraska Press Association v. Stuart (1976)*

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**By Tom McInnis**

**[Related cases in Gag Orders and Free Speech, Prior Restraint, Freedom of the Press](#)**

In *Nebraska Press Association v. Stuart*, 427 U.S. 539 (1976), the Supreme Court unanimously ruled that a trial court judge did not have the authority to place gag orders on reporting about a specific crime prior to jury impanelment, finding it a form of prior restraint and in violation of the First Amendment right of freedom of the press.

**Nebraska judge issued a gag order before jury impanelment**

The controversy arose after Erwin Simants was charged with murdering six people in their home in Sutherland, Nebraska, a town of about 850 people located in a very rural part of the state. Hugh Stuart, a Nebraska state trial judge, feared that publicity surrounding the crime would make

it impossible to find an impartial jury, so he issued a gag order on news coverage until a jury was impaneled. The Nebraska Supreme Court modified the gag order but restrained newspapers and other media from publishing or broadcasting accounts of confessions or admissions made by the accused to law enforcement officers or third parties, except members of the press, or other facts “strongly implicative” of the accused. The Supreme Court granted *certiorari* to determine whether the order violated the First Amendment.

### **Court ruled that ruled that the gag order violated the First Amendment**

Writing for the majority, Chief Justice Warren E. Burger explained that although restraints on freedom of press are possible under some circumstances, any prior restraints must be presumed to violate the First Amendment. Even when trying to balance two such important rights as the freedom of press with the Sixth Amendment right to a fair trial, it should be presumed that reporting on criminal proceedings will take priority.

Burger reasoned that pretrial publicity, even when pervasive and adverse, does not inevitably lead to an unfair trial. After reviewing past cases that had been adversely affected by publicity, the Court believed that Judge Stuart had acted responsibly out of a legitimate concern for the effect that adverse publicity would have on the trial in an effort to protect the defendant’s right to a fair trial. Despite this concern, the Court emphasized that in this particular case there was no evidence in the record to demonstrate that other options short of prior restraint on the press would not have served the interest of ensuring Simants a fair trial.

Chief Justice Burger noted that most of the other alternatives had been discussed with approval in *Sheppard v. Maxwell* (1966). These options included:

- change of trial venue;
- postponement of the trial to allow public attention to subside;
- searching questioning of prospective jurors to screen out those with fixed opinions as to guilt or innocence;
- and the use of emphatic and clear instructions on the sworn duty of each juror.

Sequestration of jurors also is always an option. In overruling the gag order, which sought to prohibit “implicative” information, the Court also noted the reality of the problems of managing and enforcing pre-trial restraining orders and stated that these orders were too vague and too

broad to survive the scrutiny that has been given to restraints on First Amendment rights.

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- [Gag Orders](#)
- [Prior Restraint](#)
- [\*Sheppard v. Maxwell\* \(1966\)](#)
- [Warren Burger](#)

**FURTHER READING**

- Campbell, Douglas S. *Free Press v. Fair Trial, Supreme Court Decisions Since 1807*. Westport, Conn.: Praeger, 1994.
- Bush, Chilton R, ed. *Free Press and Fair Trial: Some Dimensions of the Problem*. Athens: University of Georgia Press, 1971.
- Brusckke, Jon and William E. Loges. *Free Press vs. Fair Trials: Examining Publicity's Role in Trial Outcomes*. Mahwah, N.J.: Erlbaum, 2004.
- Giles, Robert and Robert Snyder, eds. *Covering the Courts, Free Press, Fair Trials & Journalistic Performance*. New Brunswick, N.J.: Transaction, 1999.

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[Hudson, David L. Jr. "Supreme Court Said No to Prior Restraints on Press 25 Years Ago."](#) Freedom Forum Institute, August 28, 2001.

- [Larson, Milton R. and John P. Murphy. "Nebraska Press Association v. Stuart - A Prosecutor 's View of Pre-Trial Restraints on the Press."](#) DePaul Law Review 26 (1977): 417-446.

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and defamatory articles" concerning Charles G. Davis, Frank W. Brunskill, the Minneapolis Tribune, the Minneapolis Journal, Melvin C. Passolt, George E. Leach, the Jewish Race, the members of the Grand Jury of Hennepin County impaneled in November, 1927, and then holding office, and other persons, as more fully appeared in exhibits annexed to the complaint, consisting of copies of the articles described and constituting 327 pages of the record. While the complaint did not so allege, it

[Page 283 U. S. 704](#)

appears from the briefs of both parties that Charles G. Davis was a special law enforcement officer employed by a civic organization, that George E. Leach was Mayor of Minneapolis, that Frank W. Brunskill was its Chief of Police, and that Floyd B. Olson (the relator in this action) was County Attorney.

Without attempting to summarize the contents of the voluminous exhibits attached to the complaint, we deem it sufficient to say that the articles charged in substance that a Jewish gangster was in control of gambling, bootlegging and racketeering in Minneapolis, and that law enforcing officers and agencies were not energetically performing their duties. Most of the charges were directed against the Chief of Police; he was charged with gross neglect of duty, illicit relations with gangsters, and with participation in graft. The County Attorney was charged with knowing the existing conditions and with failure to take adequate measures to remedy them. The Mayor was accused of inefficiency and dereliction. One member of the grand jury was stated to be in sympathy with the gangsters. A special grand jury and a special prosecutor were demanded to deal with the situation in general, and, in particular, to investigate an attempt to assassinate one Guilford, one of the original defendants, who, it appears from the articles, was shot by gangsters after the first issue of the periodical had been published. There is no question but that the articles made serious accusations against the public officers named and

others in connection with the prevalence of crimes and the failure to expose and punish them.

At the beginning of the action, on November 22, 1927, and upon the verified complaint, an order was made directing the defendants to show cause why a temporary injunction should not issue and meanwhile forbidding the defendants to publish, circulate or have in their possession any editions of the periodical from September

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24, 1927, to November 19, 1927, inclusive, and from publishing, circulating, or having in their possession, "any future editions of said The Saturday Press" and

"any publication, known by any other name whatsoever containing malicious, scandalous and defamatory matter of the kind alleged in plaintiff's complaint herein or otherwise."

The defendants demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and on this demurrer challenged the constitutionality of the statute. The District Court overruled the demurrer and certified the question of constitutionality to the Supreme Court of the State. The Supreme Court sustained the statute (174 Minn. 457, 219 N.W. 770), and it is conceded by the appellee that the Act was thus held to be valid over the objection that it violated not only the state constitution, but also the Fourteenth Amendment of the Constitution of the United States.

Thereupon, the defendant Near, the present appellant, answered the complaint. He averred that he was the sole owner and proprietor of the publication in question. He admitted the publication of the articles in the issues described in the complaint, but denied that they were malicious, scandalous or defamatory as alleged. He expressly invoked the protection of the due process clause of the Fourteenth Amendment. The case then came on for trial. The plaintiff offered in evidence the verified complaint, together with the issues of the publication in question, which were attached to the complaint as exhibits. The defendant objected to the introduction of the evidence, invoking the constitutional provisions to which his answer referred. The objection was overruled, no further evidence was presented, and the plaintiff rested. The defendant then rested without offering evidence. The plaintiff moved that the court direct the issue of a permanent injunction, and this was done.

The District Court made findings of fact which followed the allegations of the complaint and found in general terms that the editions in question were "chiefly devoted to malicious, scandalous and defamatory articles" concerning the individuals named. The court further found that the defendants, through these publications,

"did engage in the business of regularly and customarily producing, publishing and circulating a malicious, scandalous and defamatory newspaper,"

and that "the said publication" "under said name of The Saturday Press, or any other name, constitutes a public nuisance under the laws of the State." Judgment was thereupon entered adjudging that "the newspaper, magazine and periodical known as The Saturday Press," as a public nuisance, "be and is hereby abated." The Judgment perpetually enjoined the defendants

"from producing, editing, publishing, circulating, having in their possession, selling or giving away any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law,"

and also "from further conducting said nuisance under the name and title of said The Saturday Press or any other name or title."

The defendant Near appealed from this judgment to the Supreme Court of the State, again asserting his right under the Federal Constitution, and the judgment was affirmed upon the authority of the former decision. 179 Minn. 40, 228 N.W. 326. With respect to the contention that the judgment went too far, and prevented the defendants from publishing any kind of a newspaper, the court observed that the assignments of error did not go to the form of the judgment, and that the lower court had not been asked to modify it. The court added that it saw no reason

"for defendants to construe the judgment as restraining them from operating a newspaper in harmony with the public welfare, to which all must yield,"

that the allegations of the complaint had been

found to be true, and, though this was an equitable action, defendants had not indicated a desire "to conduct their business in the usual and legitimate manner."

From the judgment as thus affirmed, the defendant Near appeals to this Court.

This statute, for the suppression as a public nuisance of a newspaper or periodical, is unusual, if not unique, and raises questions of grave importance transcending the local interests involved in the particular action. It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. It was found impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guaranty of fundamental rights of person and property. *Gitlow v. New York*, 268 U. S. 652, 268 U. S. 666; *Whitney v. California*, 274 U. S. 357, 274 U. S. 362, 274 U. S. 373; *Fiske v. Kansas*, 274 U. S. 380, 274 U. S. 382; *Stromberg v. California*, ante, p. 283 U. S. 359. In maintaining this guaranty, the authority of the State to enact laws to promote the health, safety, morals and general welfare of its people is necessarily admitted. The limits of this sovereign power must always be determined with appropriate regard to the particular subject of its exercise. Thus, while recognizing the broad discretion of the legislature in fixing rates to be charged by those undertaking a public service, this Court has decided that the owner cannot constitutionally be deprived of his right to a fair return, because that is deemed to be of the essence of ownership. *Railroad Commission Cases*, 116 U. S. 307, 116 U. S. 331; *Northern Pacific Ry. Co. v. North Dakota*, 236 U. S. 585, 236 U. S. 596. So, while liberty of contract is not an absolute right, and the wide field of activity in the making of contracts is subject to legislative supervision (*Frisbie v. United States*, 157 U. S. 161, 157 U. S. 165), this Court has held that the power of the State stops short of interference with what are deemed

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to be certain indispensable requirements of the liberty assured, notably with respect to the fixing of prices and wages. *Tyson Bros. v. Banton*, 273 U. S. 418; *Ribnik v. McBride*, 277 U. S. 350; *Adkins v. Children's Hospital*, 261 U. S. 525, 261 U. S. 560, 261 U. S. 561. Liberty of speech, and of the press, is also not an absolute right, and the State may punish its abuse. *Whitney v. California*, supra; *Stromberg v. California*, supra. Liberty, in each of its phases, has its history and connotation, and,

in the present instance, the inquiry is as to the historic conception of the liberty of the press and whether the statute under review violates the essential attributes of that liberty.

The appellee insists that the questions of the application of the statute to appellant's periodical, and of the construction of the judgment of the trial court, are not presented for review; that appellant's sole attack was upon the constitutionality of the statute, however it might be applied. The appellee contends that no question either of motive in the publication, or whether the decree goes beyond the direction of the statute, is before us. The appellant replies that, in his view, the plain terms of the statute were not departed from in this case, and that, even if they were, the statute is nevertheless unconstitutional under any reasonable construction of its terms. The appellant states that he has not argued that the temporary and permanent injunctions were broader than were warranted by the statute; he insists that what was done was properly done if the statute is valid, and that the action taken under the statute is a fair indication of its scope.

With respect to these contentions, it is enough to say that, in passing upon constitutional questions, the court has regard to substance, and not to mere matters of form, and that, in accordance with familiar principles, the statute must be tested by its operation and effect. *Henderson v. Mayor*, 92 U. S. 259, 92 U. S. 268; *Bailey v. Alabama*, 219

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U.S. 219, 219 U. S. 244; *United States v. Reynolds*, 235 U. S. 133, 235 U. S. 148, 235 U. S. 149; *St. Louis Southwestern R. Co. v. Arkansas*, 235 U. S. 350, 235 U. S. 362; *Mountain Timber Co. v. Washington*, 243 U. S. 219, 243 U. S. 237. That operation and effect we think is clearly shown by the record in this case. We are not concerned with mere errors of the trial court, if there be such, in going beyond the direction of the statute as construed by the Supreme Court of the State. It is thus important to note precisely the purpose and effect of the statute as the state court has construed it.

*First.* The statute is not aimed at the redress of individual or private wrongs. Remedies for libel remain available and unaffected. The statute, said the state court, "is not directed at threatened libel, but at an existing business which, generally speaking, involves more than libel." It is aimed at the distribution of scandalous matter as "detrimental to public morals and to the general welfare," tending "to disturb the peace of the community" and "to provoke assaults and the commission of crime." In order to obtain an injunction to suppress the future publication of the

newspaper or periodical, it is not necessary to prove the falsity of the charges that have been made in the publication condemned. In the present action, there was no allegation that the matter published was not true. It is alleged, and the statute requires the allegation, that the publication was "malicious." But, as in prosecutions for libel, there is no requirement of proof by the State of malice in fact, as distinguished from malice inferred from the mere publication of the defamatory matter. [Footnote 2] The judgment in this case proceeded upon the mere proof of publication. The statute permits the defense not of the truth alone, but only that the truth was published with good motives and

#### Page 283 U. S. 710

for justifiable ends. It is apparent that, under the statute, the publication is to be regarded as defamatory if it injures reputation, and that it is scandalous if it circulates charges of reprehensible conduct, whether criminal or otherwise, and the publication is thus deemed to invite public reprobation and to constitute a public scandal. The court sharply defined the purpose of the statute, bringing out the precise point, in these words:

"There is no constitutional right to publish a fact merely because it is true. It is a matter of common knowledge that prosecutions under the criminal libel statutes do not result in efficient repression or suppression of the evils of scandal. Men who are the victims of such assaults seldom resort to the courts. This is especially true if their sins are exposed and the only question relates to whether it was done with good motives and for justifiable ends. This law is not for the protection of the person attacked, nor to punish the wrongdoer. It is for the protection of the public welfare."

*Second.* The statute is directed not simply at the circulation of scandalous and defamatory statements with regard to private citizens, but at the continued publication by newspapers and periodicals of charges against public officers of corruption, malfeasance in office, or serious neglect of duty. Such charges, by their very nature, create a public scandal. They are scandalous and defamatory within the meaning of the statute, which has its normal operation in relation to publications dealing prominently and chiefly with the alleged derelictions of public officers. [Footnote 3]

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*Third.* The object of the statute is not punishment, in the ordinary sense, but suppression of the offending newspaper or periodical. The reason for the enactment, as the state court has said, is that prosecutions to enforce penal statutes for libel do not result in "efficient repression or suppression

of the evils of scandal." Describing the business of publication as a public nuisance does not obscure the substance of the proceeding which the statute authorizes. It is the continued publication of scandalous and defamatory matter that constitutes the business and the declared nuisance. In the case of public officers, it is the reiteration of charges of official misconduct, and the fact that the newspaper or periodical is principally devoted to that purpose, that exposes it to suppression. In the present instance, the proof was that nine editions of the newspaper or periodical in question were published on successive dates, and that they were chiefly devoted to charges against public officers and in relation to the prevalence and protection of crime. In such a case, these officers are not left to their ordinary remedy in a suit for libel, or the authorities to a prosecution for criminal libel. Under this statute, a publisher of a newspaper or periodical, undertaking to conduct a campaign to expose and to censure official derelictions, and devoting his publication principally to that purpose, must face not simply the possibility of a verdict against him in a suit or prosecution for libel, but a determination that his newspaper or periodical is a public nuisance to be abated, and that this abatement and suppression will follow unless he is prepared with legal evidence to prove the truth of the charges and also to satisfy the court that, in

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addition to being true, the matter was published with good motives and for justifiable ends.

This suppression is accomplished by enjoining publication, and that restraint is the object and effect of the statute.

*Fourth.* The statute not only operates to suppress the offending newspaper or periodical, but to put the publisher under an effective censorship. When a newspaper or periodical is found to be "malicious, scandalous, and defamatory," and is suppressed as such, resumption of publication is punishable as a contempt of court by fine or imprisonment. Thus, where a newspaper or periodical has been suppressed because of the circulation of charges against public officers of official misconduct, it would seem to be clear that the renewal of the publication of such charges would constitute a contempt, and that the judgment would lay a permanent restraint upon the publisher, to escape which he must satisfy the court as to the character of a new publication. Whether he would be permitted again to publish matter deemed to be derogatory to the same or

other public officers would depend upon the court's ruling. In the present instance, the judgment restrained the defendants from

"publishing, circulating, having in their possession, selling or giving away any publication whatsoever which is a malicious, scandalous or defamatory newspaper, as defined by law."

The law gives no definition except that covered by the words "scandalous and defamatory," and publications charging official misconduct are of that class. While the court, answering the objection that the judgment was too broad, saw no reason for construing it as restraining the defendants "from operating a newspaper in harmony with the public welfare to which all must yield," and said that the defendants had not indicated "any desire to conduct their business in the usual and legitimate manner," the manifest inference is that, at least with respect to a

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new publication directed against official misconduct, the defendant would be held, under penalty of punishment for contempt as provided in the statute, to a manner of publication which the court considered to be "usual and legitimate" and consistent with the public welfare.

If we cut through mere details of procedure, the operation and effect of the statute, in substance, is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter -- in particular, that the matter consists of charges against public officers of official dereliction -- and, unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed and further publication is made punishable as a contempt. This is of the essence of censorship.

The question is whether a statute authorizing such proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licenser, resulted in renunciation of the censorship of the press. [Footnote 4] The liberty deemed to be established was thus described by Blackstone:

"The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an

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undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity."

4 Bl.Com. 151, 152; *see* Story on the Constitution, §§ 1884, 1889. The distinction was early pointed out between the extent of the freedom with respect to censorship under our constitutional system and that enjoyed in England. Here, as Madison said,

"the great and essential rights of the people are secured against legislative as well as against executive ambition. They are secured not by laws paramount to prerogative, but by constitutions paramount to laws. This security of the freedom of the press requires that it should be exempt not only from previous restraint by the Executive, as in Great Britain, but from legislative restraint also."

Report on the Virginia Resolutions, Madison's Works, vol. IV, p. 543. This Court said, in *Patterson v. Colorado*, 205 U. S. 454, 205 U. S. 462:

"In the first place, the main purpose of such constitutional provisions is 'to prevent all such previous restraints upon publications as had been practiced by other governments,' and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare. *Commonwealth v. Blanding*, 3 Pick. 304, 313, 314; *Respublica v. Oswald*, 1 Dallas 319, 1 U. S. 325. The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false. This was the law of criminal libel apart from statute in most cases, if not in all. *Commonwealth v. Blanding, ubi sup.*; 4 Bl.Com. 150."

The criticism upon Blackstone's statement has not been because immunity from previous restraint upon publication has not been regarded as deserving of special emphasis, but chiefly because that immunity cannot be deemed to exhaust the conception of the liberty guaranteed by

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state and federal constitutions. The point of criticism has been "that the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions", and that

"the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications."

2 Cooley, Const.Lim., 8th ed., p. 885. But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions. *Id.*, pp. 883, 884. The law of criminal libel rests upon that secure foundation. There is also the conceded authority of courts to punish for contempt when publications directly tend to prevent the proper discharge of judicial functions. *Patterson v. Colorado, supra; Toledo Newspaper Co. v. United States, 247 U. S. 402, 247 U. S. 419.* [Footnote 5] In the present case, we have no occasion to inquire as to the permissible scope of subsequent punishment. For whatever wrong the appellant has committed or may commit by his publications the State appropriately affords both public and private redress by its libel laws. As has been noted, the statute in question does not deal with punishments; it provides for no punishment, except in case of contempt for violation of the court's order, but for suppression and injunction, that is, for restraint upon publication.

The objection has also been made that the principle as to immunity from previous restraint is stated too

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broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases:

"When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight, and that no Court could regard them as protected by any constitutional right."

*Schenck v. United States*, 249 U. S. 47, 249 U. S. 52. No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. [Footnote 6] On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government. The constitutional guaranty of free speech does not

"protect a man from an injunction against uttering words that may have all the effect of force. *Gompers v. Buck Stove & Range Co.*, 221 U. S. 418, 221 U. S. 439."

*Schenck v. United States, supra.* These limitations are not applicable here. Nor are we now concerned with questions as to the extent of authority to prevent publications in order to protect private rights according to the principles governing the exercise of the jurisdiction of courts of equity. [Footnote 7]

The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally, although not exclusively, immunity from previous restraints or censorship. The conception of the liberty of the press in this country had broadened with the exigencies of the colonial

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period and with the efforts to secure freedom from oppressive administration. [Footnote 8] That liberty was especially cherished for the immunity it afforded from previous restraint of the publication of censure of public officers and charges of official misconduct. As was said by Chief Justice Parker, in *Commonwealth v. Blanding*, 3 Pick. 304, 313, with respect to the constitution of Massachusetts:

"Besides, it is well understood, and received as a commentary on this provision for the liberty of the press, that it was intended to prevent all such *previous restraints* upon publications as had been practiced by other governments, and in early times here, to stifle the efforts of patriots towards enlightening their fellow subjects upon their rights and the duties of rulers. The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse."

In the letter sent by the Continental Congress (October 26, 1774) to the Inhabitants of Quebec, referring to the "five great rights," it was said: [Footnote 9]

"The last right we shall mention regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiments on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them whereby oppressive officers are shamed or intimidated into more honourable and just modes of conducting affairs."

Madison, who was the leading spirit in the preparation of the First Amendment of the Federal Constitution, thus described the practice and sentiment which led to the guaranties of liberty of the press in state constitutions: [Footnote 10]

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"In every State, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men of every description which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this footing it yet stands. . . . Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States that it is better to leave a few of its noxious branches to their luxuriant growth than, by pruning them away, to injure the vigour of those yielding the proper fruits. And can the wisdom of this policy be doubted by any who reflect that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; who reflect that to the same beneficent source the United States owe much of the lights which conducted them to the ranks of a free and independent nation, and which have improved their political system into a shape so auspicious to their happiness? Had 'Sedition Acts,' forbidding every publication that might bring the constituted agents into contempt or disrepute, or that might excite the hatred of the people against the authors of unjust or pernicious measures, been uniformly enforced against the press, might not the United States have been languishing at this day under the infirmities of a sickly Confederation? Might they not, possibly, be miserable colonies, groaning under a foreign yoke?"

The fact that, for approximately one hundred and fifty years, there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right. Public officers, whose character and

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conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals. The general principle that the constitutional guaranty of the liberty of the press gives immunity from previous restraints has been approved in many decisions under the provisions of state constitutions. [Footnote 11]

The importance of this immunity has not lessened. While reckless assaults upon public men, and efforts to bring obloquy upon those who are endeavoring faithfully to discharge official duties, exert a baleful influence and deserve the severest condemnation in public opinion, it cannot be said that this abuse is greater, and it is believed to be less, than that which characterized the period in which our institutions took shape. Meanwhile, the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and

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property by criminal alliances and official neglect, emphasizes the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy consistent with constitutional privilege.

In attempted justification of the statute, it is said that it deals not with publication *per se*, but with the "business" of publishing defamation. If, however, the publisher has a constitutional right to publish, without previous restraint, an edition of his newspaper charging official derelictions, it cannot be denied that he may publish subsequent editions for the same purpose. He does not lose his right by exercising it. If his

right exists, it may be exercised in publishing nine editions, as in this case, as well as in one edition. If previous restraint is permissible, it may be imposed at once; indeed, the wrong may be as serious in one publication as in several. Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint. Similarly, it does not matter that the newspaper or periodical is found to be "largely" or "chiefly" devoted to the publication of such derelictions. If the publisher has a right, without previous restraint, to publish them, his right cannot be deemed to be dependent upon his publishing something else, more or less, with the matter to which objection is made.

Nor can it be said that the constitutional freedom from previous restraint is lost because charges are made of derelictions which constitute crimes. With the multiplying provisions of penal codes, and of municipal charters and ordinances carrying penal sanctions, the conduct of

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public officers is very largely within the purview of criminal statutes. The freedom of the press from previous restraint has never been regarded as limited to such animadversions as lay outside the range of penal enactments. Historically, there is no such limitation; it is inconsistent with the reason which underlies the privilege, as the privilege so limited would be of slight value for the purposes for which it came to be established.

The statute in question cannot be justified by reason of the fact that the publisher is permitted to show, before injunction issues, that the matter published is true and is published with good motives and for justifiable ends. If such a statute, authorizing suppression and injunction on such a basis, is constitutionally valid, it would be equally permissible for the legislature to provide that at any time the publisher of any newspaper could be brought before a court, or even an administrative officer (as the constitutional protection may not be regarded as resting on mere procedural details) and required to produce proof of the truth of his publication, or of what he intended to publish, and of his motives, or stand enjoined. If this can be done, the legislature may provide machinery for determining in the complete exercise of its discretion what are justifiable ends, and restrain publication accordingly. And it would be but a step to a complete system of censorship. The recognition of authority to impose previous restraint upon publication in order to protect the community against the circulation of charges of misconduct, and especially of official misconduct, necessarily would carry with it the

admission of the authority of the censor against which the constitutional barrier was erected. The preliminary freedom, by virtue of the very reason for its existence, does not depend, as this Court has said, on proof of truth. *Patterson v. Colorado, supra*.

Equally unavailing is the insistence that the statute is designed to prevent the circulation of scandal which tends

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to disturb the public peace and to provoke assaults and the commission of crime. Charges of reprehensible conduct, and in particular of official malfeasance, unquestionably create a public scandal, but the theory of the constitutional guaranty is that even a more serious public evil would be caused by authority to prevent publication.

"To prohibit the intent to excite those unfavorable sentiments against those who administer the Government is equivalent to a prohibition of the actual excitement of them, and to prohibit the actual excitement of them is equivalent to a prohibition of discussions having that tendency and effect, which, again, is equivalent to a protection of those who administer the Government, if they should at any time deserve the contempt or hatred of the people, against being exposed to it by free animadversions on their characters and conduct. [Footnote 12]"

There is nothing new in the fact that charges of reprehensible conduct may create resentment and the disposition to resort to violent means of redress, but this well understood tendency did not alter the determination to protect the press against censorship and restraint upon publication. As was said in *New Yorker Staats-Zeitung v. Nolan*, 89 N.J. Eq. 387, 388, 105 Atl. 72:

"If the township may prevent the circulation of a newspaper for no reason other than that some of its inhabitants may violently disagree with it, and resent its circulation by resorting to physical violence, there is no limit to what may be prohibited."

The danger of violent reactions becomes greater with effective organization of defiant groups resenting exposure, and if this consideration warranted legislative interference with the initial freedom of publication, the constitutional protection would be reduced to a mere form of words.

For these reasons we hold the statute, so far as it authorized the proceedings in this action under clause (b)

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of section one, to be an infringement of the liberty of the press guaranteed by the Fourteenth Amendment. We should add that this decision rests upon the operation and effect of the statute, without regard to the question of the truth of the charges contained in the particular periodical. The fact that the public officers named in this case, and those associated with the charges of official dereliction, may be deemed to be impeccable cannot affect the conclusion that the statute imposes an unconstitutional restraint upon publication.

*Judgment reversed.*

[Footnote 1]

Mason's Minnesota Statutes, 1927, 10123-1 to 10123-3.

[Footnote 2]

Mason's Minn.Stats. 10112, 10113; *State v. Shipman*, 83 Minn. 441, 445, 86 N.W. 431; *State v. Minor*, 163 Minn. 109, 110, 203 N.W. 596.

[Footnote 3]

It may also be observed that, in a prosecution for libel, the applicable Minnesota statute (Mason's Minn.Stats., 1927, §§ 10112, 10113) provides that the publication is justified "whenever the matter charged as libelous is true and was published with good motives and for justifiable ends," and also

"is excused when honestly made, in belief of its truth, and upon reasonable grounds for such belief, and consists of fair comments upon the conduct of a person in respect to public affairs."

The clause last mentioned is not found in the statute in question.

[Footnote 4]

May, Constitutional History of England, vol. 2, chap. IX, p. 4; DeLolme, Commentaries on the Constitution of England, chap. IX, pp. 318, 319.

[Footnote 5]

*See Hugonson's Case*, 2 Atk. 469; *Respublica v. Oswald*, 1 Dallas 319; *Cooper v. People*, 13 Colo. 337, 373, 22 Pac. 790; *Nebraska v. Rosewater*, 60 Nebr. 438, 83 N.W. 353; *State v. Tugwell*, 19 Wash. 238, 52 Pac. 1056; *People v. Wilson*, 64 Ill. 195; *Storey v. People*, 79 Ill. 45; *State v. Circuit Court*, 97 Wis. 1, 72 N.W.193.

[Footnote 6]

Chafee, *Freedom of Speech*, p. 10.

[Footnote 7]

*See* 29 Harvard Law Review, 640.

[Footnote 8]

*See* Duniway "The Development of Freedom of the Press in Massachusetts," p. 123; Bancroft's History of the United States, vol. 2, 261.

[Footnote 9]

Journal of the Continental Congress, 1904 ed., vol. I, pp. 104, 108.

[Footnote 10]

Report on the Virginia Resolutions, Madison's Works, vol. iv, 544.

[Footnote 11]

*Dailey v. Superior Court*, 112 Cal. 94, 98, 44 Pac. 458; *Jones, Varnum & Co. v. Townsend's Admx.*, 21 Fla. 431, 450; *State ex rel. Liversey v. Judge*, 34 La. 741, 743; *Commonwealth v. Blanding*, 3 Pick, 304, 313; *Lindsay v. Montana Federation of Labor*, 37 Mont. 264, 275, 277, 96 Pac. 127; *Howell v. Bee Publishing Co.*, 100 Neb. 39, 42, 158 N.W. 358; *New Yorker Staats-Zeitung v. Nolan*, 89 N.J.Eq. 387, 105 Atl. 72; *Brandreth v. Lane*, 8 Paige 24; *New York Juvenile Guardian Society v. Roosevelt*, 7 Daly 188; *Ulster Square Dealer v. Fowler*, 111 N.Y.Supp. 16; *Star Co. v. Brush*, 170 *id.* 987, 172 *id.* 320, 172 *id.* 851; *Dopp v. Doll*, 9 Ohio Dec.Rep. 428; *Respublica v. Oswald*, 1 Dall. 319, 1 U. S. 325; *Respublica v. Dennie*, 4 Yeates 267, 269; *Ex parte Neill*, 32 Tex.Cr. 275, 22 S.W. 923; *Mitchell v. Grand Lodge*, 56 Tex.Civ.App. 306, 309, 121 S.W. 178; *Sweeney v. Baker*, 13 W.Va. 158, 182; *Citizens Light, Heat & Power Co. v. Montgomery Light & Water Co.*, 171 Fed. 553,

556; *Willis v. O'Connell*, 231 Fed. 1004, 1010; *Dearborn Publishing Co. v. Fitzgerald*, 271 Fed. 479, 485.

[Footnote 12]

Madison, *op. cit.* p. 549.

MR. JUSTICE BUTLER, dissenting.

The decision of the Court in this case declares Minnesota and every other State powerless to restrain by injunction the business of publishing and circulating among the people malicious, scandalous and defamatory periodicals that in due course of judicial procedure has been adjudged to be a public nuisance. It gives to freedom of the press a meaning and a scope not heretofore recognized, and construes "liberty" in the due process clause of the Fourteenth Amendment to put upon the States a federal restriction that is without precedent.

Confessedly, the Federal Constitution, prior to 1868, when the Fourteenth Amendment was adopted, did not protect the right of free speech or press against state action. *Barron v. Baltimore*, 7 Pet. 243, 32 U. S. 250. *Fox v. Ohio*, 5 How. 410, 46 U. S. 434. *Smith v. Maryland*, 18 How. 71, 59 U. S. 76. *Withers v. Buckley*, 20 How. 84, 61 U. S. 89-91. Up to that time, the right was safeguarded solely by the constitutions and laws of the States, and, it may be added, they operated adequately to protect it. This Court was not called on until 1925 to decide whether the "liberty" protected by the Fourteenth Amendment includes the right of free speech and press. That question has been finally answered

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in the affirmative. *Cf. Patterson v. Colorado*, 205 U. S. 454, 205 U. S. 462. *Prudential Ins. Co. v. Cheek*, 259 U. S. 530, 259 U. S. 538, 259 U. S. 543. *See Gitlow v. New York*, 268 U. S. 652. *Fiske v. Kansas*, 274 U. S. 380. *Stromberg v. California*, *ante*, p. 283 U. S. 359.

The record shows, and it is conceded, that defendants' regular business was the publication of malicious, scandalous and defamatory articles concerning the principal public officers, leading newspapers of the city, many private persons and the Jewish race. It also shows that it was their purpose at all hazards to continue to carry on the business. In every edition, slanderous and defamatory matter predominates to the practical exclusion of all else. Many of the statements are so highly improbable as

to compel a finding that they are false. The articles themselves show malice. [Footnote 2/1]

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The defendant here has no standing to assert that the statute is invalid because it might be construed so as to violate the Constitution. His right is limited solely to

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the inquiry whether, having regard to the point properly raised in his case, the effect of applying the statute is to deprive him of his liberty without due process of law.

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This Court should not reverse the judgment below upon the ground that, in some other case, the statute may be applied in a way that is repugnant to the freedom of the press protected by the Fourteenth Amendment. *Castillo v. McConnico*, 168 U. S. 674, 168 U. S. 680. *Williams v. Mississippi*, 170 U. S. 213, 170 U. S. 225. *Yazoo & Miss. R. Co. v. Jackson Vinegar Co.*, 226 U. S. 217, 226 U. S. 219-220. *Plymouth Coal Co. v. Pennsylvania*, 232 U. S. 531, 232 U. S. 544-546.

This record requires the Court to consider the statute as applied to the business of publishing articles that are, in fact, malicious, scandalous and defamatory.

The statute provides that any person who "shall be engaged in the business of regularly or customarily producing, publishing or circulating" a newspaper, magazine or other periodical that is (a) "obscene, lewd and lascivious" or (b) "malicious, scandalous and defamatory"

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is guilty of a nuisance, and may be enjoined as provided in the Act. It will be observed that the qualifying words are used conjunctively. In actions brought under (b) "there shall be available the defense that the truth was published with good motives and for justifiable ends."

The complaint charges that defendants were engaged in the business of regularly and customarily publishing "malicious, scandalous and

defamatory newspapers" known as the Saturday Press, and nine editions dated respectively on each Saturday commencing September 25 and ending November 19, 1927, were made a part of the complaint. These are all that were published.

On appeal from the order of the district court overruling defendants' demurrer to the complaint, the state supreme court said (174 Minn. 457, 461, 219 N.W. 770):

"The constituent elements of the declared nuisance are the customary and regular dissemination by means of a newspaper which finds its way into families, reaching the young as well as the mature, of a selection of scandalous and defamatory articles treated in such a way as to excite attention and interest so as to command circulation. . . . The statute is not directed at threatened libel, but at an existing business which, generally speaking, involves more than libel. The distribution of scandalous matter is detrimental to public morals and to the general welfare. It tends to disturb the peace of the community. Being defamatory and malicious, it tends to provoke assaults and the commission of crime. It has no concern with the publication of the truth, with good motives and for justifiable ends. . . . In Minnesota no agency can hush the sincere and honest voice of the press; but our constitution was never intended to protect malice, scandal and defamation when untrue or published with bad motives or without justifiable ends. . . . It was never the intention of the constitution to afford protection

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to a publication devoted to scandal and defamation. . . . Defendants stand before us upon the record as being regularly and customarily engaged in a business of conducting a newspaper sending to the public malicious, scandalous and defamatory printed matter."

The case was remanded to the district court.

Near's answer made no allegations to excuse or justify the business or the articles complained of. It formally denied that the publications were malicious, scandalous or defamatory, admitted that they were made as alleged, and attacked the statute as unconstitutional. At the trial, the plaintiff introduced evidence unquestionably sufficient to support the complaint. The defendant offered none. The court found the facts as alleged in the complaint, and, specifically, that each edition "was chiefly devoted to malicious, scandalous and defamatory articles" and that the last edition was chiefly devoted to malicious, scandalous and defamatory

articles concerning Leach (mayor of Minneapolis), Davis (representative of the law enforcement league of citizens), Brunskill (chief of police), Olson (county attorney), the Jewish race, and members of the grand jury then serving in that court; that defendants, in and through the several publications,

"did thereby engage in the business of regularly and customarily producing, publishing and circulating a malicious, scandalous and defamatory newspaper."

Defendant Near again appealed to the supreme court. In its opinion (179 Minn. 40, 228 N.W. 326), the court said:

"No claim is advanced that the method and character of the operation of the newspaper in question was not a nuisance if the statute is constitutional. It was regularly and customarily devoted largely to malicious, scandalous and defamatory matter. . . . The record presents the same questions, upon which we have already passed. "

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Defendant concedes that the editions of the newspaper complained of are "defamatory *per se*," and he says:

"It has been asserted that the constitution was never intended to be a shield for malice, scandal, and defamation when untrue, or published with bad motives, or for unjustifiable ends. . . . The contrary is true; every person *does* have a constitutional right to publish malicious, scandalous, and defamatory matter though untrue, and with bad motives, and for unjustifiable ends, *in the first instance*, though he is subject to responsibility therefor *afterwards*."

The record, when the substance of the articles is regarded, requires that concession here. And this Court is required to pass on the validity of the state law on that basis.

No question was raised below, and there is none here, concerning the relevancy or weight of evidence, burden of proof, justification or other matters of defense, the scope of the judgment or proceedings to enforce it, or the character of the publications that may be made notwithstanding the injunction.

There is no basis for the suggestion that defendants may not interpose any defense or introduce any evidence that would be open to them in a libel

case, or that malice may not be negated by showing that the publication was made in good faith in belief of its truth, or that, at the time and under the circumstances, it was justified as a fair comment on public affairs or upon the conduct of public officers in respect of their duties as such. *See* Mason's Minnesota Statutes, §§ 10112, 10113.

The scope of the judgment is not reviewable here. The opinion of the state supreme court shows that it was not reviewable there, because defendants' assignments of error in that court did not go to the form of the judgment, and because the lower court had not been asked to modify the judgment.

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The Act was passed in the exertion of the State's power of police, and this court is, by well established rule, required to assume, until the contrary is clearly made to appear, that there exists in Minnesota a state of affairs that justifies this measure for the preservation of the peace and good order of the State. *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 220 U. S. 79. *Gitlow v. New York*, *supra*, 268 U. S. 668-669. *Corporation Commission v. Lowe*, 281 U. S. 431, 281 U. S. 438. *O'Gorman & Young v. Hartford Ins. Co.*, 282 U. S. 251, 282 U. S. 257-258.

The publications themselves disclose the need and propriety of the legislation. They show:

In 1913 one Guilford, originally a defendant in this suit, commenced the publication of a scandal sheet called the Twin City Reporter; in 1916, Near joined him in the enterprise, later bought him out and engaged the services of one Bevens. In 1919, Bevens acquired Near's interest, and has since, alone or with others, continued the publication. Defendants admit that they published some reprehensible articles in the Twin City Reporter, deny that they personally used it for blackmailing purposes, admit that, by reason of their connection with the paper their reputation did become tainted, and state that Bevens, while so associated with Near, did use the paper for blackmailing purposes. And Near says it was for that reason he sold his interest to Bevens.

In a number of the editions, defendants charge that, ever since Near sold his interest to Bevens in 1919, the Twin City Reporter has been used for blackmail, to dominate public gambling and other criminal activities, and as well to exert a kind of control over public officers and the government of the city.

The articles in question also state that, when defendants announced their intention to publish the Saturday Press, they were threatened, and that, soon after the first publication,

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Guilford was waylaid and shot down before he could use the firearm which he had at hand for the purpose of defending himself against anticipated assaults. It also appears that Near apprehended violence, and was not unprepared to repel it. There is much more of like significance.

The long criminal career of the Twin City Reporter -- if it is, in fact, as described by defendants -- and the arming and shooting arising out of the publication of the Saturday Press, serve to illustrate the kind of conditions, in respect of the business of publishing malicious, scandalous and defamatory periodicals, by which the state legislature presumably was moved to enact the law in question. It must be deemed appropriate to deal with conditions existing in Minnesota.

It is of the greatest importance that the States shall be untrammelled and free to employ all just and appropriate measures to prevent abuses of the liberty of the press.

In his work on the Constitution (5th ed.), Justice Story, expounding the First Amendment, which declares "Congress shall make no law abridging the freedom of speech or of the press," said (§ 1880):

"That this amendment was intended to secure to every citizen an absolute right to speak, or write, or print whatever he might please, without any responsibility, public or private, therefor is a supposition too wild to be indulged by any rational man. This would be to allow to every citizen a right to destroy at his pleasure the reputation, the peace, the property, and even the personal safety of every other citizen. A man might, out of mere malice and revenge, accuse another of the most infamous crimes; might excite against him the indignation of all his fellow citizens by the most atrocious calumnies; might disturb, nay, overturn, all his domestic peace, and embitter his parental affections; might inflict the most distressing punishments upon the weak, the timid, and the innocent;

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might prejudice all a man's civil, and political, and private rights, and might stir up sedition, rebellion, and treason even against the government itself in the wantonness of his passions or the corruption of his heart.

Civil society could not go on under such circumstances. Men would then be obliged to resort to private vengeance to make up for the deficiencies of the law, and assassination and savage cruelties would be perpetrated with all the frequency belonging to barbarous and brutal communities. It is plain, then, that the language of this amendment imports no more than that every man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint, so always that he does not injure any other person in his rights, person, property, or reputation, and so always that he does not thereby disturb the public peace or attempt to subvert the government. It is neither more nor less than an expansion of the great doctrine recently brought into operation in the law of libel, *that every man shall be at liberty to publish what is true, with good motives and for justifiable ends*. And, with this reasonable limitation, it is not only right in itself, but it is an inestimable privilege in a free government. Without such a limitation, it might become the scourge of the republic, first denouncing the principles of liberty and then, by rendering the most virtuous patriots odious through the terrors of the press, introducing despotism in its worst form."

(Italicizing added.)

The Court quotes Blackstone in support of its condemnation of the statute as imposing a previous restraint upon publication. But the previous restraints referred to by him subjected the press to the arbitrary will of an administrative officer. He describes the practice (Book IV, p. 152):

"To subject the press to the restrictive power of a licenser, as was formerly done both before and since the revolution [of 1688], is to subject all freedom

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of sentiment to the prejudices of one man and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. [[Footnote 2/2](#)]"

Story gives the history alluded to by Blackstone (§ 1882):

"The art of printing, soon after its introduction, we are told, was looked upon, as well in England as in other countries, as merely a matter of state, and subject to the coercion of the crown. It was, therefore, regulated in England by the king's proclamations, prohibitions, charters of privilege, and licenses, and finally by the decrees of the Court of Star-Chamber, which limited the number of printers and of presses which each should

employ, and prohibited new publications unless previously approved by proper licensers. On the demolition of this odious jurisdiction, in 1641, the Long Parliament of Charles the First, after their rupture with that prince, assumed the same powers which the Star-Chamber exercised with respect to licensing books, and during the Commonwealth (such is human frailty and the love of power even in republics), they issued their ordinances for that purpose, founded principally upon a Star-Chamber decree of 1637. After the restoration of Charles the Second, a statute on the same subject was passed, copied, with some few alterations, from the parliamentary ordinances. The act expired in 1679, and was revived and continued for a few years after the revolution of 1688. Many attempts were made by the government to keep it in force, but it was

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so strongly resisted by Parliament that it expired in 1694, and has never since been revived."

It is plain that Blackstone taught that, under the common law liberty of the press means simply the absence of restraint upon publication in advance as distinguished from liability, civil or criminal, for libelous or improper matter so published. And, as above shown, Story defined freedom of the press guaranteed by the First Amendment to mean that "every man shall be at liberty to publish what is true, with good motives and for justifiable ends." His statement concerned the definite declaration of the First Amendment. It is not suggested that the freedom of press included in the liberty protected by the Fourteenth Amendment, which was adopted after Story's definition, is greater than that protected against congressional action. *And see* 2 Cooley's Constitutional Limitations, 8th ed., p. 886. 2 Kent's Commentaries (14th ed.) Lect. XXIV, p. 17.

The Minnesota statute does not operate as a *previous* restraint on publication within the proper meaning of that phrase. It does not authorize administrative control in advance such as was formerly exercised by the licensers and censors but prescribes a remedy to be enforced by a suit in equity. In this case, there was previous publication made in the course of the business of regularly producing malicious, scandalous and defamatory periodicals. The business and publications unquestionably constitute an abuse of the right of free press. The statute denounces the things done as a nuisance on the ground, as stated by the state supreme court, that they threaten morals, peace and good order. There is no question of the power of the State to denounce such transgressions. The restraint authorized is only in respect of continuing to

do what has been duly adjudged to constitute a nuisance. The controlling words are

"All persons guilty of such nuisance may be enjoined, as hereinafter

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provided. . . . Whenever any such nuisance is committed . . . , an action in the name of the State"

may be brought

"to perpetually enjoin the person or persons committing, conducting or maintaining any such nuisance, *from further committing, conducting or maintaining any such nuisance*. . . . The court may make its order and judgment permanently enjoining . . . defendants found guilty . . . from committing or continuing the acts prohibited hereby, and in and by such judgment, such nuisance may be wholly abated. . . ."

There is nothing in the statute [Footnote 2/3] purporting to prohibit publications that have not been adjudged to constitute a nuisance. It is fanciful to suggest similarity between the granting or enforcement of the decree authorized by this statute to prevent *further* publication of malicious, scandalous and defamatory articles and the *previous* restraint upon the press by licensers as referred to by Blackstone and described in the history of the times to which he alludes.

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The opinion seems to concede that, under clause (a) of the Minnesota law, the business of regularly publishing and circulating an obscene periodical may be enjoined as a nuisance. It is difficult to perceive any distinction, having any relation to constitutionality, between clause (a) and clause (b) under which this action was brought. Both nuisances are offensive to morals, order and good government. As that resulting from lewd publications constitutionally may be enjoined, it is hard to understand why the one resulting from a regular business of malicious defamation may not.

It is well known, as found by the state supreme court, that existing libel laws are inadequate effectively to suppress evils resulting from the kind of business and publications that are shown in this case. The doctrine that measures such as the one before us are invalid because they operate as previous restraints to infringe freedom of press exposes the peace and

good order of every community and the business and private affairs of every individual to the constant and protracted false and malicious

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assaults of any insolvent publisher who may have purpose and sufficient capacity to contrive and put into effect a scheme or program for oppression, blackmail or extortion. The judgment should be affirmed.

MR. JUSTICE VAN DEVANTER, MR. JUSTICE McREYNOLDS, and MR. JUSTICE SUTHERLAND concur in this opinion.

[Footnote 2/1]

The following articles appear in the last edition published, dated November 19, 1927:

*"FACTS NOT THEORIES"*

"I am a bosom friend of Mr. Olson,' snorted a gentleman of Yiddish blood, 'and I want to protest against your article,' and blah, blah, blah, ad infinitum, ad nauseam."

"I am not taking orders from men of Barnett's faith, at least right now. There have been too many men in this city and especially those in official life, who HAVE been taking orders and suggestions from JEW GANGSTERS, therefore we HAVE Jew Gangsters, practically ruling Minneapolis."

"It was buzzards of the Barnett stripe who shot down my buddy. It was Barnett gunmen who staged the assault on Samuel Shapiro. It is Jew thugs who have 'pulled' practically every robbery in this city. It was a member of the Barnett gang who shot down George Rubenstein (Ruby) while he stood in the shelter of Mose Barnett's ham-cavern on Hennepin avenue. It was Mose Barnett himself who shot down Roy Rogers on Hennepin avenue. It was at Mose Barnett's place of 'business' that the '13 dollar Jew' found a refuge while the police of New York were combing the country for him. It was a gang of Jew gunmen who boasted that, for five hundred dollars, they would kill any man in the city. It was Mose Barnett, a Jew, who boasted that he held the chief of police of Minneapolis in his hand -- had bought and paid for him."

"It is Jewish men and women -- pliant tools of the Jew gangster, Mose Barnett, who stand charged with having falsified the election records and

returns in the Third ward. And it is Mose Barnett himself, who, indicted for his part in the Shapiro assault, is a fugitive from justice today."

"Practically every vendor of vile hooch, every owner of a moonshine still, every snake-faced gangster and embryonic yegg in the Twin Cities is a JEW."

"Having these examples before me, I feel that I am justified in my refusal to take orders from a Jew who boasts that he is a 'bosom friend' of Mr. Olson."

"I find in the mail at least twice per week letters from gentlemen of Jewish faith who advise me against 'launching an attack on the Jewish people.' These gentlemen have the cart before the horse. I am launching, nor is Mr. Guilford, no attack against any race, BUT:"

"When I find men of a certain race banding themselves together for the purpose of preying upon Gentile or Jew; gunmen, KILLERS, roaming our streets shooting down men against whom they have no personal grudge (or happen to have); defying OUR laws; corrupting OUR officials; assaulting businessmen; beating up unarmed citizens; spreading a reign of terror through every walk of life, then I say to you in all sincerity that I refuse to back up a single step from that 'issue' -- if they choose to make it so."

"If the people of Jewish faith in Minneapolis wish to avoid criticism of these vermin whom I rightfully call 'Jews,' they can easily do so BY THEMSELVES CLEANING HOUSE."

"I'm not out to cleanse Israel of the filth that clings to Israel's skirts. I'm out to 'hew to the line, let the chips fly where they may.'"

"I simply state a fact when I say that ninety percent of the crimes committed against society in this city are committed by Jew gangsters."

"It was a Jew who employed JEWS to shoot down Mr. Guilford. It was a Jew who employed a Jew to intimidate Mr. Shapiro and a Jew who employed JEWS to assault that gentleman when he refused to yield to their threats. It was a JEW who wheedled or employed Jews to manipulate the election records and returns in the Third ward in flagrant violation of law. It was a Jew who left two hundred dollars with another Jew to pay to our chief of police just before the last municipal election, and:"

"It is Jew, Jew, Jew, as long as one cares to comb over the records."

"I am launching no attack against the Jewish people As A RACE. I am merely calling attention to a FACT. And if the people of that race and faith wish to rid themselves of the odium and stigma THE RODENTS OF THEIR OWN RACE HAVE BROUGHT UPON THEM, they need only to step to the front and help the decent citizens of Minneapolis rid the city of these criminal Jews."

"Either Mr. Guilford or myself stands ready to do battle for a MAN, regardless of his race, color or creed, but neither of us will step one inch out of our chosen path to avoid a fight IF the Jews ant to battle."

"Both of us have some mighty loyal friends among the Jewish people, but not one of them comes whining to ask that we 'lay off' criticism of Jewish gangsters, and none of them who comes carping to us of their 'bosom friendship' for any public official now under our journalistic guns."

*"GUIL's [Guilford's] CHATTERBOX"*

"I headed into the city on September 26th, ran across three Jews in a Chevrolet; stopped a lot of lead, and won a bed for myself in St. Barnabas Hospital for six weeks. . . ."

"Whereupon I have withdrawn all allegiance to anything with a hook nose that eats herring. I have adopted the sparrow as my national bird until Davis' law enforcement league or the K.K.K. hammers the eagle's beak out straight. So if I seem to act crazy as I ankle down the street, bear in mind that I am merely saluting MY national emblem."

"All of which has nothing to do with the present whereabouts of Big Mose Barnett. Methinks he headed the local delegation to the new 'Palestine for Jews only.' He went ahead of the boys so he could do a little fixing with the Yiddish chief of police and get his twenty-five percent of the gambling rake-off. Boys will be boys, and 'ganefs' will be ganefs."

*GRAND JURIES AND DITTO*

"There are grand juries, and there are grand juries. The last one was a real grand jury. It acted. The present one is like the scion who is labelled 'Junior.' That means not so good. There are a few mighty good folks on it -- there are some who smell bad. One petty peanut politician whose graft was almost pitiful in its size when he was a public official has already

shot his mouth off in several places. He is establishing his alibi in advance for what he intends to keep from taking place."

"But George, we won't bother you. [Meaning a grand juror.] We are aware that the gambling syndicate was waiting for your body to convene before the big crap game opened again. The Yids had your dimensions, apparently, and we always go by the judgment of a dog in appraising people."

"We will call for a special grand jury and a special prosecutor within a short time, as soon as half of the staff can navigate to advantage, and then we'll show you what a real grand jury can do. Up to the present, we have been merely tapping on the window. Very soon, we shall start smashing glass."

[Footnote 2/2]

May, Constitutional History of England, c. IX. Duniway, Free dom of the Press in Massachusetts, cc. I and II. Cooley, Constitutional Limitations (8th ed.) Vol. II, pp. 880-881. Pound, Equitable Relief against Defamation, 29 Harv.L.Rev. 640, 650 *et seq.* Madison, Letters and Other Writings (1865 ed.) Vol. IV, pp. 542, 543. *Respublica v. Oswald*, 1 Dall. 319, 1 U. S. 325. Rawle, A View of the Constitution (2d ed. 1829) p. 124. Paterson, Liberty of the Press, c. III.

[Footnote 2/3]

"§ 1. Any person who, as an individual, or as a member or employee of a firm, or association or organization, or as an officer, director, member or employee of a corporation, shall be engaged in the business of regularly or customarily producing, publishing or circulating, having in possession, selling or giving away"

"(a) an obscene, lewd and lascivious newspaper, magazine, or other periodical, or"

"(b) a malicious, scandalous and defamatory newspaper, magazine, or other periodical,"

"is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined, as hereinafter provided."

"\* \* \* \*"

"In actions brought under (b) above, there shall be available the defense that the truth was published with good motives and for justifiable ends and in such actions the plaintiff shall not have the right to report [resort] to issues or editions of periodicals taking place more than three months before the commencement of the action."

"§ 2. Whenever any such nuisance is committed or is kept, maintained, or exists, as above provided for, the County Attorney of any county where any such periodical is published or circulated . . . may commence and maintain in the District Court of said county, an action in the name of the State of Minnesota . . . to perpetually enjoin the person or persons committing, conducting or maintaining any such nuisance, from further committing, conducting, or maintaining any such nuisance. . . ."

"§ 3. The action may be brought to trial and tried as in the case of other actions in such District Court, and shall be governed by the practice and procedure applicable to civil actions for injunctions."

"After trial, the court may make its order and judgment permanently enjoining any and all defendants found guilty of violating this Act from further committing or continuing the acts prohibited hereby, and in and by such judgment, such nuisance may be wholly abated."

"The court may, as in other cases of contempt, at any time punish, by fine of not more than \$1,000, or by imprisonment in the county jail for not more than twelve months, any person or persons violating any injunction, temporary or permanent, made or issued pursuant to this Act."

**427 U.S. 539 (1976)**

NEBRASKA PRESS ASSN. ET AL.  
V.  
STUART, JUDGE, ET AL.

No. 75-817.

**Supreme Court of United States.**

Argued April 19, 1976.

Decided June 30, 1976.

CERTIORARI TO THE SUPREME COURT OF NEBRASKA.\*540 *E. Barrett Prettyman, Jr.*, argued the cause for petitioners. With him on the briefs were *James L. Koley* and *Stephen T. McGill*.\*541 *Harold Mosher*, Assistant Attorney General of Nebraska, argued the cause for respondent Stuart. With him on the brief was *Paul L. Douglas*, Attorney General. *Milton R. Larson* argued the cause for respondent State of Nebraska. With him on the brief was *Erwin N. Griswold*. *Leonard P. Vyhnalek* filed a brief for respondent Simants.

*Floyd Abrams* argued the cause for the National Broadcasting Co. et al. as *amici curiae* urging reversal. With him on the brief were *Eugene R. Scheiman*, *Corydon B. Dunham*, *David H. Marion*, *Harold E. Kohn*, *Robert Sack*, *John B. Summers*, *William Barnabas McHenry*, *David Otis Fuller, Jr.*, *Richard M. Schmidt, Jr.*, *Ian Volner*, and *J. Laurent Scharff*.<sup>[\*]</sup>

MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The respondent State District Judge entered an order restraining the petitioners from publishing or broadcasting accounts of confessions or admissions made by the accused or facts “strongly implicative” of the accused in a widely reported murder of six persons. We granted certiorari to decide whether the entry of such an order on the showing made before the state court violated the constitutional guarantee of freedom of the press.

**\*542 I**

On the evening of October 18, 1975, local police found the six members of the Henry Kellie family murdered in their home in Sutherland, Neb., a town of about 850 people. Police released the description of a suspect, Erwin Charles Simants, to the reporters who had hastened to the scene of the crime. Simants was arrested and arraigned in Lincoln County Court the following morning, ending a tense night for this small rural community.

The crime immediately attracted widespread news coverage, by local, regional, and national newspapers, radio and television stations. Three days after the crime, the County Attorney and Simants’ attorney joined in asking the County Court to enter a restrictive order relating to “matters that may or may not be publicly reported or

disclosed to the public,” because of the “mass coverage by news media” and the “reasonable likelihood of prejudicial news which would make difficult, if not impossible, the impaneling of an impartial jury and tend to prevent a fair trial.” The County Court heard oral argument but took no evidence; no attorney for members of the press appeared at this stage. The County Court granted the prosecutor’s motion for a restrictive order and entered it the next day, October 22. The order prohibited everyone in attendance from “releas[ing] or authoriz[ing] the release for public dissemination in any form or manner whatsoever any testimony given or evidence adduced”; the order also required members of the press to observe the Nebraska Bar-Press Guidelines.<sup>[1]</sup>

\*543 Simants’ preliminary hearing was held the same day, open to the public but subject to the order. The County Court bound over the defendant for trial to the State District Court. The charges, as amended to reflect the autopsy findings, were that Simants had committed the murders in the course of a sexual assault.

Petitioners—several press and broadcast associations, publishers, and individual reporters—moved on October 23 for leave to intervene in the District Court, asking that the restrictive order imposed by the County Court be vacated. The District Court conducted a hearing, at which the County Judge testified and newspaper articles about the *Simants* case were admitted in evidence. The District Judge granted petitioners’ motion to intervene and, on October 27, entered his own restrictive order. The judge found “because of the nature of the crimes charged in the complaint that there is a clear and present danger that pre-trial publicity could impinge upon the defendant’s right to a fair trial.” The order applied only until the jury was impaneled, and specifically prohibited petitioners from reporting five subjects: (1) the existence or contents of a confession Simants had made to law enforcement officers, which had been introduced in open court at arraignment; (2) the fact or nature of statements Simants had made to other persons; (3) the contents of a note he had written the night of the crime; (4) certain aspects of the medical testimony at the preliminary hearing; and (5) the identity of the \*544victims of the alleged sexual assault and the nature of the assault. It also prohibited reporting the exact nature of the restrictive order itself. Like the County Court’s order, this order incorporated the Nebraska Bar-Press Guidelines. Finally, the order set out a plan for attendance, seating, and courthouse traffic control during the trial.

Four days later, on October 31, petitioners asked the District Court to stay its order. At the same time, they applied to the Nebraska Supreme Court for a writ of mandamus, a stay, and an expedited appeal from the order. The State of Nebraska and the defendant Simants intervened in these actions. The Nebraska Supreme Court heard oral argument on November 25, and issued its *per curiam* opinion December 1. *State v. Simants*, 194 Neb. 783, 236 N. W. 2d 794 (1975).<sup>[2]</sup>

\*545 The Nebraska Supreme Court balanced the “heavy presumption against . . . constitutional validity” that an order restraining publication bears, *New York Times Co. v. United States*, 403 U. S. 713, 714 (1971), against the importance of the defendant’s right to trial by an impartial jury. Both society and the individual defendant, the court held, had a vital interest in assuring that Simants be tried by an impartial jury. Because of the publicity surrounding the crime, the court determined

that this right was in jeopardy. The court noted that Nebraska statutes required the District Court to try Simants within six months of his arrest, and that a change of venue could move the trial only to adjoining counties, which had been subject to essentially the same publicity as Lincoln County. The Nebraska Supreme Court held that “[u]nless the absolutist position of the relators was constitutionally correct, it would appear that the District Court acted properly.” 194 Neb., at 797, 236 N. W. 2d, at 803.

The Nebraska Supreme Court rejected that “absolutist position,” but modified the District Court’s order to accommodate the defendant’s right to a fair trial and the petitioners’ interest in reporting pretrial events. The order as modified prohibited reporting of only three matters: (a) the existence and nature of any confessions or admissions made by the defendant to law enforcement officers, (b) any confessions or admissions made to any third parties, except members of the press, and (c) other facts “strongly implicative” of the accused. The Nebraska Supreme Court did not rely on the Nebraska Bar-Press Guidelines. See n. 1, *supra*. After construing Nebraska law to permit closure in certain circumstances, the court remanded the case to the District Judge for reconsideration of the issue whether pretrial hearings should be closed to the press and public.

\*546 We granted certiorari to address the important issues raised by the District Court order as modified by the Nebraska Supreme Court, but we denied the motion to expedite review or to stay entirely the order of the State District Court pending Simants’ trial. 423 U. S. 1027 (1975). We are informed by the parties that since we granted certiorari, Simants has been convicted of murder and sentenced to death. His appeal is pending in the Nebraska Supreme Court.

## II

The order at issue in this case expired by its own terms when the jury was impaneled on January 7, 1976. There were no restraints on publication once the jury was selected, and there are now no restrictions on what may be spoken or written about the *Simants* case. Intervenor Simants argues that for this reason the case is moot.

Our jurisdiction under Art. III, § 2, of the Constitution extends only to actual cases and controversies. *Indianapolis School Comm’rs v. Jacobs*, 420 U. S. 128 (1975); *Sosna v. Iowa*, 419 U. S. 393, 397-403 (1975). The Court has recognized, however, that jurisdiction is not necessarily defeated simply because the order attacked has expired, if the underlying dispute between the parties is one “capable of repetition, yet evading review.” *Southern Pacific Terminal Co. v. ICC*, 219 U. S. 498, 515 (1911).

The controversy between the parties to this case is “capable of repetition” in two senses. First, if Simants’ conviction is reversed by the Nebraska Supreme Court and a new trial ordered, the District Court may enter another restrictive order to prevent a resurgence of prejudicial publicity before Simants’ retrial. Second, the State of Nebraska is a party to this case; the Nebraska Supreme Court’s decision authorizes state prosecutors to \*547 seek restrictive orders in appropriate cases. The dispute between the State and the petitioners who cover events throughout the State is thus

“capable of repetition.” Yet, if we decline to address the issues in this case on grounds of mootness, the dispute will evade review, or at least considered plenary review in this Court, since these orders are by nature short-lived. See, e. g., *Weinstein v. Bradford*, 423 U. S. 147 (1975); *Sosna v. Iowa*, *supra*; *Roe v. Wade*, 410 U. S. 113, 125 (1973); *Moore v. Ogilvie*, 394 U. S. 814, 816 (1969); *Carroll v. Princess Anne*, 393 U. S. 175, 178-179 (1968). We therefore conclude that this case is not moot, and proceed to the merits.

### III

The problems presented by this case are almost as old as the Republic. Neither in the Constitution nor in contemporaneous writings do we find that the conflict between these two important rights was anticipated, yet it is inconceivable that the authors of the Constitution were unaware of the potential conflicts between the right to an unbiased jury and the guarantee of freedom of the press. The unusually able lawyers who helped write the Constitution and later drafted the Bill of Rights were familiar with the historic episode in which John Adams defended British soldiers charged with homicide for firing into a crowd of Boston demonstrators; they were intimately familiar with the clash of the adversary system and the part that passions of the populace sometimes play in influencing potential jurors. They did not address themselves directly to the situation presented by this case; their chief concern was the need for freedom of expression in the political arena and the dialogue in ideas. But they recognized that there were risks to private rights from an unfettered press. Jefferson, for example, \*548 writing from Paris in 1786 concerning press attacks on John Jay, stated:

“In truth it is afflicting that a man who has past his life in serving the public . . . should yet be liable to have his peace of mind so much disturbed by any individual who shall think proper to arraign him in a newspaper. It is however an evil for which there is no remedy. Our liberty depends on the freedom of the press, and that cannot be limited without being lost. . . .” 9 Papers of Thomas Jefferson 239 (J. Boyd ed. 1954).

See also F. Mott, *Jefferson and the Press* 21, 38-46 (1943).

The trial of Aaron Burr in 1807 presented Mr. Chief Justice Marshall, presiding as a trial judge, with acute problems in selecting an unbiased jury. Few people in the area of Virginia from which jurors were drawn had not formed some opinions concerning Mr. Burr or the case, from newspaper accounts and heightened discussion both private and public. The Chief Justice conducted a searching *voir dire* of the two panels eventually called, and rendered a substantial opinion on the purposes of *voir dire* and the standards to be applied. See 1 *Causes Celebres, Trial of Aaron Burr for Treason* 404-427, 473-481 (1879); *United States v. Burr*, 25 F. Cas. 49 (No. 14,692g) (CC Va. 1807). Burr was acquitted, so there was no occasion for appellate review to examine the problem of prejudicial pretrial publicity. Mr. Chief Justice Marshall’s careful *voir dire* inquiry into the matter of possible bias makes clear that the problem is not a new one.

The speed of communication and the pervasiveness of the modern news media have exacerbated these problems, however, as numerous appeals demonstrate. The trial of Bruno Hauptmann in a small New Jersey community for \*549 the abduction and murder of the Charles Lindberghs' infant child probably was the most widely covered trial up to that time, and the nature of the coverage produced widespread public reaction. Criticism was directed at the "carnival" atmosphere that pervaded the community and the courtroom itself. Responsible leaders of press and the legal profession—including other judges—pointed out that much of this sorry performance could have been controlled by a vigilant trial judge and by other public officers subject to the control of the court. See generally Hudon, *Freedom of the Press Versus Fair Trial: The Remedy Lies With the Courts*, 1 Val. U. L. Rev. 8, 12-14 (1966); Hallam, *Some Object Lessons on Publicity in Criminal Trials*, 24 Minn. L. Rev. 453 (1940); Lippmann, *The Lindbergh Case in Its Relation to American Newspapers*, in *Problems of Journalism* 154-156 (1936).

The excesses of press and radio and lack of responsibility of those in authority in the *Hauptmann* case and others of that era led to efforts to develop voluntary guidelines for courts, lawyers, press, and broadcasters. See generally J. Lofton, *Justice and the Press* 117-130 (1966).<sup>[3]</sup> The effort was renewed in 1965 when the American Bar Association embarked on a project to develop standards for all aspects of criminal justice, including guidelines to accommodate the right to a fair trial and the rights of a free press. See Powell, *The Right to a \*550 Fair Trial*, 51 A. B. A. J. 534 (1965). The resulting standards, approved by the Association in 1968, received support from most of the legal profession. American Bar Association Project on Standards for Criminal Justice, *Fair Trial and Free Press* (Approved Draft 1968). Other groups have undertaken similar studies. See Report of the Judicial Conference Committee on the Operation of the Jury System, "Free Press-Fair Trial" Issue, 45 F. R. D. 391 (1968); Special Committee on Radio, Television, and the Administration of Justice of the Association of the Bar of the City of New York, *Freedom of the Press and Fair Trial* (1967). In the wake of these efforts, the cooperation between bar associations and members of the press led to the adoption of voluntary guidelines like Nebraska's. See n. 1, *supra*; American Bar Association Legal Advisory Committee on Fair Trial and Free Press, *The Rights of Fair Trial and Free Press* 1-6 (1969).

In practice, of course, even the most ideal guidelines are subjected to powerful strains when a case such as *Simants*' arises, with reporters from many parts of the country on the scene. Reporters from distant places are unlikely to consider themselves bound by local standards. They report to editors outside the area covered by the guidelines, and their editors are likely to be guided only by their own standards. To contemplate how a state court can control acts of a newspaper or broadcaster outside its jurisdiction, even though the newspapers and broadcasts reach the very community from which jurors are to be selected, suggests something of the practical difficulties of managing such guidelines.

The problems presented in this case have a substantial history outside the reported decisions of courts, in the efforts of many responsible people to accommodate the competing interests. We cannot resolve all of them, for \*551 it is not the function of this Court to write a code. We look instead to this particular case and the legal context in which it arises.

## IV

The Sixth Amendment in terms guarantees “trial, by an impartial jury . . .” in federal criminal prosecutions. Because “trial by jury in criminal cases is fundamental to the American scheme of justice,” the Due Process Clause of the Fourteenth Amendment guarantees the same right in state criminal prosecutions. *Duncan v. Louisiana*, 391 U. S. 145, 149 (1968).

“In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, ‘indifferent’ jurors. . . . ‘A fair trial in a fair tribunal is a basic requirement of due process.’ *In re Murchison*, 349 U. S. 133, 136. In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as ‘indifferent as he stands unsworne.’ Co. Litt. 155b. His verdict must be based upon the evidence developed at the trial.” *Irvin v. Dowd*, 366 U. S. 717, 722 (1961).

In the overwhelming majority of criminal trials, pretrial publicity presents few unmanageable threats to this important right. But when the case is a “sensational” one tensions develop between the right of the accused to trial by an impartial jury and the rights guaranteed others by the First Amendment. The relevant decisions of this Court, even if not dispositive, are instructive by way of background.

In *Irvin v. Dowd*, *supra*, for example, the defendant was convicted of murder following intensive and hostile news coverage. The trial judge had granted a defense motion for a change of venue, but only to an \*552adjacent county, which had been exposed to essentially the same news coverage. At trial, 430 persons were called for jury service; 268 were excused because they had fixed opinions as to guilt. Eight of the 12 who served as jurors thought the defendant guilty, but said they could nevertheless render an impartial verdict. On review the Court vacated the conviction and death sentence and remanded to allow a new trial for, “[w]ith his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion . . . .” 366 U. S., at 728.

Similarly, in *Rideau v. Louisiana*, 373 U. S. 723 (1963), the Court reversed the conviction of a defendant whose staged, highly emotional confession had been filmed with the cooperation of local police and later broadcast on television for three days while he was awaiting trial, saying “[a]ny subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality.” *Id.*, at 726. And in *Estes v. Texas*, 381 U. S. 532 (1965), the Court held that the defendant had not been afforded due process where the volume of trial publicity, the judge’s failure to control the proceedings, and the telecast of a hearing and of the trial itself “inherently prevented a sober search for the truth.” *Id.*, at 551. See also *Marshall v. United States*, 360 U. S. 310 (1959).

In *Sheppard v. Maxwell*, 384 U. S. 333 (1966), the Court focused sharply on the impact of pretrial publicity and a trial court’s duty to protect the defendant’s constitutional right to a fair trial. With only Mr. Justice Black dissenting, and he without opinion, the Court ordered a new trial for the petitioner, even though the first trial had occurred 12 years before. Beyond doubt the press had shown no responsible

concern for the constitutional guarantee of a fair trial; the community \*553 from which the jury was drawn had been inundated by publicity hostile to the defendant. But the trial judge “did not fulfill his duty to protect [the defendant] from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom.” *Id.*, at 363. The Court noted that “unfair and prejudicial news comment on pending trials has become increasingly prevalent,” *id.*, at 362, and issued a strong warning:

“Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, *the trial courts must take strong measures to ensure that the balance is never weighed against the accused.* . . . Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should *continue the case* until the threat abates, *or transfer it* to another county not so permeated with publicity. In addition, *sequestration of the jury* was something the judge should have raised *sua sponte* with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. *Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the* \*554 *court should be permitted to frustrate its function.* Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures.” *Id.*, at 362-363 (emphasis added).

Because the trial court had failed to use even minimal efforts to insulate the trial and the jurors from the “deluge of publicity,” *id.*, at 357, the Court vacated the judgment of conviction and a new trial followed, in which the accused was acquitted.

Cases such as these are relatively rare, and we have held in other cases that trials have been fair in spite of widespread publicity. In *Stroble v. California*, 343 U. S. 181 (1952), for example, the Court affirmed a conviction and death sentence challenged on the ground that pretrial news accounts, including the prosecutor’s release of the defendant’s recorded confession, were allegedly so inflammatory as to amount to a denial of due process. The Court disapproved of the prosecutor’s conduct, but noted that the publicity had receded some six weeks before trial, that the defendant had not moved for a change of venue, and that the confession had been found voluntary and admitted in evidence at trial. The Court also noted the thorough examination of jurors on *voir dire* and the careful review of the facts by the state courts, and held that petitioner had failed to demonstrate a denial of due process. See also *Murphy v. Florida*, 421 U. S. 794 (1975); *Beck v. Washington*, 369 U. S. 541 (1962).

Taken together, these cases demonstrate that pretrial publicity—even pervasive, adverse publicity—does not inevitably lead to an unfair trial. The capacity of the jury eventually impaneled to decide the case fairly is influenced by the tone and extent of

the publicity, \*555 which is in part, and often in large part, shaped by what attorneys, police, and other officials do to precipitate news coverage. The trial judge has a major responsibility. What the judge says about a case, in or out of the courtroom, is likely to appear in newspapers and broadcasts. More important, the measures a judge takes or fails to take to mitigate the effects of pretrial publicity—the measures described in *Sheppard*—may well determine whether the defendant receives a trial consistent with the requirements of due process. That this responsibility has not always been properly discharged is apparent from the decisions just reviewed.

The costs of failure to afford a fair trial are high. In the most extreme cases, like *Sheppard* and *Estes*, the risk of injustice was avoided when the convictions were reversed. But a reversal means that justice has been delayed for both the defendant and the State; in some cases, because of lapse of time retrial is impossible or further prosecution is gravely handicapped. Moreover, in borderline cases in which the conviction is not reversed, there is some possibility of an injustice unredressed. The “strong measures” outlined in *Sheppard v. Maxwell* are means by which a trial judge can try to avoid exacting these costs from society or from the accused.

The state trial judge in the case before us acted responsibly, out of a legitimate concern, in an effort to protect the defendant’s right to a fair trial.<sup>[4]</sup> What we must decide is not simply whether the Nebraska courts erred \*556 in seeing the possibility of real danger to the defendant’s rights, but whether in the circumstances of this case the means employed were foreclosed by another provision of the Constitution.

## V

The First Amendment provides that “Congress shall make no law . . . abridging the freedom . . . of the press,” and it is “no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action.” *Near v. Minnesota ex rel. Olson*, 283 U. S. 697, 707 (1931). See also *Grosjean v. American Press Co.*, 297 U. S. 233, 244 (1936). The Court has interpreted these guarantees to afford special protection against orders that prohibit the publication or broadcast of particular information or commentary—orders that impose a “previous” or “prior” restraint on speech. None of our decided cases on prior restraint involved restrictive orders entered to protect a defendant’s right to a fair and impartial jury, but the opinions on prior restraint have a common thread relevant to this case.

In *Near v. Minnesota ex rel. Olson*, *supra*, the Court held invalid a Minnesota statute providing for the abatement as a public nuisance of any “malicious, scandalous and defamatory newspaper, magazine or other periodical.” *Near* had published an occasional weekly newspaper described by the County Attorney’s complaint as “largely devoted to malicious, scandalous and defamatory articles” concerning political and other public figures. 283 U. S., at 703. Publication was enjoined pursuant to the statute. Excerpts from *Near*’s paper, set out in the dissenting opinion of Mr. Justice Butler, show beyond question that one of its principal characteristics was blatant anti-Semitism. See *id.*, at 723, 724-727, n. 1.

\*557 Mr. Chief Justice Hughes, writing for the Court, noted that freedom of the press is not an absolute right, and the State may punish its abuses. He observed that the statute was “not aimed at the redress of individual or private wrongs.” *Id.*, at 708, 709. He then focused on the statute:

“[T]he operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter . . . and unless the owner or publisher is able . . . to satisfy the judge that the [matter is] true and . . . published with good motives . . . his newspaper or periodical is suppressed . . . . This is of the essence of censorship.” *Id.*, at 713.

The Court relied on *Patterson v. Colorado ex rel. Attorney General*, 205 U. S. 454, 462 (1907): “[T]he main purpose of [the First Amendment] is ‘to prevent all such *previous restraints* upon publications as had been practiced by other governments.’ “[5]

The principles enunciated in *Near* were so universally accepted that the precise issue did not come before us again until *Organization for a Better Austin v. Keefe*, \*558 402 U. S. 415 (1971). There the state courts had enjoined the petitioners from picketing or passing out literature of any kind in a specified area. Noting the similarity to *Near v. Minnesota*, a unanimous Court held:

“Here, as in that case, the injunction operates, not to redress alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature ‘of any kind’ in a city of 18,000.

.....

“Any prior restraint on expression comes to this Court with a ‘heavy presumption’ against its constitutional validity. *Carroll v. Princess Anne*, 393 U. S. 175, 181 (1968); *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58, 70 (1963). Respondent thus carries a heavy burden of showing justification for the imposition of such a restraint. He has not met that burden. . . . Designating the conduct as an invasion of privacy, the apparent basis for the injunction here, is not sufficient to support an injunction against peaceful distribution of informational literature of the nature revealed by this record.” 402 U. S., at 418-420.

More recently in *New York Times Co. v. United States*, 403 U. S. 713 (1971), the Government sought to enjoin the publication of excerpts from a massive, classified study of this Nation’s involvement in the Vietnam conflict, going back to the end of the Second World War. The dispositive opinion of the Court simply concluded that the Government had not met its heavy burden of showing justification for the prior restraint. Each of the six concurring Justices and the three dissenting Justices expressed his views separately, but “every member of the Court, tacitly or explicitly, accepted the *Near* and *Keefe* condemnation of prior restraint as presumptively unconstitutional.” *Pittsburgh Press Co. v. Human Rel.* \*559 *Comm’n*, 413 U. S. 376, 396 (1973) (BURGER, C. J., dissenting). The Court’s conclusion in *New York Times* suggests that the burden on the Government is not reduced by the temporary

nature of a restraint; in that case the Government asked for a temporary restraint solely to permit it to study and assess the impact on national security of the lengthy documents at issue.

The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. A criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law's sanction become fully operative.

A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraint "freezes" it at least for the time.<sup>[6]</sup>

The damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events. Truthful reports of public judicial proceedings have been afforded special protection against subsequent punishment. See *Cox Broadcasting Corp v. Cohn*, 420 U. S. 469, 492-493 (1975); see also, *Craig v. Harney*, 331 U. S. 367, 374 (1947). For the same reasons the protection against prior restraint should have particular force as applied to reporting of criminal proceedings, whether the crime in question is a single isolated act or a pattern of criminal conduct.

"A responsible press has always been regarded as \*560 the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism." *Sheppard v. Maxwell*, 384 U. S., at 350.

The extraordinary protections afforded by the First Amendment carry with them something in the nature of a fiduciary duty to exercise the protected rights responsibly—a duty widely acknowledged but not always observed by editors and publishers. It is not asking too much to suggest that those who exercise First Amendment rights in newspapers or broadcasting enterprises direct some effort to protect the rights of an accused to a fair trial by unbiased jurors.

Of course, the order at issue—like the order requested in *New York Times*—does not prohibit but only postpones publication. Some news can be delayed and most commentary can even more readily be delayed without serious injury, and there often is a self-imposed delay when responsible editors call for verification of information. But such delays are normally slight and they are self-imposed. Delays imposed by governmental authority are a different matter.

"We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficent-sounding the purposes of controlling the press might be, we . . . remain intensely skeptical about

those measures that would allow government to insinuate itself into the editorial \*561 rooms of this Nation's press." *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241, 259 (1974) (WHITE, J., concurring).

See also *Columbia Broadcasting v. Democratic Comm.*, 412 U. S. 94 (1973). As a practical matter, moreover, the element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly.

The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other. In this case, the petitioners would have us declare the right of an accused subordinate to their right to publish in all circumstances. But if the authors of these guarantees, fully aware of the potential conflicts between them, were unwilling or unable to resolve the issue by assigning to one priority over the other, it is not for us to rewrite the Constitution by undertaking what they declined to do. It is unnecessary, after nearly two centuries, to establish a priority applicable in all circumstances. Yet it is nonetheless clear that the barriers to prior restraint remain high unless we are to abandon what the Court has said for nearly a quarter of our national existence and implied throughout all of it. The history of even wartime suspension of categorical guarantees, such as habeas corpus or the right to trial by civilian courts, see *Ex parte Milligan*, 4 Wall. 2 (1867), cautions against suspending explicit guarantees.

The Nebraska courts in this case enjoined the publication of certain kinds of information about the *Simants* case. There are, as we suggested earlier, marked differences in setting and purpose between the order entered here and the orders in *Near*, *Keefe*, and *New York Times*, but as to the underlying issue—the right of the press to be free from *prior* restraints on publication—those \*562 cases form the backdrop against which we must decide this case.

## VI

We turn now to the record in this case to determine whether, as Learned Hand put it, “the gravity of the ‘evil,’ discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.” *United States v. Dennis*, 183 F. 2d 201, 212 (CA2 1950), *aff’d*, 341 U. S. 494 (1951); see also L. Hand, *The Bill of Rights* 58-61 (1958). To do so, we must examine the evidence before the trial judge when the order was entered to determine (a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger. The precise terms of the restraining order are also important. We must then consider whether the record supports the entry of a prior restraint on publication, one of the most extraordinary remedies known to our jurisprudence.

## A

In assessing the probable extent of publicity, the trial judge had before him newspapers demonstrating that the crime had already drawn intensive news coverage, and the testimony of the County Judge, who had entered the initial restraining order

based on the local and national attention the case had attracted. The District Judge was required to assess the probable publicity that would be given these shocking crimes prior to the time a jury was selected and sequestered. He then had to examine the probable nature of the publicity and determine how it would affect prospective jurors.

Our review of the pretrial record persuades us that the trial judge was justified in concluding that there would \*563 be intense and pervasive pretrial publicity concerning this case. He could also reasonably conclude, based on common human experience, that publicity might impair the defendant's right to a fair trial. He did not purport to say more, for he found only "a clear and present danger that pre-trial publicity *could* impinge upon the defendant's right to a fair trial." (Emphasis added.) His conclusion as to the impact of such publicity on prospective jurors was of necessity speculative, dealing as he was with factors unknown and unknowable.

## **B**

We find little in the record that goes to another aspect of our task, determining whether measures short of an order restraining all publication would have insured the defendant a fair trial. Although the entry of the order might be read as a judicial determination that other measures would not suffice, the trial court made no express findings to that effect; the Nebraska Supreme Court referred to the issue only by implication. See 194 Neb., at 797-798, 236 N. W. 2d, at 803.

Most of the alternatives to prior restraint of publication in these circumstances were discussed with obvious approval in *Sheppard v. Maxwell*, 384 U. S., at 357-362: (a) change of trial venue to a place less exposed to the intense publicity that seemed imminent in Lincoln County;<sup>[7]</sup> (b) postponement of the trial to allow \*564 public attention to subside; (c) searching questioning of prospective jurors, as Mr. Chief Justice Marshall used in the *Burr* case, to screen out those with fixed opinions as to guilt or innocence; (d) the use of emphatic and clear instructions on the sworn duty of each juror to decide the issues only on evidence presented in open court. Sequestration of jurors is, of course, always available. Although that measure insulates jurors only after they are sworn, it also enhances the likelihood of dissipating the impact of pretrial publicity and emphasizes the elements of the jurors' oaths.

This Court has outlined other measures short of prior restraints on publication tending to blunt the impact of pretrial publicity. See *Sheppard v. Maxwell, supra*, at 361-362. Professional studies have filled out these suggestions, recommending that trial courts in appropriate cases limit what the contending lawyers, the police, and witnesses may say to anyone. See American Bar Association Project on Standards for Criminal Justice, Fair Trial and Free Press 2-15 (App. Draft 1968).<sup>[8]</sup>

\*565 We have noted earlier that pretrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial. The decided cases "cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process." *Murphy v. Florida*, 421 U. S., at 799. Appellate

evaluations as to the impact of publicity take into account what other measures were used to mitigate the adverse effects of publicity. The more difficult prospective or predictive assessment that a trial judge must make also calls for a judgment as to whether other precautionary steps will suffice.

We have therefore examined this record to determine the probable efficacy of the measures short of prior restraint on the press and speech. There is no finding that alternative measures would not have protected Simants' rights, and the Nebraska Supreme Court did no more than imply that such measures might not be adequate. Moreover, the record is lacking in evidence to support such a finding.

## C

We must also assess the probable efficacy of prior restraint on publication as a workable method of protecting Simants' right to a fair trial, and we cannot ignore the reality of the problems of managing and enforcing pretrial restraining orders. The territorial jurisdiction of the issuing court is limited by concepts of sovereignty, see, e. g., *Hanson v. Denckla*, 357 U. S. 235 (1958); *Pennoyer v. Neff*, 95 U. S. 714 (1878). The need for *in personam* jurisdiction also presents an obstacle to a restraining order that applies to publication at large as distinguished from restraining publication within a given jurisdiction.<sup>[9]</sup> See generally American Bar Association, Legal Advisory Committee on Fair Trial and Free Press, Recommended Court Procedure to Accommodate Rights of Fair Trial and Free Press (Rev. Draft, Nov. 1975); Rendleman, Free Press-Fair Trial: Review of Silence Orders, 52 N. C. L. Rev. 127, 149-155 (1973).<sup>[10]</sup>

The Nebraska Supreme Court narrowed the scope of the restrictive order, and its opinion reflects awareness of the tensions between the need to protect the accused as fully as possible and the need to restrict publication as little as possible. The dilemma posed underscores how difficult it is for trial judges to predict what information will in fact undermine the impartiality of jurors, and the difficulty of drafting an order that will effectively keep prejudicial information from prospective jurors. When a restrictive order is sought, a court can anticipate only part of what will develop that may injure the accused. But information not so obviously prejudicial may emerge, and what may properly be published in these "gray zone" circumstances may not violate the restrictive order and yet be prejudicial.

Finally, we note that the events disclosed by the record took place in a community of 850 people. It is reasonable to assume that, without any news accounts being printed or broadcast, rumors would travel swiftly by word of mouth. One can only speculate on the accuracy of such reports, given the generative propensities of rumors; they could well be more damaging than reasonably accurate news accounts. But plainly a whole community cannot be restrained from discussing a subject intimately affecting life within it.

Given these practical problems, it is far from clear that prior restraint on publication would have protected Simants' rights.

## D

Finally, another feature of this case leads us to conclude that the restrictive order entered here is not supportable. At the outset the County Court entered a very broad restrictive order, the terms of which are not before us; it then held a preliminary hearing open to the public and the press. There was testimony concerning at least two incriminating statements made by Simants to private persons; the statement—evidently a confession—that he gave to law enforcement officials was also introduced. The State District Court’s later order was entered after this public hearing and, as modified by the \*568 Nebraska Supreme Court, enjoined reporting of (1) “[c]onfessions or admissions against interest made by the accused to law enforcement officials”; (2) “[c]onfessions or admissions against interest, oral or written, if any, made by the accused to third parties, excepting any statements, if any, made by the accused to representatives of the news media”; and (3) all “[o]ther information strongly implicative of the accused as the perpetrator of the slayings.” 194 Neb., at 801, 236 N. W. 2d, at 805.

To the extent that this order prohibited the reporting of evidence adduced at the open preliminary hearing, it plainly violated settled principles: “[T]here is nothing that proscribes the press from reporting events that transpire in the courtroom.” *Sheppard v. Maxwell*, 384 U. S., at 362-363. See also *Cox Broadcasting Corp. v. Cohn*, 420 U. S. 469 (1975); *Craig v. Harney*, 331 U. S. 367 (1947). The County Court could not know that closure of the preliminary hearing was an alternative open to it until the Nebraska Supreme Court so construed state law; but once a public hearing had been held, what transpired there could not be subject to prior restraint.

The third prohibition of the order was defective in another respect as well. As part of a final order, entered after plenary review, this prohibition regarding “implicative” information is too vague and too broad to survive the scrutiny we have given to restraints on First Amendment rights. See, e. g., *Hynes v. Mayor of Oradell*, 425 U. S. 610 (1976); *Buckley v. Valeo*, 424 U. S. 1, 76-82 (1976); *NAACP v. Button*, 371 U. S. 415 (1963). The third phase of the order entered falls outside permissible limits.

## E

The record demonstrates, as the Nebraska courts held, that there was indeed a risk that pretrial news accounts, \*569 true or false, would have some adverse impact on the attitudes of those who might be called as jurors. But on the record now before us it is not clear that further publicity, unchecked, would so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court. We cannot say on this record that alternatives to a prior restraint on petitioners would not have sufficiently mitigated the adverse effects of pretrial publicity so as to make prior restraint unnecessary. Nor can we conclude that the restraining order actually entered would serve its intended purpose. Reasonable minds can have few doubts about the gravity of the evil pretrial publicity can work, but the probability that it would do so here was not demonstrated with the degree of certainty our cases on prior restraint require.

Of necessity our holding is confined to the record before us. But our conclusion is not simply a result of assessing the adequacy of the showing made in this case; it results in part from the problems inherent in meeting the heavy burden of demonstrating, in advance of trial, that without prior restraint a fair trial will be denied. The practical problems of managing and enforcing restrictive orders will always be present. In this sense, the record now before us is illustrative rather than exceptional. It is significant that when this Court has reversed a state conviction because of prejudicial publicity, it has carefully noted that some course of action short of prior restraint would have made a critical difference. See *Sheppard v. Maxwell*, *supra*, at 363; *Estes v. Texas*, 381 U. S., at 550-551; *Rideau v. Louisiana*, 373 U. S., at 726; *Irvin v. Dowd*, 366 U. S., at 728. However difficult it may be, we need not rule out the possibility of showing the kind of threat to fair trial rights that would possess \*570 the requisite degree of certainty to justify restraint. This Court has frequently denied that First Amendment rights are absolute and has consistently rejected the proposition that a prior restraint can never be employed. See *New York Times Co. v. United States*, 403 U. S. 713 (1971); *Organization for a Better Austin v. Keefe*, 402 U. S. 415 (1971); *Near v. Minnesota ex rel. Olson*, 283 U. S. 697 (1931).

Our analysis ends as it began, with a confrontation between prior restraint imposed to protect one vital constitutional guarantee and the explicit command of another that the freedom to speak and publish shall not be abridged. We reaffirm that the guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high and the presumption against its use continues intact. We hold that, with respect to the order entered in this case prohibiting reporting or commentary on judicial proceedings held in public, the barriers have not been overcome; to the extent that this order restrained publication of such material, it is clearly invalid. To the extent that it prohibited publication based on information gained from other sources, we conclude that the heavy burden imposed as a condition to securing a prior restraint was not met and the judgment of the Nebraska Supreme Court is therefore

*Reversed.*

MR. JUSTICE WHITE, concurring.

Technically there is no need to go farther than the Court does to dispose of this case, and I join the Court's opinion. I should add, however, that for the reasons which the Court itself canvasses there is grave doubt in my mind whether orders with respect to the press such as were entered in this case would ever be justifiable. \*571 It may be the better part of discretion, however, not to announce such a rule in the first case in which the issue has been squarely presented here. Perhaps we should go no further than absolutely necessary until the federal courts, and ourselves, have been exposed to a broader spectrum of cases presenting similar issues. If the recurring result, however, in case after case is to be similar to our judgment today, we should at some point announce a more general rule and avoid the interminable litigation that our failure to do so would necessarily entail.

MR. JUSTICE POWELL, concurring.

Although I join the opinion of the Court, in view of the importance of the case I write to emphasize the unique burden that rests upon the party, whether it be the State or a defendant, who undertakes to show the necessity for prior restraint on pretrial publicity.<sup>[\*]</sup>

In my judgment a prior restraint properly may issue only when it is shown to be necessary to prevent the dissemination of prejudicial publicity that otherwise poses a high likelihood of preventing, directly and irreparably, the impaneling of a jury meeting the Sixth Amendment requirement of impartiality. This requires a showing that (i) there is a clear threat to the fairness of trial, (ii) such a threat is posed by the actual publicity to be restrained, and (iii) no less restrictive alternatives are available. Notwithstanding such a showing, a restraint may not issue unless it also is shown that previous publicity or publicity from unrestrained sources will not render the restraint inefficacious. The threat to the fairness \*572 of the trial is to be evaluated in the context of Sixth Amendment law on impartiality, and any restraint must comply with the standards of specificity always required in the First Amendment context.

I believe these factors are sufficiently addressed in the Court's opinion to demonstrate beyond question that the prior restraint here was impermissible.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, concurring in the judgment.

The question presented in this case is whether, consistently with the First Amendment, a court may enjoin the press, in advance of publication,<sup>[1]</sup> from reporting or commenting on information acquired from public court proceedings, public court records, or other sources about pending judicial proceedings. The Nebraska Supreme Court upheld such a direct prior restraint on the press, issued by the judge presiding over a sensational state murder trial, on the ground that there existed a "clear and present danger that pretrial publicity could substantially impair the right of the defendant [in the murder trial] to a trial by an impartial jury unless restraints were imposed." *State v. Simants*, 194 Neb. 783, 794, 236 N. W. 2d 794, 802 (1975). The right to a fair trial by a jury of one's peers is unquestionably one of the most precious and sacred safeguards enshrined in the Bill of Rights. I would hold, however, that resort to prior restraints on the freedom of the press is a constitutionally impermissible method for enforcing that right; judges have at their disposal a broad spectrum of devices for ensuring that fundamental fairness is accorded the \*573 accused without necessitating so drastic an incursion on the equally fundamental and salutary constitutional mandate that discussion of public affairs in a free society cannot depend on the preliminary grace of judicial censors.

## I

The history of the current litigation highlights many of the dangers inherent in allowing any prior restraint on press reporting and commentary concerning the operations of the criminal justice system.

This action arose out of events surrounding the prosecution of respondent-intervenor Simants for the premeditated mass murder of the six members of the Kellie family in

Sutherland, Neb., on October 18, 1975. Shortly after the crimes occurred, the community of 850 was alerted by a special announcement over the local television station. Residents were requested by the police to stay off the streets and exercise caution as to whom they admitted into their houses, and rumors quickly spread that a sniper was loose in Sutherland. When an investigation implicated Simants as a suspect, his name and description were provided to the press and then disseminated to the public.

Simants was apprehended on the morning of October 19, charged with six counts of premeditated murder, and arraigned before the County Court of Lincoln County, Neb. Because several journalists were in attendance and “proof concerning bail . . . would be prejudicial to the rights of the defendant to later obtain a fair trial,” App. 7, a portion of the bail hearing was closed, over Simants’ objection, pursuant to the request of the Lincoln County Attorney. At the hearing, counsel was appointed for Simants, bail was denied, and October 22 was set as the date for a preliminary hearing to determine whether Simants should be bound over for trial in \*574 the District Court of Lincoln County, Neb. News of Simants’ apprehension, which was broadcast over radio and television and reported in the press, relieved much of the tension that had built up during the night. During the period from October 19 until the first restrictive order was entered three days later, representatives of the press made accurate factual reports of the events that transpired, including reports of incriminating statements made by Simants to various relatives.

On the evening of October 21, the prosecution filed a motion that the County Court issue a restrictive order enjoining the press from reporting significant aspects of the case. The motion, filed without further evidentiary support, stated:

“The State of Nebraska hereby represents unto the Court that *by reason of the nature of the above-captioned case*, there has been, and no doubt there will continue to be, mass coverage by news media not only locally but nationally as well; that a preliminary hearing on the charges has been set to commence at 9:00 a. m. on October 22, 1975; and there is *a reasonable likelihood of prejudicial news which would make difficult, if not impossible, the impaneling of an impartial jury* and tend to prevent a fair trial should the defendant be bound over to trial in the District Court if testimony of witnesses at the preliminary hearing is reported to the public.

“Wherefore the State of Nebraska moves that the Court forthwith enter a Restrictive Order setting forth the matters that may or may not be publicly reported or disclosed to the public with reference to said case or with reference to the preliminary hearing thereon, and to whom said order shall apply.” App. 8. (Emphasis supplied.)

Half an hour later, the County Court Judge heard \*575 argument on the prosecution motion. Defense counsel joined in urging imposition of a restrictive order, and further moved that the preliminary hearing be closed to both the press and the public. No representatives of the media were notified of or called to testify at the hearing, and no evidence of any kind was introduced.

On October 22, when the autopsy results were completed, the County Attorney filed an amended complaint charging that the six premeditated murders had been

committed by Simants in conjunction with the perpetration of or attempt to perpetrate a sexual assault. About the same time, at the commencement of the preliminary hearing, the County Court entered a restrictive order premised on its finding that there was “a reasonable likelihood of prejudicial news which would make difficult, if not impossible, the impaneling of an impartial jury in the event that the defendant is bound over to the District Court for trial . . . .” Amended Pet. for Cert. 1a. Accordingly, the County Court ordered that all parties to the case, attorneys, court personnel, public officials, law enforcement officials, witnesses, and “any other person present in Court” during the preliminary hearing, were not to “release or authorize the release for public dissemination in any form or manner whatsoever any testimony given or evidence adduced during the preliminary hearing.” *Id.*, at 2a. The court further ordered that no law enforcement official, public officer, attorney, witness, or “news media” “disseminate any information concerning this matter apart from the preliminary hearing other than as set forth in the Nebraska Bar-Press Guidelines for Disclosure and Reporting of Information Relating to Imminent or Pending Criminal Litigation.” *Ibid.*<sup>[2]</sup> The order was to \*576 remain in effect “until modified or rescinded by a higher court or until the defendant is ordered released from these charges.” *Id.*, at 3a. The court also denied the defense request to close the preliminary hearing,<sup>[3]</sup> and an open hearing was then held, at which time various witnesses testified, disclosing significant factual information concerning the events surrounding the alleged crimes. Upon completion of the hearing, the County Court bound the defendant over for trial in the District Court, since it found that the offenses charged in the indictment had been committed, and that there was probable cause to believe that Simants had committed them.

The next day, petitioners—Nebraska newspaper publishers, broadcasters, journalists, and media associations, \*577 and national newswire services that report from and to Nebraska—sought leave from the District Court to intervene in the criminal case and vacation of the County Court’s restrictive order as repugnant to the First and Sixth Amendments to the United States Constitution as well as relevant provisions of the Nebraska Constitution. Simants’ attorney moved that the order be continued and that future pretrial hearings in the case be closed. The District Court then held an evidentiary hearing, after which it denied the motion to close any hearings, granted petitioners’ motion to intervene, and adopted on an interim basis the County Court’s restrictive order. The only testimony adduced at the hearing with respect to the need for the restrictive order was that of the County Court Judge, who stated that he had premised his order on his awareness of media publicity, “[c]onversation around the courthouse,” and “statements of counsel.” App. 64, 65. In addition, several newspaper clippings pertaining to the case were introduced as exhibits before the District Court.

Without any further hearings, the District Court on October 27 terminated the County Court’s order and substituted its own. The court found that “*because of the nature of the crimes charged in the complaint . . . there is a clear and present danger that pre-trial publicity could impinge upon the defendant’s right to a fair trial* and that an order setting forth the limitations of pre-trial publicity is appropriate . . . .” Amended Pet. for Cert. 9a (emphasis supplied). Respondent Stuart, the District Court Judge, then “adopted” as his order the Nebraska Bar-Press Guidelines as “clarified” by him in certain respects.<sup>[4]</sup>

\*578 On October 31, petitioners sought a stay of the order from the District Court and immediate relief from the Nebraska Supreme Court by way of mandamus, stay, or expedited appeal. When neither the District Court nor the Nebraska Supreme Court acted on these motions, \*579 petitioners on November 5 applied to MR. JUSTICE BLACKMUN, as Circuit Justice, for a stay of the District Court's order. Five days later, the Nebraska Supreme Court issued a *per curiam* statement that to avoid being put in the position of "exercising parallel jurisdiction with the Supreme Court of the United States," it would continue the matter until this Court "made known whether or not it will accept jurisdiction in the matter." *Id.*, at 19a-20a.

On November 13, MR. JUSTICE BLACKMUN filed an in chambers opinion in which he declined to act on the stay "at least for the immediate present." 423 U. S. 1319, 1326. He observed: "[I]f no action on the [petitioners'] application to the Supreme Court of Nebraska could be anticipated before December 1, [as was indicated by a communication from that court's clerk before the court issued the *per curiam* statement,] . . . a definitive decision by the State's highest court on an issue of profound constitutional implications, demanding immediate resolution, would be delayed for a period so long that the very day-to-day duration of that delay would constitute and aggravate a deprivation of such constitutional rights, if any, that the [petitioners] possess and may properly assert. Under those circumstances, I would not hesitate promptly to act." *Id.*, at 1324-1325. However, since the Nebraska Supreme Court had indicated in its *per curiam* statement that it was only declining to act because of uncertainty as to what this Court would do, and since it was deemed appropriate for the state court to pass initially on the validity of the restrictive order, MR. JUSTICE BLACKMUN, "without prejudice to the [petitioners] to reapply to me should prompt action not be forthcoming," *id.*, at 1326, denied the stay "[o]n the expectation . . . that the Supreme Court of Nebraska, forthwith and without delay will entertain the \*580[petitioners'] application made to it, and will promptly decide it in the full consciousness that `time is of the essence.`" *Id.*, at 1325.

When, on November 18, the Supreme Court of Nebraska set November 25 as the date to hear arguments on petitioners' motions, petitioners reapplied to MR. JUSTICE BLACKMUN for relief. On November 20, MR. JUSTICE BLACKMUN, concluding that each passing day constituted an irreparable infringement on First Amendment values and that the state courts had delayed adjudication of petitioners' claims beyond "tolerable limits," 423 U. S. 1327, 1329, granted a partial stay of the District Court's order. First, the "wholesale incorporation" of the Nebraska Bar-Press Guidelines was stayed on the ground that they "constitute a `voluntary code' which was not intended to be mandatory" and which was "sufficiently riddled with vague and indefinite admonitions —understandably so in view of the basic nature of `guidelines,' " that they did "not provide the substance of a permissible court order in the First Amendment area." *Id.*, at 1330, 1331. However, the state courts could "reimpose particular provisions included in the Guidelines so long as they are deemed pertinent to the facts of this particular case and so long as they are adequately specific and in keeping with the remainder of this order." *Id.*, at 1331. Second, the portion of the District Court order prohibiting reporting of the details of the crimes, the identities of the victims, and the pathologist's testimony at the preliminary hearing was stayed because there was "[n]o persuasive justification" for the restraint; such "facts in themselves do not implicate a particular putative defendant," *ibid.*, and "until the bare facts concerning the crimes are related to a particular accused, . . . their being reported

in the media [does not appear to] irreparably infringe the accused's right \*581 to a fair trial of the issue as to whether he was the one who committed the crimes." *Id.*, at 1332. Third, believing that prior restraints of this kind "are not necessarily and in all cases invalid," MR. JUSTICE BLACKMUN concluded that "certain facts that strongly implicate an accused may be restrained from publication by the media prior to his trial. A confession or statement against interest is the paradigm," *id.*, at 1332-1333, and other such facts would include "those associated with the circumstances of his arrest," those "that are not necessarily implicative, but that are highly prejudicial, as, for example, facts associated with the accused's criminal record, if he has one," and "statements as to the accused's guilt by those associated with the prosecution." *Id.*, at 1333.<sup>[5]</sup> Finally, the restrictive order's limitation on disclosure of the nature of the limitations themselves was stayed "to the same extent" as the limitations. *Ibid.*<sup>[6]</sup>

The following day petitioners filed a motion that the Court vacate MR. JUSTICE BLACKMUN'S order to the extent it permitted the imposition of any prior restraint on publication. Meanwhile, on November 25, the Supreme Court of Nebraska heard oral argument as scheduled, \*582 and on December 1 filed a *per curiam* opinion.<sup>[7]</sup> Initially, the court held that it was improper for petitioners or any other third party to intervene in a criminal case, and that the appeal from that case must therefore be denied. However, the court concluded that it had jurisdiction over petitioners' mandamus action against respondent Stuart, and that respondents Simants and State of Nebraska had properly intervened in that action.<sup>[8]</sup> Addressing the merits of the prior restraint issued by the District Court, the Nebraska Supreme Court acknowledged that this Court "has not yet had occasion to speak definitively where a clash between these two preferred rights [the First Amendment freedom of speech and of the press and the Sixth Amendment right to trial by an impartial jury] was sought to be accommodated by a prior restraint on freedom of the press." 194 Neb., at 791, 236 N. W. 2d, at 800. However, relying on dictum in *Branzburg v. Hayes*, 408 U. S. 665 (1972),<sup>[9]</sup> and our statement in *New York Times Co. v. United States*, 403 U. S. 713 (1971), that a prior restraint on the \*583 media bears "a heavy presumption against its constitutional validity," *id.*, at 714, the court discerned an "implication" "that if there is only a presumption of unconstitutionality then there must be some circumstances under which prior restraints may be constitutional for otherwise there is no need for a mere presumption." 194 Neb., at 793, 236 N. W. 2d, at 801. The court then concluded that there was evidence "to overcome the heavy presumption" in that the State's obligation to accord Simants an impartial jury trial "may be impaired" by pretrial publicity and that pretrial publicity "might make it difficult or impossible" to accord Simants a fair trial. *Id.*, at 794, 797, 236 N. W. 2d, at 802, 803.<sup>[10]</sup> Accordingly, the court held, *id.*, at 801, 236 N. W. 2d, at 805:

"[T]he order of the District Court of October 27, 1975, is void insofar as it incorporates the voluntary guidelines and in certain other respects in that it impinges too greatly upon freedom of the press. The guidelines were not intended to be contractual and cannot be enforced as if they were.

"The order of the District Court of October 27, 1975, is vacated and is modified and reinstated in the \*584 following respects: It shall be effective only as to events which have occurred prior to the filing of this opinion, and only as it applies to the relators herein, and only insofar as it restricts publication of the existence or content of the

following, if any such there be: (1) Confessions or admissions against interest made by the accused to law enforcement officials. (2) Confessions or admissions against interest, oral or written, if any, made by the accused to third parties, excepting any statements, if any, made by the accused to representatives of the news media. (3) Other information strongly implicative of the accused as the perpetrator of the slayings.”<sup>[11]</sup>

On December 4 petitioners applied to this Court for a stay of that order and moved that their previously filed papers be treated as a petition for a writ of certiorari. On December 8, we granted the latter motion and deferred consideration of the petition for a writ and application for a stay pending responses from respondents on the close of business the following day. 423 U. S. 1011.<sup>[12]</sup> On December 12, we granted the petition for a writ of certiorari, denied the motion to expedite, and denied the application for a stay. 423 U. S. 1027.<sup>[13]</sup>

## \*585 II

### A

The Sixth Amendment to the United States Constitution guarantees that “[i]n 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 . . . .” The right to a jury trial, applicable to the States through the Due Process Clause of the Fourteenth Amendment, see, e. g., *Duncan v. Louisiana*, 391 U. S. 145 (1968), is essentially \*586 the right to a “fair trial by a panel of impartial, ‘indifferent’ jurors,” *Irvin v. Dowd*, 366 U. S. 717, 722 (1961), jurors who are “ ‘indifferent as [they] stand unsworn.’ ” *Reynolds v. United States*, 98 U. S. 145, 154 (1879), quoting E. Coke, *A Commentary upon Littleton* 155*b* (19th ed. 1832). See also, e. g., *Ristaino v. Ross*, 424 U. S. 589, 597 n. 9 (1976); *Rideau v. Louisiana*, 373 U. S. 723 (1963); *Irvin v. Dowd*, *supra*, at 722; *In re Murchison*, 349 U. S. 133, 136 (1955); *In re Oliver*, 333 U. S. 257 (1948). So basic to our jurisprudence is the right to a fair trial that it has been called “the most fundamental of all freedoms.” *Estes v. Texas*, 381 U. S. 532, 540 (1965). It is a right essential to the preservation and enjoyment of all other rights, providing a necessary means of safeguarding personal liberties against government oppression. See, e. g., *Rideau v. Louisiana*, *supra*, at 726-727. See generally *Duncan v. Louisiana*, *supra*, at 149-158.

The First Amendment to the United States Constitution, however, secures rights equally fundamental in our jurisprudence, and its ringing proclamation that “Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .” has been both applied through the Fourteenth Amendment to invalidate restraints on freedom of the press imposed by the States, see, e. g., *Miami Herald Publishing Co. v. Tornillo*, 418 U. S. 241 (1974); *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964); *Near v. Minnesota ex rel. Olson*, 283 U. S. 697 (1931), and interpreted to interdict such restraints imposed by the courts, see, e. g., *New York Times Co. v. United States*, 403 U. S. 713 (1971); *Craig v. Harney*, 331 U. S. 367 (1947); *Bridges v. California*, 314 U. S. 252 (1941). Indeed, it has been correctly perceived that a “responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. . . . The \*587 press

does not simply publish information about trials but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism.” *Sheppard v. Maxwell*, 384 U. S. 333, 350 (1966). See also, *e. g.*, *Cox Broadcasting Corp. v. Cohn*, 420 U. S. 469, 491-496 (1975). Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government. Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability. See, *e. g.*, *In re Oliver, supra*, at 270-271; L. Brandeis, *Other People’s Money* 62 (1933) (“Sunlight is said to be the best of disinfectants; electric light the most efficient policeman”).

No one can seriously doubt, however, that uninhibited prejudicial pretrial publicity may destroy the fairness of a criminal trial, see, *e. g.*, *Sheppard v. Maxwell, supra*, and the past decade has witnessed substantial debate, colloquially known as the Free Press/Fair Trial controversy, concerning this interface of First and Sixth Amendment rights. In effect, we are now told by respondents that the two rights can no longer coexist when the press possesses and seeks to publish “confessions or admissions against interest” and other information “strongly implicative”<sup>[14]</sup> of a criminal defendant as the \*588 perpetrator of a crime, and that one or the other right must therefore be subordinated. I disagree. Settled case law concerning the impropriety and constitutional invalidity of prior restraints on the press compels the conclusion that there can be no prohibition on the publication by the press of any information pertaining to pending judicial proceedings or the operation of the criminal justice system, no matter how shabby the means by which the information is obtained.<sup>[15]</sup> This does not imply, however, any subordination of Sixth Amendment rights, for an accused’s right to a fair trial may be adequately assured through methods that do not infringe First Amendment values.

## B

“[I]t has been generally, if not universally, considered that it is the chief purpose of the [First Amendment’s] guaranty to prevent previous restraints upon publication.” \*589 *Near v. Minnesota ex rel. Olson*, 283 U. S., at 713. See also, *e. g.*, *id.*, at 716-717; *Patterson v. Colorado ex rel. Attorney General*, 205 U. S. 454, 462 (1907); *Grosjean v. American Press Co.*, 297 U. S. 233, 249 (1936).<sup>[16]</sup> Prior restraints are “the essence of censorship,” *Near v. Minnesota ex rel. Olson, supra*, at 713, and “[o]ur distaste for censorship—reflecting the natural distaste of a free people—is deep-written in our law.” *Southeastern Promotions, Ltd. v. Conrad*, 420 U. S. 546, 553 (1975). The First Amendment thus accords greater protection against prior restraints than it does against subsequent punishment for a particular speech, see, *e. g.*, *Carroll v. Princess Anne*, 393 U. S. 175, 180-181 (1968); *Near v. Minnesota ex rel. Olson, supra*; “a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn

that the risks of free-wheeling censorship are formidable.” *Southeastern Promotions, Ltd. v. Conrad*, *supra*, at 559. A commentator has cogently summarized many of the reasons for this deep-seated American hostility to prior restraints:

“A system of prior restraint is in many ways more inhibiting than a system of subsequent punishment: It is likely to bring under government scrutiny a far wider range of expression; it shuts off communication before it takes place; suppression by a stroke of the pen is more likely to be applied than suppression through a criminal process; the procedures \*590 do not require attention to the safeguards of the criminal process; the system allows less opportunity for public appraisal and criticism; the dynamics of the system drive toward excesses, as the history of all censorship shows.” T. Emerson, *The System of Freedom of Expression* 506 (1970).<sup>[17]</sup>

Respondents correctly contend that “the [First Amendment] protection even as to previous restraint is not absolutely unlimited.” *Near v. Minnesota ex rel. Olson*, *supra*, at 716. However, the exceptions to the rule have been confined to “exceptional cases.” *Ibid.* The Court in *Near*, the first case in which we were faced with a prior restraint against the press, delimited three such possible exceptional circumstances. The first two exceptions were that “the primary requirements of decency may be enforced against obscene publications,” and that “[t]he security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government [for] [t]he constitutional guaranty of free speech does not `protect a man from an injunction against uttering words that may have all the effect of force. . . .’ ” *Ibid.* These exceptions have since come to be interpreted as situations in which the “speech” involved is not encompassed within the meaning of the First Amendment. See, e. g., *Roth v. United States*, 354 U. S. 476, 481 (1957); *Miller v. California*, 413 U. S. 15 (1973); *Chaplinsky v. New Hampshire*, 315 U. S. 568 (1942). See also *New York Times Co. v. United States*, 403 U. S., at 726 n. (BRENNAN, J., concurring); *id.*, at 731 n. 1 (WHITE, J., concurring). \*591 And even in these situations, adequate and timely procedures are mandated to protect against any restraint of speech that does come within the ambit of the First Amendment. See, e. g., *Southeastern Promotions, Ltd. v. Conrad*, *supra*; *United States v. Thirty-seven Photographs*, 402 U. S. 363 (1971); *Freedman v. Maryland*, 380 U. S. 51 (1965); *Bantam Books, Inc. v. Sullivan*, 372 U. S. 58 (1963); *Speiser v. Randall*, 357 U. S. 513 (1958); *Kingsley Books, Inc. v. Brown*, 354 U. S. 436 (1957). Thus, only the third category in *Near* contemplated the possibility that speech meriting and entitled to constitutional protection might nevertheless be suppressed before publication in the interest of some overriding countervailing interest:

” `When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.’ *Schenck v. United States*, 249 U. S. 47, 52. No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.” 283 U. S., at 716.

Even this third category, however, has only been adverted to in dictum and has never served as the basis for actually upholding a prior restraint against the publication of

constitutionally protected materials. In *New York Times Co. v. United States*, *supra*, we specifically addressed the scope of the “military security” exception alluded to in *Near* and held that there could be no prior restraint on publication of the “Pentagon Papers” despite the fact that a majority of the Court believed that release of the documents, which were \*592 classified “Top Secret-Sensitive” and which were obtained surreptitiously, would be harmful to the Nation and might even be prosecuted after publication as a violation of various espionage statutes. To be sure, our brief *per curiam* declared that “`[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity,”

” *id.*, at 714, quoting *Bantam Books, Inc. v. Sullivan*, *supra*, at 70, and that the “Government `thus carries a heavy burden of showing justification for the imposition of such a restraint.’ ” 403 U. S., at 714, quoting *Organization for a Better Austin v. Keefe*, 402 U. S. 415, 419 (1971). This does not mean, as the Nebraska Supreme Court assumed,<sup>[18]</sup> that prior restraints can be justified on an *ad hoc* balancing approach that concludes that the “presumption” must be overcome in light of some perceived “justification.” Rather, this language refers to the fact that, as a matter of procedural safeguards and burden of proof, prior restraints even within a recognized exception to the rule against prior restraints will be extremely difficult to justify; but as an initial matter, the purpose for which a prior restraint is sought to be imposed “must fit within one of the narrowly defined exceptions to the prohibition against prior restraints.” *Southeastern Promotions, Ltd. v. Conrad*, 420 U. S., at 559; see also, *e. g.*, *id.*, at 555; *Pittsburgh Press Co. v. Human Rel. Comm’n*, 413 U. S. 376, 382 (1973); *Organization for a Better Austin v. Keefe*, *supra*, at 419-420; *cf.*, *e. g.*, *Healy v. James*, 408 U. S. 169 (1972); *Freedman v. Maryland*, 380 U. S., at 58-59. Indeed, two Justices in *New York Times* apparently controverted the existence of even a limited “military security” exception to the rule against prior restraints on the publication of otherwise protected material, material, see 403 U. S., \*593 at 714 (Black, J., concurring); *id.*, at 720 (Douglas, J., concurring). And a majority of the other Justices who expressed their views on the merits made it clear that they would take cognizance only of a “single, extremely narrow class of cases in which the First Amendment’s ban on prior judicial restraint may be overridden.” *Id.*, at 726 (BRENNAN, J., concurring). Although variously expressed, it was evident that even the exception was to be construed very, very narrowly: when disclosure “will *surely result in direct, immediate, and irreparable damage* to our Nation or its people,” *id.*, at 730 (STEWART, J., joined by WHITE, J., concurring) (emphasis supplied) or when there is “governmental allegation and proof that publication must *inevitably, directly, and immediately* cause the occurrence of an event kindred to imperiling the safety of a transport already at sea . . . . [But] [i]n no event may mere conclusions be sufficient.” *Id.*, at 726-727 (BRENNAN, J., concurring) (emphasis supplied). See also *id.*, at 730-731 (WHITE, J., joined by STEWART, J., concurring) (“concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system” is not overcome even by a showing that “revelation of these documents will do substantial damage to public interests”).<sup>[19]</sup> It is thus clear that even within the sole possible exception to the prohibition against prior restraints on publication of constitutionally protected materials, \*594 the obstacles to issuance of such an injunction are formidable. What respondents urge upon us, however, is the creation of a new, potentially pervasive exception to this settled rule of virtually blanket prohibition of prior restraints.<sup>[20]</sup>

I would decline this invitation. In addition to the almost insuperable presumption against the constitutionality of prior restraints even under a recognized exception, and however laudable the State's motivation for imposing restraints in this case,<sup>[21]</sup> there are compelling \*595 reasons for not carving out a new exception to the rule against prior censorship of publication.

## I

Much of the information that the Nebraska courts \*596 enjoined petitioners from publishing was already in the public domain, having been revealed in open court proceedings or through public documents. Our prior cases have foreclosed any serious contention that further disclosure of such information can be suppressed before publication or even punished after publication. "A trial is a public event. What transpires in the court room is public property. . . . Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it." *Craig v. Harney*, 331 U. S., at 374. Similarly, *Estes v. Texas*, 381 U. S., at 541-542, a case involving the Sixth Amendment right to a fair trial, observed: "[R]eporters of all media . . . are plainly free to report whatever occurs in open court through their respective media. This was settled in *Bridges v. California*, 314 U. S. 252 (1941), and *Pennekamp v. Florida*, 328 U. S. 331 (1946), which we reaffirm." See also *id.*, at 583-585 (Warren, C. J., concurring). And *Sheppard v. Maxwell*, 384 U. S., at 362-363, a case that detailed numerous devices that could be employed for ensuring fair trials, explicitly reiterated that "[o]f course, there is nothing that proscribes the press from reporting events that transpire in the courtroom." See also *id.*, at 350; *Stroble v. California*, 343 U. S. 181, 193 (1952). The continuing vitality of these statements was reaffirmed only last Term in *Cox Broadcasting Corp. v. Cohn*, a case involving a suit for damages brought after publication under state law recognizing the privacy interest of its citizens. In holding that \*597 a "State may [not] impose sanctions on the accurate publication of the name of a rape victim obtained from public records," 420 U. S., at 491, we observed:

"[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. *Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations.* Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. *With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.* See *Sheppard v. Maxwell*, 384 U. S. 333, 350 (1966).

"Appellee has claimed in this litigation that the efforts of the press have infringed his right to privacy by broadcasting to the world the fact that his daughter was a rape victim. *The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions, however, are without question events of*

*legitimate concern to the public and consequently fall within the responsibility of the press to report the operations of government.*

*“The special protected nature of accurate reports of judicial proceedings has repeatedly been recognized.”* *Id.*, at 491-492 (emphasis supplied).

\*598 “By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served. *Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business.* In preserving that form of government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection.” *Id.*, at 495 (emphasis supplied).

See also *id.*, at 496. Prior restraints are particularly anathematic to the First Amendment, and any immunity from punishment subsequent to publication of given material applies *a fortiori* to immunity from suppression of that material before publication. Thus, in light of *Craig*, which involved a contempt citation for a threat to the administration of justice, and *Cox Broadcasting*, which similarly involved an attempt to establish civil liability after publication, it should be clear that no injunction against the reporting of such information can be permissible.

## 2

The order of the Nebraska Supreme Court also applied, of course, to “confessions” and other information “strongly implicative” of the accused which were obtained from sources other than official records or open \*599 court proceedings. But for the reasons that follow—reasons equally applicable to information obtained by the press from official records or public court proceedings—I believe that the same rule against prior restraints governs *any* information pertaining to the criminal justice system, even if derived from nonpublic sources and regardless of the means employed by the press in its acquisition.

The only exception that has thus far been recognized even in dictum to the blanket prohibition against prior restraints against publication of material which would otherwise be constitutionally shielded was the “military security” situation addressed in *New York Times Co. v. United States*. But unlike the virtually certain, direct, and immediate harm required for such a restraint under *Near* and *New York Times*, the harm to a fair trial that might otherwise eventuate from publications which are suppressed pursuant to orders such as that under review must inherently remain speculative.

A judge importuned to issue a prior restraint in the pretrial context will be unable to predict the manner in which the potentially prejudicial information would be published, the frequency with which it would be repeated or the emphasis it would be

given, the context in which or purpose for which it would be reported, the scope of the audience that would be exposed to the information,<sup>[22]\*600</sup> or the impact, evaluated in terms of current standards for assessing juror impartiality,<sup>[23]</sup> the information would have on that audience. These considerations would render speculative the prospective impact on a fair trial of reporting even an alleged confession or other information “strongly implicative” of the accused. Moreover, we can take judicial notice of the fact that given the prevalence of plea bargaining, few criminal cases proceed to trial, and the judge would thus have to predict what the likelihood was that a jury would even have to be impaneled.<sup>[24]</sup> Indeed, even in cases that do proceed to trial, the material sought to be suppressed before trial will often be admissible and may be admitted in any event.<sup>[25]\*601</sup> And, more basically, there are adequate devices for screening from jury duty those individuals who have in fact been exposed to prejudicial pretrial publicity.

Initially, it is important to note that once the jury is impaneled, the techniques of sequestration of jurors and control over the courtroom and conduct of trial should prevent prejudicial publicity from infecting the fairness of judicial proceedings.<sup>[26]</sup> Similarly, judges may stem much of the flow of prejudicial publicity at its source, before it is obtained by representatives of the press.<sup>[27]</sup> But even if the press nevertheless obtains potentially prejudicial information and decides to publish that information, \*602 the Sixth Amendment rights of the accused may still be adequately protected. In particular, the trial judge should employ the *voir dire* to probe fully into the effect of publicity. The judge should broadly explore such matters as the extent to which prospective jurors had read particular news accounts or whether they had heard about incriminating data such as an alleged confession or statements by purportedly reliable sources concerning the defendant’s guilt. See, e. g., *Ham v. South Carolina*, 409 U. S. 524, 531-534 (1973) (opinion of MARSHALL, J.); *Swain v. Alabama*, 380 U. S. 202, 209-222 (1965). Particularly in cases of extensive publicity, defense counsel should be accorded more latitude in personally asking or tendering searching questions that might root out indications of bias, both to facilitate intelligent exercise of peremptory challenges and to help uncover factors that would dictate disqualification for cause. Indeed, it may sometimes be necessary to question on *voir dire* prospective jurors individually or in small groups, both to maximize the likelihood that members of the venire will respond honestly to questions concerning bias, and to avoid contaminating unbiased members of the venire when other members disclose prior knowledge of prejudicial information. Moreover, *voir dire* may indicate the need to grant a brief continuance<sup>[28]</sup> or to grant a change of venue,<sup>[29]</sup> techniques that can effectively \*603 mitigate any publicity at a particular time or in a particular locale. Finally, if the trial court fails or refuses to utilize these devices effectively, there are the “palliatives” of reversals on appeal and directions for a new trial. *Sheppard v. Maxwell*, 384 U. S., at 363.<sup>[30]</sup> We have indicated that even in a case involving outrageous publicity and a “carnival atmosphere” in the courtroom, “these procedures would have been sufficient to guarantee [the defendant] a fair trial . . . .” *Id.*, at 358. See generally *id.*, at 358-363; cf. *Times-Picayune Pub. Corp. v. Schulingkamp*, 419 U. S. 1301, 1308, and n. 3 (1974) (POWELL, J., in chambers). For this reason, the one thing *Sheppard* did not approve was “any direct limitations on the freedom traditionally exercised by the news media.” 384 U. S., at 350.<sup>[31]</sup> Indeed, the \*604 traditional techniques approved in *Sheppard* for ensuring fair trials would have been adequate in every case in which we have found that a new trial was required due to lack of fundamental fairness to the accused.

For these reasons alone I would reject the contention that speculative deprivation of an accused's Sixth Amendment right to an impartial jury is comparable to the damage to the Nation or its people that *Near* and *New York Times* would have found sufficient to justify a prior restraint on reporting. Damage to that Sixth Amendment right could never be considered so direct, immediate and irreparable, and based on such proof rather than speculation, that prior restraints on the press could be justified on this basis.

## C

There are additional, practical reasons for not starting down the path urged by respondents.<sup>[32]</sup> The exception \*605 to the prohibition of prior restraints adumbrated in *Near* and *New York Times* involves no judicial weighing of the countervailing public interest in receiving the suppressed information; the direct, immediate, and irreparable harm that would result from disclosure is simply deemed to outweigh the public's interest in knowing, for example, the specific details of troop movements during wartime. As the Supreme Court of Nebraska itself admitted,<sup>[33]</sup> however, any attempt to impose a prior restraint on the reporting of information concerning the operation of the criminal justice system will inevitably involve the courts in an *ad hoc* evaluation of the need for the public to receive particular information that might nevertheless implicate the accused as the perpetrator of a crime. For example, disclosure of the \*606 circumstances surrounding the obtaining of an involuntary confession or the conduct of an illegal search resulting in incriminating fruits may be the necessary predicate for a movement to reform police methods, pass regulatory statutes, or remove judges who do not adequately oversee law enforcement activity; publication of facts surrounding particular plea-bargaining proceedings or the practice of plea bargaining generally may provoke substantial public concern as to the operations of the judiciary or the fairness of prosecutorial decisions; reporting the details of the confession of one accused may reveal that it may implicate others as well, and the public may rightly demand to know what actions are being taken by law enforcement personnel to bring those other individuals to justice; commentary on the fact that there is strong evidence implicating a government official in criminal activity goes to the very core of matters of public concern, and even a brief delay in reporting that information shortly before an election may have a decisive impact on the outcome of the democratic process, see *Carroll v. Princess Anne*, 393 U. S., at 182; dissemination of the fact that indicted individuals who had been accused of similar misdeeds in the past had not been prosecuted or had received only mild sentences may generate crucial debate on the functioning of the criminal justice system; revelation of the fact that despite apparently overwhelming evidence of guilt, prosecutions were dropped or never commenced against large campaign contributors or members of special interest groups may indicate possible corruption among government officials; and disclosure of the fact that a suspect has been apprehended as the perpetrator of a heinous crime may be necessary to calm community fears that the actual perpetrator is still at large. Cf. *Times-Picayune Pub. Corp. v. Schulingkamp*, 419 U. S., at 1302 \*607 (POWELL, J., in chambers).<sup>[34]</sup> In all of these situations, judges would be forced to evaluate whether the public interest in receiving the information outweighed the speculative impact on Sixth Amendment rights.

These are obviously only some examples of the problems that plainly would recur, not in the almost theoretical situation of suppressing disclosure of the location of troops

during wartime, but on a regular basis throughout the courts of the land. Recognition of any judicial authority to impose prior restraints on the basis of harm to the Sixth Amendment rights of particular defendants, especially since that harm must remain speculative, will thus inevitably interject judges at all levels into censorship roles that are simply inappropriate and impermissible under the First Amendment. Indeed, the potential for arbitrary and excessive judicial utilization of any such power would be exacerbated by the fact that judges and committing magistrates might in some cases be determining the propriety of publishing information that reflects on their competence, integrity, or general performance on the bench.

There would be, in addition, almost intractable procedural difficulties associated with any attempt to impose prior restraints on publication of information relating to pending criminal proceedings, and the ramifications of these procedural difficulties would accentuate the burden on First Amendment rights. The incentives and dynamics of the system of prior restraints would inevitably lead to overemployment of the technique. In order to minimize pretrial publicity against \*608 his clients and pre-empt ineffective-assistance-of-counsel claims, counsel for defendants might routinely seek such restrictive orders. Prosecutors would often acquiesce in such motions to avoid jeopardizing a conviction on appeal. And although judges could readily reject many such claims as frivolous, there would be a significant danger that judges would nevertheless be predisposed to grant the motions, both to ease their task of ensuring fair proceedings and to insulate their conduct in the criminal proceeding from reversal. We need not raise any specter of floodgates of litigation or drain on judicial resources to note that the litigation with respect to these motions will substantially burden the media. For to bind the media, they would have to be notified and accorded an opportunity to be heard. See, e. g., *Carroll v. Princess Anne*, *supra*; *McKinney v. Alabama*, 424 U. S. 669 (1976). This would at least entail the possibility of restraint proceedings collateral to every criminal case before the courts, and there would be a significant financial drain on the media involuntarily made parties to these proceedings. Indeed, small news organs on the margin of economic viability might choose not to contest even blatantly unconstitutional restraints or to avoid all crime coverage, with concomitant harm to the public's right to be informed of such proceedings.<sup>[35]</sup> Such acquiescence might also mean that significant erroneous precedents will remain unchallenged, to be relied on for even broader restraints in the future. Moreover, these collateral restraint proceedings would be unlikely to result in equal treatment of all \*609 organs of the media<sup>[36]</sup> and, even if all the press could be brought into the proceeding, would often be ineffective, since disclosure of incriminating material may transpire before an effective restraint could be imposed.<sup>[37]</sup>

To be sure, because the decision to impose such restraints even on the disclosure of supposedly narrow categories of information would depend on the facts of each case, and because precious First Amendment rights are at stake, those who could afford the substantial costs would seek appellate review. But that review is often inadequate, since delay inherent in judicial proceedings could itself destroy the contemporary news value of the information the press seeks to disseminate.<sup>[38]</sup> As one commentator has observed:

“Prior restraints fall on speech with a brutality and a finality all their own. Even if they are ultimately lifted they cause irremediable loss—a loss in the immediacy, the impact, of speech. . . . Indeed it is the hypothesis of the First Amendment that injury is

inflicted on our society when we stifle the immediacy of speech.” A. Bickel, *The Morality of Consent* 61 (1975).<sup>[39]</sup>

\*610 And, as noted, given the significant financial disincentives, particularly on the smaller organs of the media,<sup>[40]</sup> to challenge any restrictive orders once they are imposed \*611 by trial judges, there is the distinct possibility that many erroneous impositions would remain uncorrected.<sup>[41]</sup>

### III

I unreservedly agree with Mr. Justice Black that “free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them.” *Bridges v. California*, 314 U. S., at 260. But I would reject the notion that a \*612 choice is necessary, that there is an inherent conflict that cannot be resolved without essentially abrogating one right or the other. To hold that courts cannot impose any prior restraints on the reporting of or commentary upon information revealed in open court proceedings, disclosed in public documents, or divulged by other sources with respect to the criminal justice system is not, I must emphasize, to countenance the sacrifice of precious Sixth Amendment rights on the altar of the First Amendment. For although there may in some instances be tension between uninhibited and robust reporting by the press and fair trials for criminal defendants, judges possess adequate tools short of injunctions against reporting for relieving that tension. To be sure, these alternatives may require greater sensitivity and effort on the part of judges conducting criminal trials than would the stifling of publicity through the simple expedient of issuing a restrictive order on the press; but that sensitivity and effort is required in order to ensure the full enjoyment and proper accommodation of both First and Sixth Amendment rights.

There is, beyond peradventure, a clear and substantial damage to freedom of the press whenever even a temporary restraint is imposed on reporting of material concerning the operations of the criminal justice system, an institution of such pervasive influence in our constitutional scheme. And the necessary impact of reporting even confessions can never be so direct, immediate, and irreparable that I would give credence to any notion that prior restraints may be imposed on that rationale. It may be that such incriminating material would be of such slight news value or so inflammatory in particular cases that responsible organs of the media, in an exercise of self-restraint, would choose not to publicize that material, and not make the judicial task of safeguarding \*613 precious rights of criminal defendants more difficult. Voluntary codes such as the Nebraska Bar-Press Guidelines are a commendable acknowledgment by the media that constitutional prerogatives bring enormous responsibilities, and I would encourage continuation of such voluntary cooperative efforts between the bar and the media. However, the press may be arrogant, tyrannical, abusive, and sensationalist, just as it may be incisive, probing, and informative. But at least in the context of prior restraints on publication, the decision of what, when, and how to publish is for editors, not judges. See, e. g., *Near v. Minnesota ex rel. Olson*, 283 U. S., at 720; *Cox Broadcasting Corp. v. Cohn*, 420 U. S., at 496; *Miami Herald Publishing Co. v. Tornillo*, 418 U. S., at 258; *id.*, at 259 (WHITE, J., concurring); cf. *New York Times Co. v. Sullivan*, 376 U. S., at 269-283. Every restrictive order imposed on the press in this case was accordingly an unconstitutional prior restraint on the freedom of the press, and I

would therefore reverse the judgment of the Nebraska Supreme Court and remand for further proceedings not inconsistent with this opinion.

## **APPENDIX TO OPINION OF BRENNAN, J., CONCURRING IN JUDGMENT**

### **NEBRASKA BAR-PRESS GUIDELINES FOR DISCLOSURE AND REPORTING OF INFORMATION RELATING TO IMMINENT OR PENDING CRIMINAL LITIGATION**

These voluntary guidelines reflect standards which bar and news media representatives believe are a reasonable means of accommodating, on a voluntary basis, the correlative constitutional rights of free speech and free press with the right of an accused to a fair trial. They \*614 are not intended to prevent the news media from inquiring into and reporting on the integrity, fairness, efficiency and effectiveness of law enforcement, the administration of justice, or political or governmental questions whenever involved in the judicial process.

As a voluntary code, these guidelines do not necessarily reflect in all respects what the members of the bar or the news media believe would be permitted or required by law.

#### **Information Generally Appropriate for Disclosure, Reporting**

Generally, it is appropriate to disclose and report the following information:

1. The arrested person's name, age, residence, employment, marital status and similar biographical information.
2. The charge, its text, any amendments thereto, and, if applicable, the identity of the complaint.
3. The amount or conditions of bail.
4. The identity of and biographical information concerning the complaining party and victim, and, if a death is involved, the apparent cause of death unless it appears that the cause of death may be a contested issue.
5. The identity of the investigating and arresting agencies and the length of the investigation.
6. The circumstances of arrest, including time, place, resistance, pursuit, possession of and all weapons used, and a description of the items seized at the time of arrest. It is appropriate to disclose and report at the time of seizure the description of physical evidence subsequently seized other than a confession, admission or statement. It is appropriate to disclose and report the subsequent finding of weapons, bodies, contraband, stolen property and similar physical items if, in view \*615 of the time and other circumstances, such disclosure and reporting are not likely to interfere with a fair trial.

7. Information disclosed by the public records, including all testimony and other evidence adduced at the trial.

### **Information Generally Not Appropriate for Disclosure, Reporting**

Generally, it is not appropriate to disclose or report the following information because of the risk of prejudice to the right of an accused to a fair trial:

1. The existence or contents of any confession, admission or statement given by the accused, except it may be stated that the accused denies the charges made against him. This paragraph is not intended to apply to statements made by the accused to representatives of the news media or to the public.
2. Opinions concerning the guilt, the innocence or the character of the accused.
3. Statements predicting or influencing the outcome of the trial.
4. Results of any examination or tests or the accused's refusal or failure to submit to an examination or test.
5. Statements or opinions concerning the credibility or anticipated testimony of prospective witnesses.
6. Statements made in the judicial proceedings outside the presence of the jury relating to confessions or other matters which, if reported, would likely interfere with a fair trial.

### **Prior Criminal Records**

Lawyers and law enforcement personnel should not volunteer the prior criminal records of an accused except to aid in his apprehension or to warn the public of any dangers he presents. The news media can obtain prior criminal records from the public records of the courts, \*616 police agencies and other governmental agencies and from their own files. The news media acknowledge, however, that publication or broadcast of an individual's criminal record can be prejudicial, and its publication or broadcast should be considered very carefully, particularly after the filing of formal charges and as the time of the trial approaches, and such publication or broadcast should generally be avoided because readers, viewers and listeners are potential jurors and an accused is presumed innocent until proven guilty.

### **Photographs**

1. Generally, it is not appropriate for law enforcement personnel to deliberately pose a person in custody for photographing or televising by representatives of the news media.
2. Unposed photographing and televising of an accused outside the courtroom is generally appropriate, and law enforcement personnel should not interfere with such

photographing or televising except in compliance with an order of the court or unless such photographing or televising would interfere with their official duties.

3. It is appropriate for law enforcement personnel to release to representatives of the news media photographs of a suspect or an accused. Before publication of any such photographs, the news media should eliminate any portions of the photographs that would indicate a prior criminal offense or police record.

### **Continuing Committee for Cooperation**

The members of the bar and the news media recognize the desirability of continued joint efforts in attempting to resolve any areas of differences that may arise in their mutual objective of assuring to all Americans both the correlative constitutional rights to freedom<sup>\*617</sup> of speech and press and to a fair trial. The bar and the news media, through their respective associations, have determined to establish a permanent committee to revise these guidelines whenever this appears necessary or appropriate, to issue opinions as to their application to specific situations, to receive, evaluate and make recommendations with respect to complaints and to seek to effect through educational and other voluntary means a proper accommodation of the constitutional correlative rights of free speech, free press and fair trial.

June, 1970

MR. JUSTICE STEVENS, concurring in the judgment.

For the reasons eloquently stated by MR. JUSTICE BRENNAN, I agree that the judiciary is capable of protecting the defendant's right to a fair trial without enjoining the press from publishing information in the public domain, and that it may not do so. Whether the same absolute protection would apply no matter how shabby or illegal the means by which the information is obtained, no matter how serious an intrusion on privacy might be involved, no matter how demonstrably false the information might be, no matter how prejudicial it might be to the interests of innocent persons, and no matter how perverse the motivation for publishing it, is a question I would not answer without further argument. See *Ashwander v. TVA*, 297 U. S. 288, 346-347 (Brandeis, J., concurring). I do, however, subscribe to most of what MR. JUSTICE BRENNAN says and, if ever required to face the issue squarely, may well accept his ultimate conclusion.

### **NOTES**

[\*] Briefs of *amici curiae* urging reversal were filed by *Melvin L. Wulf, Joel M. Gora, Charles C. Marson, and Joseph Remcho* for the American Civil Liberties Union et al.; by *Arthur B. Hanson* for the American Newspaper Publishers Assn.; by *William I. Harkaway* for the National Press Club; by *Lawrence Speiser* for the Reporters Committee for Freedom of the Press Legal Defense and Research Fund; by *Don H. Reuben and Lawrence Gunnels* for the Tribune Co.; and by *Joseph A. Califano, Jr., John G. Kester, Richard M. Cooper, Alan R. Finberg, Robert C. Lobdell, David R. Hardy, Dan Paul, Edgar A. Zingman, and Donald B. Holbrook* for the Washington Post Co. et al.

[1] These Guidelines are voluntary standards adopted by members of the state bar and news media to deal with the reporting of crimes and criminal trials. They outline the matters of fact that may appropriately be reported, and also list what items are not generally appropriate for reporting, including confessions, opinions on guilt or innocence, statements that would influence the outcome of a trial, the results of tests or examinations, comments on the credibility of witnesses, and evidence presented in the jury's absence. The publication of an accused's criminal record should, under the Guidelines, be "considered very carefully." The Guidelines also set out standards for taking and publishing photographs, and set up a joint bar-press committee to foster cooperation in resolving particular problems that emerge.

[2] In the interim, petitioners applied to MR. JUSTICE BLACKMUN as Circuit Justice for a stay of the State District Court's order. He postponed ruling on the application out of deference to the Nebraska Supreme Court, 423 U. S. 1319 (Nov. 13, 1975) (in chambers); when he concluded that the delay before that court had "exceed[ed] tolerable limits," he entered an order. 423 U. S. 1327, 1329 (Nov. 20, 1975) (in chambers). We need not set out in detail MR. JUSTICE BLACKMUN'S careful decision on this difficult issue. In essence he stayed the order insofar as it incorporated the admonitory Bar-Press Guidelines and prohibited reporting of some other matters. But he declined "at least on an application for a stay and at this distance, [to] impose a prohibition upon the Nebraska courts from placing any restrictions at all upon what the media may report prior to trial." *Id.*, at 1332. He therefore let stand that portion of the District Court's order that prohibited reporting the existence or nature of a confession, and declined to prohibit that court from restraining publication of facts that were so "highly prejudicial" to the accused or "strongly implicative" of him that they would "irreparably impair the ability of those exposed to them to reach an independent and impartial judgment as to guilt." *Id.*, at 1333. Subsequently, petitioners applied for a more extensive stay; this was denied by the full Court. 423 U. S. 1027 (1975).

[3] The Warren Commission conducting an inquiry into the murder of President Kennedy implied grave doubts whether, after the dissemination of "a great deal of misinformation" prejudicial to Oswald, a fair trial could be had. Report of the President's Commission on the Assassination of President John F. Kennedy 231 (1964). Probably the same could be said in turn with respect to a trial of Oswald's murderer even though a multitude were eyewitnesses to the guilty act. See generally *id.*, at 231-242; Jaffe, Trial by Newspaper, 40 N. Y. U. L. Rev. 504 (1965); Powell, The Right to a Fair Trial, 51 A. B. A. J. 534 (1965).

[4] The record also reveals that counsel for both sides acted responsibly in this case, and there is no suggestion that either sought to use pretrial news coverage for partisan advantage. A few days after the crime, newspaper accounts indicated that the prosecutor had announced the existence of a confession; we learned at oral argument that these accounts were false, although in fact a confession had been made. Tr. of Oral Arg. 36-37, 59.

[5] In *Near v. Minnesota*, Mr. Chief Justice Hughes was also able to say: "There is also the conceded authority of courts to punish for contempt when publications directly tend to prevent the proper discharge of judicial functions." 283 U. S., at 715.

A subsequent line of cases limited sharply the circumstances under which courts may exact such punishment. See *Craig v. Harney*, 331 U. S. 367 (1947); *Pennekamp v. Florida*, 328 U. S. 331 (1946); *Bridges v. California*, 314 U. S. 252 (1941). Because these cases deal with punishment based on contempt, however, they deal with problems substantially different from those raised by prior restraint. See also Barist, *The First Amendment and Regulation of Prejudicial Publicity—An Analysis*, 36 Ford. L. Rev. 425, 433-442 (1968).

[6] See A. Bickel, *The Morality of Consent* 61 (1975).

[7] The respondent and intervenors argue here that a change of venue would not have helped, since Nebraska law permits a change only to adjacent counties, which had been as exposed to pretrial publicity in this case as Lincoln County. We have held that state laws restricting venue must on occasion yield to the constitutional requirement that the State afford a fair trial. *Groppi v. Wisconsin*, 400 U. S. 505 (1971). We note also that the combined population of Lincoln County and the adjacent counties is over 80,000, providing a substantial pool of prospective jurors.

[8] Closing of pretrial proceedings with the consent of the defendant when required is also recommended in guidelines that have emerged from various studies. At oral argument petitioners' counsel asserted that judicially imposed restraints on lawyers and others would be subject to challenge as interfering with press rights to news sources. Tr. of Oral Arg. 7-8. See, e. g., *Chicago Council of Lawyers v. Bauer*, 522 F. 2d 242 (CA7 1975), cert. denied *sub nom. Cunningham v. Chicago Council of Lawyers*, *post*, p. 912. We are not now confronted with such issues.

We note that in making its proposals, the American Bar Association recommended strongly against resort to direct restraints on the press to prohibit publication. American Bar Association Project on Standards for Criminal Justice, Fair Trial and Free Press 68-73 (App. Draft 1968). Other groups have reached similar conclusions. See Report of the Judicial Conference Committee on the Operation of the Jury System, "Free Press-Fair Trial" Issue, 45 F. R. D. 391, 401-403 (1968); Special Committee on Radio, Television, and the Administration of Justice of the Association of the Bar of the City of New York, *Freedom of the Press and Fair Trial* 10-11 (1967).

[9] Here, for example, the Nebraska Supreme Court decided that the District Court had no jurisdiction of the petitioners except by virtue of their voluntary submission to the jurisdiction of that court when they moved to intervene. Except for the intervention which placed them within reach of the court, the Nebraska Supreme Court conceded, the petitioners "could have ignored the [restraining] order . . . ." *State v. Simants*, 194 Neb. 783, 795, 236 N. W. 2d 794, 802 (1975).

[10] Assuming, *arguendo*, that these problems are within reach of legislative enactment, or that some application of evolving concepts of long-arm jurisdiction would solve the problems of personal jurisdiction, even a cursory examination suggests how awkwardly broad prior restraints on publication, directed not at named parties but at large, would fit into our jurisprudence. The British experience is in sharp contrast for a variety of reasons; Great Britain has a smaller and unitary court system permitting the development of a manageable system of prior restraints by the

application of the constructive contempt doctrine. Cf. n. 5, *supra*, at 557; see generally *Maryland v. Baltimore Radio Show*, 338 U. S. 912, 921-936 (1950) (App. to opinion of Frankfurter, J., respecting denial of certiorari); Gillmor, *Free Press and Fair Trial in English Law*, 22 Wash. & Lee L. Rev. 17 (1965). Moreover, any comparison between the two systems must take into account that although England gives a very high place to freedom of the press and speech, its courts are not subject to the explicit strictures of a written constitution.

[\*] In *Times-Picayune Pub. Corp. v. Schulingkamp*, 419 U. S. 1301, 1307 (1974), an in-chambers opinion, I noted that there is a heavy presumption against the constitutional validity of a court order restraining pretrial publicity.

[1] In referring to the “press” and to “publication” in this opinion, I of course use those words as terms of art that encompass broadcasting by the electronic media as well.

[2] A copy of the “Nebraska Bar-Press Guidelines,” ostensibly a voluntary code formulated by representatives of the media and the bar, was attached to the order. The Guidelines, which are similar to voluntary codes adhered to by the press in several States, are attached as an appendix to this opinion.

Excepted from the scope of the County Court’s order were: (1) factual statements of the accused’s name, age, residence, occupation, and family status; (2) the circumstances of the arrest (time and place, identity of the arresting and investigating officers and agencies, and the length of the investigation); (3) the nature, substance, and text of the charge; (4) quotations from, or any reference without comment to, public records or communications heretofore disseminated to the public; (5) the scheduling and result of any stage of the judicial proceeding held in open court; (6) a request for assistance in obtaining evidence; and (7) a request for assistance in obtaining the names of possible witnesses. The court also ordered that a copy of the preliminary hearing proceedings was to be made available to the public at the expiration of the order.

[3] The court apparently believed that a public preliminary hearing was required by state law. The Nebraska Supreme Court subsequently held that the pertinent state statute did not require that pretrial hearings be open to the public. Both petitioners and the State of Nebraska agree that the question whether preliminary hearings may be closed to the public consistently with the “Public Trial” Clause of the Sixth Amendment is not before us, and it is therefore one on which I would express no views.

[4] The Nebraska Bar-Press Guidelines, see appendix to this opinion, were “clarified” as follows, Amended Pet. for Cert. 10a-11a:

“1. It is hereby stated the trial of the case commences when a jury is empaneled to try the case, and that all reporting prior to that event, specifically including the preliminary hearing is ‘pretrial’ publicity.

“2. It would appear that defendant has made a statement or confession to law enforcement officials and it is inappropriate to report the existence of such statement or the contents of it.

“3. It appears that the defendant may have made statements against interest to James Robert Boggs, Amos Simants and Grace Simants, and may have left a note in the William Boggs residence, and that the nature of such statements, or the fact that such statements were made, or the nature of the testimony of these witnesses with reference to such statements in the preliminary hearing will not be reported.

“4. The non-technical aspects of the testimony of Dr. Miles Foster may be reported within the guidelines and at the careful discretion of the press. The testimony of this witness dealing with technical subjects, tests or investigations performed or the results thereof, or his opinions or conclusions as a result of such tests or investigations will not be reported.

“5. The general physical facts found at the scene of the crime may be reported within the guidelines and at the careful discretion of the press. However, the identity of the person or persons allegedly sexually assaulted or the details of any alleged assault by the defendant will not be reported.

“6. The exact nature of the limitations of publicity as entered by this order will not be reported. That is to say, the fact of the entering of this order limiting pre-trial publicity and the adoption of the Bar-Press Guidelines may be reported, but specific reference to confessions, statements against interest, witnesses or type of evidence to which this order will apply will not be reported.”

An additional portion of the order relating to the press’ accommodations in the courtroom and the taking of photographs in the courthouse was not contested below and is not before this Court. The full order, including its references to confessions, was read in open court.

[5] MR. JUSTICE BLACKMUN’S view of the burden of proof for imposing such restraints was as follows: “The accused, and the prosecution if it joins him, bears the burden of showing that publicizing particular facts will irreparably impair the ability of those exposed to them to reach an independent and impartial judgment as to guilt.” 423 U. S., at 1333.

[6] The in-chambers opinion also stayed any prohibition concerning reporting of the pending application for relief in the Supreme Court of Nebraska, but permitted a prohibition of reporting of the two in-chambers opinions to the extent they contained “facts properly suppressed.” *Id.*, at 1334. Nothing in the opinion was to be “deemed as barring what the District Judge may impose by way of restriction on what the parties and officers of the court may say to any representative of the media.” *Ibid.*

[7] Two justices of the Supreme Court of Nebraska dissented on jurisdictional grounds similar to those that formed the predicate for that court’s earlier *per curiam* statement, and two other justices who agreed with those jurisdictional claims nevertheless joined the *per curiam* to avoid a procedural deadlock.

[8] These rulings resulted in the paradoxical situation that “[petitioners] could have ignored the [County Court’s] order” because that court had not obtained personal jurisdiction over them and because “courts have no general power in any kind of case to enjoin or restrain ‘everybody,’ ” *State v. Simants*, 194 Neb. 783, 795, 236 N. W. 2d 794, 802 (1975). However, because they had improperly intervened in the criminal case (from which they could not appeal), a prior restraint could issue against them. Indeed, the court noted that the prior restraint “applies only to [petitioners]” and not to any other organs of the media. *Id.*, at 788, 236 N. W. 2d, at 798.

[9] See n. 21, *infra*.

[10] The evidence relied on by the Nebraska Supreme Court included the following: The fact that before entry of the restrictive order, certain newspapers had reported information “which, if true, tended clearly to connect the accused with the slayings,” 194 Neb., at 796, 236 N. W. 2d, at 802; the fact that “counsel for the media stated that it is already doubtful that an unbiased jury can be found to hear the Simants case in Lincoln County,” *id.*, at 797, 236 N. W. 2d, at 803; the fact that Nebraska law required the trial to transpire within six months of the date the information was filed, *ibid.*; the relatively small population of the counties to which Nebraska law would permit a change of venue, *id.*, at 797-798, 236 N. W. 2d, at 803; the “mere heinousness or enormity of a crime”; and “the trial court’s own knowledge of the surrounding circumstances,” *id.*, at 798, 236 N. W. 2d, at 803.

[11] The Nebraska Supreme Court also “adopted” American Bar Association Project on Standards for Criminal Justice, Fair Trial and Free Press § 3.1, Pretrial Hearings (App. Draft 1968), which provides for exclusion of the press and public from pretrial hearings under certain circumstances, and remanded the case to the District Court to consider any applications to close future pretrial proceedings under that standard. The constitutionality of closing pretrial proceedings under specific conditions is not before us, and is a question on which I would intimate no views.

[12] JUSTICES STEWART and MARSHALL and I noted that we would have granted the application for a stay.

[13] JUSTICES STEWART and MARSHALL and I dissented from denial of the motions to expedite and to grant a stay; MR. JUSTICE WHITE dissented from the latter motion to the extent the state courts had prohibited the reporting of information publicly disclosed during the preliminary hearing in the underlying criminal proceeding.

Although the order of the Nebraska Supreme Court expired when the jury in *State v. Simants* was impaneled and sequestered on January 7, 1976, this case is not moot. This is a paradigmatic situation of “short term orders, capable of repetition, yet evading review.” *E. g., Southern Pacific Terminal Co. v. ICC*, 219 U. S. 498, 515 (1911). It is evident that the decision of the Nebraska Supreme Court will subject petitioners to future restrictive orders with respect to pretrial publicity, and that the validity of these orders, which typically expire when the jury is sequestered, generally cannot be fully litigated within that period of time. See, *e.*

*g.*, *Weinstein v. Bradford*, 423 U. S. 147, 149 (1975). See also *Carroll v. Princess Anne*, 393 U. S. 175, 178-179 (1968).

Counsel informs us that Simants has subsequently been tried, convicted, and sentenced to death, and that his appeal is currently pending in the Nebraska Supreme Court. Simants' defense rested on a plea of not guilty by reason of insanity, and all of the information which remained unreported during the pretrial period was ultimately received in evidence. The trial judge also declined to close further pretrial hearings, granted Simants' requests to sequester the jury and conduct *voir dire* with no more than four prospective jurors present at one time, and denied Simants' request for a change of venue. A *Jackson v. Denno* (378 U. S. 368 (1964)) hearing and the first day of *voir dire* were also closed to the public. Petitioners have challenged the latter rulings, and that litigation is still pending in the state courts.

[14] The precise scope of these terms is not, of course, self-evident. Almost any statement may be an "admission against interest" if, for example, it can be shown to be false and thus destructive of the accused's credibility. This would even be true with respect to exculpatory statements made by an accused, such as those relating to alleged alibi defenses. Similarly, there is considerable vagueness in the phrase "strongly implicative" of the accused's guilt. The Nebraska Supreme Court did not elaborate on its meaning, and counsel for the State suggests it only covers the existence of the accused's prior criminal record, if any. Tr. of Oral Arg. 54. Others might view the phrase considerably more expansively. See *supra*, at 581; cf. 194 Neb., at 789-790, 236 N. W. 2d, at 799. Indeed, even the fact the accused was indicted might be viewed as "strongly implicative" of his guilt by reporters not schooled in the law, and the threat of contempt for transgression of such directives would thus tend to self-censorship even as to materials not intended to be covered by the restrictive order.

[15] Of course, even if the press cannot be enjoined from reporting certain information, that does not necessarily immunize it from civil liability for libel or invasion of privacy or from criminal liability for transgressions of general criminal laws during the course of obtaining that information.

[16] The only criticism of this statement is that it does not embrace all of the protection accorded freedom of speech and of the press by the First Amendment. See, *e. g.*, *Near v. Minnesota ex rel. Olson*, 283 U. S., at 714-715.

[17] Thus the First Amendment constitutes a direct repudiation of the British system of licensing. See, *e. g.*, *Near v. Minnesota ex rel. Olson*, *supra*, at 713-714; *Grosjean v. American Press Co.*, 297 U. S. 233, 245-250 (1936); *Bridges v. California*, 314 U. S. 252, 263-264 (1941); *Wood v. Georgia*, 370 U. S. 375, 384, and n. 5 (1962).

[18] See n. 33, *infra*; *supra*, at 582-583.

[19] The rarity of prior restraint cases of any type in this Court's jurisprudence has also been noted. See, *e. g.*, *New York Times Co. v. United States*, 403 U. S., at 733; *Near v. Minnesota ex rel. Olson*, 283 U. S., at 718 ("The fact that for

approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right”).

[20] The Nebraska Supreme Court denigrated what it termed the “extremist and absolutist” position of petitioners for assuming that “each and every exercise of freedom of the press is equally important” and that “there can be no degree of values for the particular right in which the absolutist has a special interest.” 194 Neb., at 799, 800, 236 N. W. 2d, at 804. This seriously mischaracterizes petitioners’ contentions, for petitioners do not assert that First Amendment freedoms are paramount in all circumstances. For example, this case does not involve the question of when, if ever, the press may be held in contempt subsequent to publication of certain material, see *Wood v. Georgia*, 370 U. S. 375 (1962); *Craig v. Harney*, 331 U. S. 367, 376 (1947); *Pennekamp v. Florida*, 328 U. S. 331 (1946); *Bridges v. California*, 314 U. S. 252 (1941). Nor does it involve the question of damages actions for malicious publication of erroneous material concerning those involved in the criminal justice system, see *New York Times Co. v. Sullivan*, 376 U. S. 254 (1964). See also *Time, Inc. v. Firestone*, 424 U. S. 448 (1976); *Gertz v. Robert Welch, Inc.*, 418 U. S. 323 (1974). And no contention is made that the press would be immune from criminal liability for crimes committed in acquiring material for publication. However, to the extent petitioners take a forceful stand against the imposition of any prior restraints on publication, their position is anything but “extremist,” for the history of the press under our Constitution has been one in which freedom from prior restraint *is* all but absolute.

[21] One can understand the reasons why the four prior restraint orders issued in this case. The crucial importance of preserving Sixth Amendment rights was obviously of uppermost concern, and the question had not been definitively resolved in this Court. Our language concerning the “presumption” against prior restraints could have been misinterpreted to condone an *ad hoc* balancing approach rather than merely to state the test for assessing the adequacy of procedural safeguards and for determining whether the high burden of proof had been met in a case falling within one of the categories that constitute the exceptions to the rule against prior restraints. Indeed, in *Branzburg v. Hayes*, 408 U. S. 665 (1972), there was even an intimation that such restraints might be permissible, since the Court stated that “[n]ewsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and *they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal.*” *Id.*, at 684-685 (emphasis supplied). However, the Court in *Branzburg* had taken pains to emphasize that the case, which presented the question whether the First Amendment accorded a reporter a testimonial privilege for an agreement not to reveal facts relevant to a grand jury’s investigation of a crime or the criminal conduct of his source, did not involve any “prior restraint or restriction on what the press may publish.” *Id.*, at 681. It was evident from the full passage in which the sentence appeared, which focused on the fact that there is no “constitutional right of special access [by the press] to information not available to the public generally,” *id.*, at 684, that the passage is best regarded as indicating that to the extent newsmen are properly excluded from judicial proceedings, they would probably be unable to report about those proceedings. See generally *id.*, at 683-685. See also *id.*, at

691 (decision “involves no restraint on what newspapers may publish or on the type or quality of information reporters may seek to acquire”); *Pell v. Procunier*, 417 U. S. 817, 833-834 (1974). It is clear that the passage was not intended to decide the important question presented by this case. In any event, in light of my views respecting prior restraints, it should be unmistakable that the First Amendment stands as an absolute bar even to the imposition of interim restraints on reports or commentary relating to the criminal justice system, and that to the extent anything in *Branzburg* could be read as implying a different result, I think that it should be disapproved. Cf. *New York Times Co. v. United States*, *supra*, at 724-725 (BRENNAN, J., concurring).

[22] It is suggested that prior restraints are really only necessary in “small towns,” since media saturation would be more likely and incriminating materials that are published would therefore probably come to the attention of all inhabitants. Of course, the smaller the community, the more likely such information would become available through rumors and gossip, whether or not the press is enjoined from publication. For example, even with the restrictive order in the *Simants* case, all residents of Sutherland had to be excluded from the jury. Indeed, the media in such situations could help dispel erroneous conceptions circulating among the populace. And the smaller the community, the more likely there will be a need for a change of venue in any event when a heinous crime is committed. There is, in short, no justification for conditioning the scope of First Amendment protection the media will receive on the size of the community they serve.

[23] Some exposure to the facts of a case need not, under prevailing law concerning the contours of the Sixth Amendment right to an impartial jury, disqualify a prospective juror or render him incapable of according the accused a fair hearing based solely on the competent evidence adduced in open court. “[E]xposure to information about a state defendant’s prior convictions or to news accounts of the crime with which he is charged [does not] alone presumptively deprive the defendant of due process.” *Murphy v. Florida*, 421 U. S. 794, 799 (1975). See also, *e. g.*, *id.*, at 800, and n. 4; *Beck v. Washington*, 369 U. S. 541, 555-558 (1962); *Irvin v. Dowd*, 366 U. S. 717, 722-723 (1961); *Reynolds v. United States*, 98 U. S. 145, 155-156 (1879).

[24] Of course, judges accepting guilty pleas must guard against the danger that pretrial publicity has effectively coerced the defendant into pleading guilty.

[25] Cf. *Stroble v. California*, 343 U. S. 181, 195 (1952). For example, all of the material that was suppressed in this case was eventually admitted at *Simants*’ trial. Indeed, even if *Simants*’ statements to police officials had been deemed involuntary and thus suppressed, no one has suggested that confessions or statements against interest made by an accused to private individuals, for example, would be inadmissible.

[26] Failure of the trial judge to take such measures was a significant factor in our reversals of the convictions in *Sheppard v. Maxwell*, 384 U. S. 333 (1966), and *Estes v. Texas*, 381 U. S. 532 (1965).

[27] A significant component of prejudicial pretrial publicity may be traced to public commentary on pending cases by court personnel, law enforcement officials, and the attorneys involved in the case. In *Sheppard v. Maxwell*, *supra*, we observed that “the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters.” 384 U. S., at 361. See also *id.*, at 360 (“[T]he judge should have further sought to alleviate this problem [of publicity that misrepresented the trial testimony] by imposing control over the statements made to the news media by counsel, witnesses, and especially the Coroner and police officers”); *id.*, at 359, 363. As officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice. It is very doubtful that the court would not have the power to control release of information by these individuals in appropriate cases, see *In re Sawyer*, 360 U. S. 622 (1959), and to impose suitable limitations whose transgression could result in disciplinary proceedings. Cf. *New York Times Co. v. United States*, 403 U. S., at 728-730 (STEWART, J., joined by WHITE, J., concurring). Similarly, in most cases courts would have ample power to control such actions by law enforcement personnel.

[28] Excessive delay, of course, would be impermissible in light of the Sixth Amendment right to a speedy trial. See, e. g., *Barker v. Wingo*, 407 U. S. 514 (1972). However, even short continuances can be effective in attenuating the impact of publicity, especially as other news crowds past events off the front pages. And somewhat substantial delays designed to ensure fair proceedings need not transgress the speedy trial guarantee. See *Groppi v. Wisconsin*, 400 U. S. 505, 510 (1971); cf. 18 U. S. C. § 3161 (h) (8) (1970 ed., Supp. IV).

[29] In *Rideau v. Louisiana*, 373 U. S. 723 (1963), we held that it was a denial of due process to deny a request for a change of venue that was necessary to preserve the accused’s Sixth Amendment rights. And state statutes may not restrict changes of venue if to do so would deny an accused a fair trial. *Groppi v. Wisconsin*, *supra*.

[30] To be sure, as the Supreme Court of Nebraska contended, society would be paying a heavy price if an individual who is in fact guilty must be released. But in no decision of this Court has it been necessary to release an accused on the ground that an impartial jury could not be assembled; we remanded for further proceedings, assuming that a retrial before an impartial forum was still possible.

As to the contention that pretrial publicity may result in conviction of an innocent person, surely the trial judge has adequate means to control the *voir dire*, the conduct of trial, and the actions of the jury, so as to preclude that untoward possibility. Indeed, where the evidence presented at trial is insufficient, the trial judge has the responsibility not even to submit the case to the jury.

[31] Although various committees that have recently analyzed the “Free Press/Fair Trial” issue have differed over the devices that they believed could properly be employed to ensure fair trials, they have unanimously failed to embrace prior restraints on publication as within the acceptable methods. See, e. g., Report of the Judicial Conference Committee on the Operation of the Jury System, “Free Press-Fair

Trial” Issue, 45 F. R. D. 391, 401-402 (1968) (Judicial Conference Committee headed by Judge Kaufman); Special Committee on Radio, Television, and the Administration of Justice of the Association of the Bar of the City of New York, Freedom of the Press and Fair Trial: Final Report with Recommendations 10-11 (1967); American Bar Association Project on Standards for Criminal Justice, Fair Trial and Free Press 68-73 (App. Draft 1968); see also American Bar Association, Legal Advisory Committee on Fair Trial and Free Press, Recommended Court Procedure to Accommodate Rights of Fair Trial and Free Press 7 (Rev. Draft, Nov. 1975).

[32] I include these additional considerations, many of which apply generally to any system of prior restraints, only because of the fundamentality of the Sixth Amendment right invoked as the justification for imposition of the restraints in this case; the fact that there are such overwhelming reasons for precluding *any* prior restraints even to facilitate preservation of such a fundamental right reinforces the longstanding constitutional doctrine that there is effectively an absolute prohibition against prior restraints of publication of *any* material otherwise covered within the meaning of the free press guarantee of the First Amendment. See *supra*, at 588-594.

[33] For example, in addition to numerous comments about accommodating First and Sixth Amendment rights in each case, the court observed:

“That the press be absolutely free to report corruption and wrongdoing, actual or apparent, or incompetence of public officials of whatever branch of government is vastly important to the future of our state and nation cannot be denied as anyone who is familiar with recent events must be well aware. Prior restraint of the press, however slight, in such instances is unthinkable. *Near v. Minnesota ex rel. Olson, supra*. In these instances and many others no preferred constitutional rights collide.

“In cases where equally important constitutional rights may collide then it would seem that under some circumstances, rare though they will be, that an accommodation of some sort must be reached.” 194 Neb., at 798-799, 236 N. W. 2d, at 803-804.

Thus, at least when reporting of information “strongly implicative” of the accused also reflects on official actions, a particularized analysis of the need to disseminate the information is contemplated even by those who believe prior restraints might sometimes be justifiable with respect to commentary on the criminal justice system.

[34] Prior restraints may also effectively curtail the incentives for independent investigative work by the media which could otherwise uncover evidence of guilt or exonerating evidence that nevertheless threatens the Sixth Amendment rights of others by strongly implicating them in illegal activity.

[35] Indeed, to the extent media notified of the restraint proceedings choose not to appear in light of the cost and time potentially involved in overturning any restraint ultimately imposed, there will be no presentation of the countervailing public interest in maintaining a free flow of information, as opposed to the interests of prosecution, defense, and judges in maintaining fair proceedings.

[36] For example, in this case the restraints only applied to petitioners, who improperly intervened in the criminal case and thus subjected themselves to the court's jurisdiction. The numerous *amici*, however, were not subject to the restraining orders and were free to disseminate prejudicial information in the same areas in which petitioners were precluded from doing so.

[37] Cf. *New York Times Co. v. United States*, 403 U. S., at 733 (WHITE, J., joined by STEWART, J., concurring).

[38] In this case, prior restraints were in effect for over 11 weeks, and yet by the time those restraints expired, appellate review had not yet been exhausted. Moreover, appellate courts might not accord these cases the expedited hearings they so clearly would merit. See Tr. of Oral Arg. 43-48.

[39] As we observed in *Bridges v. California*, 314 U. S., at 268, which held that the convictions of a newspaper publisher and editor for contempt, based on editorial comment concerning pending cases, were violative of the First Amendment:

“It must be recognized that public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist. Since they punish utterances made during the pendency of a case, the judgments below therefore produce their restrictive results at the precise time when public interest in the matters discussed would naturally be at its height. Moreover, the ban is likely to fall not only at a crucial time but upon the most important topics of discussion.

“No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ration to the timeliness and importance of the ideas seeking expression. Yet, it would follow as a practical result of the decisions below that anyone who might wish to give public expression to his views on a pending case involving no matter what problem of public interest, just at the time his audience would be most receptive, would be as effectively discouraged as if a deliberate statutory scheme of censorship had been adopted. . . .

“This unfocused threat is, to be sure, limited in time, terminating as it does upon final disposition of the case. But this does not change its censorial quality. An endless series of moratoria on public discussion, even if each were very short, could hardly be dismissed as an insignificant abridgment of freedom of expression. And to assume that each would be short is to overlook the fact that the ‘pendency’ of a case is frequently a matter of months or even years rather than days or weeks.” *Id.*, at 269.

See also *id.*, at 277-278; *Carroll v. Princess Anne*, 393 U. S., at 182; *Wood v. Georgia*, 370 U. S., at 392; *Pennekamp v. Florida*, 328 U. S., at 346-347.

[40] The editor and publisher of *amicus* Anniston (Ala.) Star poignantly depicted in a letter to counsel the likely plight of such small, independent newspapers if the power to impose prior restraints against pretrial publicity were recognized:

“Small town dailies would be the unknown, unseen and friendless victims if the Supreme Court upholds the order of Judge Stuart. If the already irresistible powers of the judiciary are swollen by absorbing an additional function, that of government censor, the chilling effect upon vigorous public debate would be deepest in the thousands of small towns where independent, locally owned, daily and weekly newspapers are published.

“Our papers are not read in the White House, the Congress, the Supreme Court or by network news executives. The causes for which we contend and the problems we face are invisible to the world of power and intellect. We have no in-house legal staff. We retain no great, national law firms. We do not have spacious profits with which to defend ourselves and our principles, all the way to the Supreme Court, each and every time we feel them to be under attack.

“Our only alternative is obedient silence. You hear us when we speak now. Who will notice if we are silenced? The small town press will be the unknown soldier of a war between the First and Sixth Amendments, a war that should never have been declared, and can still be avoided.

“Only by associating ourselves in this brief with our stronger brothers are we able to raise our voices on this issue at all, but I am confident that the Court will listen to us because we represent the most defenseless among the petitioners.” Brief for Washington Post Co. et al. as *Amici Curiae* 31-32.

[41] There is also the danger that creation of a second “narrow” category of exceptions to the rule against prior restraints would be interpreted as a license to create further “narrow” exceptions when some “justification” for overcoming a mere “presumption” of unconstitutionality is presented. Such was the reasoning which eventuated in this litigation in the first place. See *supra*, at 582-583.

**U.S. Supreme Court**

**Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1976)**

**Nebraska Press Assn. v. Stuart**

**No. 75-817**

**Argued April 19, 1976**

**Decided June 30, 1976**

**427 U.S. 539**

*CERTIORARI TO THE SUPREME COURT OF NEBRASKA*

*Syllabus*

Respondent Nebraska state trial judge, in anticipation of a trial for a multiple murder which had attracted widespread news coverage, entered an order which, as modified by the Nebraska Supreme Court, restrained petitioner newspapers, broadcasters, journalists, news media associations, and national newswire services from publishing or broadcasting accounts of confessions or admissions made by the accused to law enforcement officers or third parties, except members of the press, and other facts "strongly implicative" of the accused. The modification of the order had occurred in the course of an action by petitioners, which had sought a stay of the trial court's original order and in which the accused and the State of Nebraska intervened. This Court granted certiorari to determine whether the order violated the constitutional guarantee of freedom of the press. The order expired by its own terms when the jury was impaneled. Respondent was convicted; his appeal is pending in the Nebraska Supreme Court.

*Held:*

1. The case is not moot simply because the order has expired, since the controversy between the parties is "capable of repetition, yet evading review." Pp. [427 U. S. 546-547](#).
2. While the guarantees of freedom of expression are not an absolute prohibition under all circumstances, the barriers to prior restraint remain high and the presumption against its use continues intact. Although it is unnecessary to establish a priority between First Amendment rights and the Sixth Amendment right to a fair trial under all circumstances, as the authors of the Bill of Rights themselves declined to do, the protection against prior restraint should have particular force as applied to reporting of criminal proceedings. Pp. [427 U. S. 556-562](#).
3. The heavy burden imposed as a condition to securing a prior restraint was not met in this case. Pp. [427 U. S. 562-570](#).
  - (a) On the pretrial record, the trial judge was justified in concluding that there would be intense and pervasive pretrial publicity concerning the case, and he could also reasonably

conclude, based on common human experience, that publicity might impair the accused's right to a fair trial. His conclusion as to the impact of such publicity on prospective jurors was of necessity speculative, however, dealing as he was with factors unknown and unknowable. Pp. [427 U. S. 562-563](#).

(b) There is no finding that measures short of prior restraint on the press and speech would not have protected the accused's rights; the Nebraska Supreme Court no more than implied that alternative measures might not suffice, and the record lacks evidence that would support such a finding. Pp. [427 U. S. 563-565](#).

(c) It is not clear that prior restraint on publication would have effectively protected the accused's rights, in view of such practical problems as the limited territorial jurisdiction of the trial court issuing the restraining order, the difficulties inherent in predicting what information will in fact undermine the jurors' impartiality, the problem of drafting an order that will effectively keep prejudicial information from prospective jurors, and the fact that in this case the events occurred in a small community where rumors would travel swiftly by word of mouth. Pp. [427 U. S. 565-567](#).

(d) To the extent that the order prohibited the reporting of evidence adduced at the open preliminary hearing held to determine whether the accused should be bound over for trial, it violated the settled principle that "there is nothing that proscribes the press from reporting events that transpire in the courtroom," *Sheppard v. Maxwell*, [384 U. S. 333](#), [384 U. S. 362-363](#), and the portion of the order restraining publication of other facts "strongly implicative" of the accused is too vague and too broad to survive the scrutiny given to restraints on First Amendment rights. Pp. [427 U. S. 567-568](#).

194 Neb. 783, 236 N.W.2d 794, reversed.

BURGER, C.J., delivered the opinion of the Court, in which WHITE, BLACKMUN, POWELL, and REHNQUIST, JJ., joined. WHITE, J., *post*, p. [427 U. S. 570](#), and POWELL, J., *post*, p. [427 U. S. 571](#), filed concurring opinions. BRENNAN, J., filed an opinion concurring in the judgment, in which STEWART and MARSHALL, JJ., joined, *post*, p. [427 U. S. 572](#). STEVENS, J., filed an opinion concurring in the judgment, *post*, p. [427 U. S. 617](#).

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MR. CHIEF JUSTICE BURGER delivered the opinion of the Court.

The respondent State District Judge entered an order restraining the petitioners from publishing or broadcasting accounts of confessions or admissions made by the accused or facts "strongly implicative" of the accused in a widely reported murder of six persons. We granted certiorari to decide whether the entry of such an order on the showing made before the state court violated the constitutional guarantee of freedom of the press.

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**I**

On the evening of October 18, 1975, local police found the six members of the Henry Kellie family murdered in their home in Sutherland, Neb. a town of about 850 people. Police released the description of a suspect, Erwin Charles Simants, to the reporters who had hastened to the scene of the crime. Simants was arrested and arraigned in Lincoln County Court the following morning, ending a tense night for this small rural community.

The crime immediately attracted widespread news coverage, by local, regional, and national newspapers, radio and television stations. Three days after the crime, the County Attorney and Simants' attorney joined in asking the County Court to enter a restrictive order relating to "matters that may or may not be publicly reported or disclosed to the public," because of the "mass coverage by news media" and the

"reasonable likelihood of prejudicial news which would make difficult, if not impossible, the impaneling of an impartial jury and tend to prevent a fair trial."

The County Court heard oral argument, but took no evidence; no attorney for members of the press appeared at this stage. The County Court granted the prosecutor's motion for a restrictive order and entered it the next day, October 22. The order prohibited everyone in attendance from

"releas[ing] or authoriz[ing] the release for public dissemination in any form or manner whatsoever any testimony given or evidence adduced;"

the order also required members of the press to observe the Nebraska Bar-Press Guidelines. [\[Footnote 1\]](#)

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Simants' preliminary hearing was held the same day, open to the public but subject to the order. The County Court bound over the defendant for trial to the State District Court. The charges, as amended to reflect the autopsy findings, were that Simants had committed the murders in the course of a sexual assault.

Petitioners -- several press and broadcast associations, publishers, and individual reporters -- moved on October 23 for leave to intervene in the District Court, asking that the restrictive order imposed by the County Court be vacated. The District Court conducted a hearing, at which the County Judge testified and newspaper articles about the Simants case were admitted in evidence. The District Judge granted petitioners' motion to intervene and, on October 27, entered his own restrictive order. The judge found, "because of the nature of the crimes charged in the complaint that there, is a clear and present danger that pretrial publicity could impinge upon the defendant's right to a fair trial." The order applied only until the jury was impaneled, and specifically prohibited petitioners from reporting five subjects: (1) the existence or contents of a confession Simants had made to law enforcement officers, which had been introduced in open court at arraignment; (2) the fact or nature of statements Simants had made to other persons; (3) the contents of a note he had written the night of the crime; (4) certain aspects of the medical testimony at the preliminary hearing; and (5) the identity of the

victims of the alleged sexual assault and the nature of the assault. It also prohibited reporting the exact nature of the restrictive order itself. Like the County Court's order, this order incorporated the Nebraska Bar-Press Guidelines. Finally, the order set out a plan for attendance, seating, and courthouse traffic control during the trial.

Four days later, on October 31, petitioners asked the District Court to stay its order. At the same time, they applied to the Nebraska Supreme Court for a writ of mandamus, a stay, and an expedited appeal from the order. The State of Nebraska and the defendant Simants intervened in these actions. The Nebraska Supreme Court heard oral argument on November 25, and issued its per curiam opinion December 1. *State v. Simants*, 194 Neb. 783, 236 N.W.2d 794 (1975). [[Footnote 2](#)]

The Nebraska Supreme Court balanced the "heavy presumption against . . . constitutional validity" that an order restraining publication bears, *New York Times Co. v. United States*, [403 U. S. 713](#), [403 U. S. 714](#) (1971), against the importance of the defendant's right to trial by an impartial jury. Both society and the individual defendant, the court held, had a vital interest in assuring that Simants be tried by an impartial jury. Because of the publicity surrounding the crime, the court determined that this right was in jeopardy. The court noted that Nebraska statutes required the District Court to try Simants within six months of his arrest, and that a change of venue could move the trial only to adjoining counties, which had been subject to essentially the same publicity as Lincoln County. The Nebraska Supreme Court held that "[u]nless the absolutist position of the relators was constitutionally correct, it would appear that the District Court acted properly." 194 Neb. at 797, 236 N.W.2d at 803.

The Nebraska Supreme Court rejected that "absolutist position," but modified the District Court's order to accommodate the defendant's right to a fair trial and the petitioners' interest in reporting pretrial events. The order as modified prohibited reporting of only three matters: (a) the existence and nature of any confessions or admissions made by the defendant to law enforcement officers, (b) any confessions or admissions made to any third parties, except members of the press, and (c) other facts "strongly implicative" of the accused. The Nebraska Supreme Court did not rely on the Nebraska Bar Press Guidelines. *See* [n 1](#), *supra*. After construing Nebraska law to permit closure in certain circumstances, the court remanded the case to the District Judge for reconsideration of the issue whether pretrial hearings should be closed to the press and public.

We granted certiorari to address the important issues raised by the District Court order as modified by the Nebraska Supreme Court, but we denied the motion to expedite review or to stay entirely the order of the State District Court pending Simants' trial. [423 U. S. 1027](#) (1975). We are informed by the parties that, since we granted certiorari, Simants has been convicted of murder and sentenced to death. His appeal is pending in the Nebraska Supreme Court.

## II

The order at issue in this case expired by its own terms when the jury was impaneled on January 7, 1976. There were no restraints on publication once the jury was selected, and there are now no restrictions on what may be spoken or written about the Simants case. Intervenor Simants argues that for this reason the case is moot.

Our jurisdiction under Art. III, § 2, of the Constitution extends only to actual cases and controversies. *Indianapolis School Comm'rs v. Jacobs*, [420 U. S. 128](#) (1975); *Sosna v. Iowa*, [419 U. S. 393](#), [419 U. S. 397-403](#) (1975). The Court has recognized, however, that jurisdiction is not necessarily defeated simply because the order attacked has expired, if the underlying dispute between the parties is one "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. ICC*, [219 U. S. 498](#), [219 U. S. 515](#) (1911).

The controversy between the parties to this case is "capable of repetition" in two senses. First, if Simants' conviction is reversed by the Nebraska Supreme Court and a new trial ordered, the District Court may enter another restrictive order to prevent a resurgence of prejudicial publicity before Simants' retrial. Second, the State of Nebraska is a party to this case; the Nebraska Supreme Court's decision authorizes state prosecutors to

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seek restrictive orders in appropriate cases. The dispute between the State and the petitioners who cover events throughout the State is thus "capable of repetition." Yet, if we decline to address the issues in this case on grounds of mootness, the dispute will evade review, or at least considered plenary review in this Court, since these orders are by nature short-lived. *See, e.g., Weinstein v. Bradford*, [423 U. S. 147](#) (1975); *Sosna v. Iowa, supra*; *Roe v. Wade*, [410 U. S. 113](#), [410 U. S. 125](#) (1973); *Moore v. Ogilvie*, [394 U. S. 814](#), [394 U. S. 816](#) (1969); *Carroll v. Princess Anne*, [393 U. S. 175](#), [393 U. S. 178-179](#) (1968). We therefore conclude that this case is not moot, and proceed to the merits.

## III

The problems presented by this case are almost as old as the Republic. Neither in the Constitution nor in contemporaneous writings do we find that the conflict between these two important rights was anticipated, yet it is inconceivable that the authors of the Constitution were unaware of the potential conflicts between the right to an unbiased jury and the guarantee of freedom of the press. The unusually able lawyers who helped write the Constitution and later drafted the Bill of Rights were familiar with the historic episode in which John Adams defended British soldiers charged with homicide for firing into a crowd of Boston demonstrators; they were intimately familiar with the clash of the adversary system and the part that passions of the populace sometimes play in influencing potential jurors. They did not address themselves directly to the situation presented by this case; their chief concern was the need for freedom of expression in the political arena and the dialogue in ideas. But they recognized that there were risks to private rights from an unfettered press. Jefferson, for example,

writing from Paris in 1786 concerning press attacks on John Jay, stated:

"In truth, it is afflicting that a man who has past his life in serving the public . . . should yet be liable to have his peace of mind so much disturbed by any individual who shall think proper to arraign him in a newspaper. It is, however, an evil for which there is no remedy. Our liberty depends on the freedom of the press, and that cannot be limited without being lost. . . ."

9 Papers of Thomas Jefferson 239 (J. Boyd ed.1954). *See also* F. Mott, Jefferson and the Press 21, 38-46 (1943).

The trial of Aaron Burr in 1807 presented Mr. Chief Justice Marshall, presiding as a trial judge, with acute problems in selecting an unbiased jury. Few people in the area of Virginia from which jurors were drawn had not formed some opinions concerning Mr. Burr or the case, from newspaper accounts and heightened discussion both private and public. The Chief Justice conducted a searching *voir dire* of the two panels eventually called, and rendered a substantial opinion on the purposes of *voir dire* and the standards to be applied. *See* 1 Causes Celebres, Trial of Aaron Burr for Treason 40427, 473481 (1879); *United States v. Burr*, 25 F.Cas. 49 (No. 14,692g) (CC Va. 1807). Burr was acquitted, so there was no occasion for appellate review to examine the problem of prejudicial pretrial publicity. Mr. Chief Justice Marshall's careful *voir dire* inquiry into the matter of possible bias makes clear that the problem is not a new one.

The speed of communication and the pervasiveness of the modern news media have exacerbated these problems, however, as numerous appeals demonstrate. The trial of Bruno Hauptmann in a small New Jersey community for

the abduction and murder of the Charles Lindberghs' infant child probably was the most widely covered trial up to that time, and the nature of the coverage produced widespread public reaction. Criticism was directed at the "carnival" atmosphere that pervaded the community and the courtroom itself. Responsible leaders of press and the legal profession -- including other judges -- pointed out that much of this sorry performance could have been controlled by a vigilant trial judge and by other public officers subject to the control of the court. *See generally* Hudson, Freedom of the Press Versus Fair Trial: The Remedy Lies With the Courts, 1 Val.U.L.Rev. 8, 114 (1966); Hallam, Some Object Lessons on Publicity in Criminal Trials, 24 Minn.L.Rev. 453 (1940); Lippmann, The Lindbergh Case in Its Relation to American Newspapers, in Problems of Journalism 154-156 (1936).

The excesses of press and radio and lack of responsibility of those in authority in the *Hauptmann* case and others of that era led to efforts to develop voluntary guidelines for courts, lawyers, press, and broadcasters. *See generally* J. Lofton, Justice and the Press 117-130 (1966). [\[Footnote 3\]](#) The effort was renewed in 1965, when the American Bar Association embarked on a project to develop standards for all aspects

of criminal justice, including guidelines to accommodate the right to a fair trial and the rights of a free press. *See* Powell, *The Right to a*

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Fair Trial, 51 A.B.A.J. 534 (1965). The resulting standards, approved by the Association in 1968, received support from most of the legal profession. American Bar Association Project on Standards for Criminal Justice, *Fair Trial and Free Press* (Approved Draft 1968). Other groups have undertaken similar studies. *See* Report of the Judicial Conference Committee on the Operation of the Jury System, "Free Press-Fair Trial" Issue, 45 F.R.D. 391 (1968); Special Committee on Radio, Television, and the Administration of Justice of the Association of the Bar of the City of New York, *Freedom of the Press and Fair Trial* (1967). In the wake of these efforts, the cooperation between bar associations and members of the press led to the adoption of voluntary guidelines like Nebraska's. *See* [n 1, supra](#); American Bar Association Legal Advisory Committee on Fair Trial and Free Press, *The Rights of Fair Trial and Free Press* 1-6 (1969).

In practice, of course, even the most ideal guidelines are subjected to powerful strains when a case such as *Simants'* arises, with reporters from many parts of the country on the scene. Reporters from distant places are unlikely to consider themselves bound by local standards. They report to editors outside the area covered by the guidelines, and their editors are likely to be guided only by their own standards. To contemplate how a state court can control acts of a newspaper or broadcaster outside its jurisdiction, even though the newspapers and broadcasts reach the very community from which jurors are to be selected, suggests something of the practical difficulties of managing such guidelines.

The problems presented in this case have a substantial history outside the reported decisions of courts, in the efforts of many responsible people to accommodate the competing interests. We cannot resolve all of them, for

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it is not the function of this Court to write a code. We look instead to this particular case and the legal context in which it arises.

#### IV

The Sixth Amendment in terms guarantees "trial, by an impartial jury . . ." in federal criminal prosecutions. Because "trial by jury in criminal cases is fundamental to the American scheme of justice," the Due Process Clause of the Fourteenth Amendment guarantees the same right in state criminal prosecutions. *Duncan v. Louisiana*, [391 U. S. 145](#), [391 U. S. 149](#) (1968).

"In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. . . . 'A fair trial in a fair tribunal is a basic requirement of due process.' *In re Murchison*, [349 U. S. 133](#), [349 U. S. 136](#). In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the

language of Lord Coke, a juror must be as 'indifferent as he stands unsworne.' Co.Litt. 155b. His verdict must be based upon the evidence developed at the trial."

*Irvin v. Dowd*, [366 U. S. 717](#), [366 U. S. 722](#) (1961).

In the overwhelming majority of criminal trials, pretrial publicity presents few unmanageable threats to this important right. But when the case is a "sensational" one, tensions develop between the right of the accused to trial by an impartial jury and the rights guaranteed others by the First Amendment. The relevant decisions of this Court, even if not dispositive, are instructive by way of background.

In *Irvin v. Dowd*, *supra*, for example, the defendant was convicted of murder following intensive and hostile news coverage. The trial judge had granted a defense motion for a change of venue, but only to an

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adjacent county, which had been exposed to essentially the same news coverage. At trial, 430 persons were called for jury service; 268 were excused because they had fixed opinions as to guilt. Eight of the 12 who served as jurors thought the defendant guilty, but said they could nevertheless render an impartial verdict. On review, the Court vacated the conviction and death sentence and remanded to allow a new trial for, "[w]ith his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion. . . ." 366 U.S. at [366 U. S. 728](#).

Similarly, in *Rideau v. Louisiana*, [373 U. S. 723](#) (1963), the Court reversed the conviction of a defendant whose staged, highly emotional confession had been filmed with the cooperation of local police and later broadcast on television for three days while he was awaiting trial, saying "[a]ny subsequent court proceedings in a community so pervasively exposed to such a spectacle could be but a hollow formality." *Id.* at [373 U. S. 726](#). And in *Estes v. Texas*, [381 U. S. 532](#) (1965), the Court held that the defendant had not been afforded due process where the volume of trial publicity, the judge's failure to control the proceedings, and the telecast of a hearing and of the trial itself "inherently prevented a sober search for the truth." *Id.* at [381 U. S. 551](#). See also *Marshall v. United States*, [360 U. S. 310](#) (1959)

In *Sheppard v. Maxwell*, [384 U. S. 333](#) (1966), the Court focused sharply on the impact of pretrial publicity and a trial court's duty to protect the defendant's constitutional right to a fair trial. With only Mr. Justice Black dissenting, and he without opinion, the Court ordered a new trial for the petitioner, even though the first trial had occurred 12 years before. Beyond doubt, the press had shown no responsible concern for the constitutional guarantee of a fair trial; the community

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from which the jury was drawn had been inundated by publicity hostile to the defendant. But the trial judge

"did not fulfill his duty to protect [the defendant] from the inherently prejudicial publicity which saturated the community and to control disruptive influences in the courtroom."

*Id.* at [384 U. S. 363](#). The Court noted that "unfair and prejudicial news comment on pending trials has become increasingly prevalent," *id.* at [384 U. S. 362](#), and issued a strong warning:

"Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, *the trial courts must take strong measures to ensure that the balance is never weighed against the accused.* . . . Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should *continue the case* until the threat abates, *or transfer it* to another county not so permeated with publicity. In addition, *sequestration of the jury* was something the judge should have raised *sua sponte* with counsel. If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences. *Neither prosecutors, counsel for defense, the accused, witnesses, court staff nor enforcement officers coming under the jurisdiction of the*

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*court should be permitted to frustrate its function.* Collaboration between counsel and the press as to information affecting the fairness of a criminal trial is not only subject to regulation, but is highly censurable and worthy of disciplinary measures."

*Id.* at [384 U. S. 362-363](#) (emphasis added). Because the trial court had failed to use even minimal efforts to insulate the trial and the jurors from the "deluge of publicity," *id.* at [384 U. S. 357](#), the Court vacated the judgment of conviction and a new trial followed, in which the accused was acquitted.

Cases such as these are relatively rare, and we have held in other cases that trials have been fair in spite of widespread publicity. In *Stroble v. California*, [343 U. S. 181](#) (1952), for example, the Court affirmed a conviction and death sentence challenged on the ground that pretrial news accounts, including the prosecutor's release of the defendant's recorded confession, were allegedly so inflammatory as to amount to a denial of due process. The Court disapproved of the prosecutor's conduct, but noted that the publicity had receded some six weeks before trial, that the defendant had not moved for a change of venue, and that the confession had been found voluntary and admitted in evidence at trial. The Court also noted the thorough examination of jurors on *voir dire* and the careful review of the facts by the state courts, and held that petitioner had failed to demonstrate a denial of due process. *See also* *Murphy v. Florida*, [421 U. S. 794](#) (1975); *Beck v. Washington*, [369 U. S. 541](#) (1962).

Taken together, these cases demonstrate that pretrial publicity even pervasive, adverse publicity -- does not inevitably lead to an unfair trial. The capacity of the jury eventually impaneled to decide the case fairly is influenced by the tone and extent of the publicity,

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which is in part, and often in large part, shaped by what attorneys, police, and other officials do to precipitate news coverage. The trial judge has a major responsibility. What the judge says about a case, in or out of the courtroom, is likely to appear in newspapers and broadcasts. More important, the measures a judge takes or fails to take to mitigate the effects of pretrial publicity -- the measures described in *Sheppard* -- may well determine whether the defendant receives a trial consistent with the requirements of due process. That this responsibility has not always been properly discharged is apparent from the decisions just reviewed.

The costs of failure to afford a fair trial are high. In the most extreme cases, like *Sheppard* and *Estes*, the risk of injustice was avoided when the convictions were reversed. But a reversal means that justice has been delayed for both the defendant and the State; in some cases, because of lapse of time retrial is impossible or further prosecution is gravely handicapped. Moreover, in borderline cases in which the conviction is not reversed, there is some possibility of an injustice unredressed. The "strong measures" outlined in *Sheppard v. Maxwell* are means by which a trial judge can try to avoid exacting these costs from society or from the accused.

The state trial judge in the case before us acted responsibly, out of a legitimate concern, in an effort to protect the defendant's right to a fair trial. [\[Footnote 4\]](#) What we must decide is not simply whether the Nebraska courts erred

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in seeing the possibility of real danger to the defendant's rights, but whether in the circumstances of this case the means employed were foreclosed by another provision of the Constitution.

V

The First Amendment provides that "Congress shall make no law . . . abridging the freedom . . . of the press," and it is

"no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action."

*Near v. Minnesota ex rel. Olson*, [283 U. S. 697](#), [283 U. S. 707](#) (1931). *See also Grosjean v. American Press Co.*, [297 U. S. 233](#), [297 U. S. 244](#) (1936). The Court has interpreted these guarantees to afford special protection against orders that prohibit the publication or broadcast of particular information or commentary -- orders that impose a "previous" or "prior" restraint on speech. None of our decided cases on prior restraint involved restrictive orders entered to protect a defendant's right to a fair and

impartial jury, but the opinions on prior restraint have a common thread relevant to this case.

In *Near v. Minnesota ex rel. Olson*, *supra*, the Court held invalid a Minnesota statute providing for the abatement as a public nuisance of any "malicious, scandalous and defamatory newspaper, magazine or other periodical." Near had published an occasional weekly newspaper described by the County Attorney's complaint as "largely devoted to malicious, scandalous and defamatory articles" concerning political and other public figures. 283 U.S. at [283 U. S. 703](#). Publication was enjoined pursuant to the statute. Excerpts from Near's paper, set out in the dissenting opinion of Mr. Justice Butler, show beyond question that one of its principal characteristics was blatant anti-Semitism. *See id.* at [283 U. S. 723](#), [283 U. S. 724-727](#), n. 1.

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Mr. Chief Justice Hughes, writing for the Court, noted that freedom of the press is not an absolute right, and the State may punish its abuses. He observed that the statute was "not aimed at the redress of individual or private wrongs." *Id.* at [283 U. S. 708](#), [283 U. S. 709](#). He then focused on the statute:

"[T]he operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter . . . and unless the owner or publisher is able . . . to satisfy the judge that the [matter is] true and . . . published with good motives . . . his newspaper or periodical is suppressed. . . . This is of the essence of censorship."

*Id.* at [283 U. S. 713](#). The Court relied on *Patterson v. Colorado ex rel. Attorney General*, [205 U. S. 454](#), [205 U. S. 462](#) (1907):

"[T]he main purpose of [the First Amendment] is 'to prevent all such *previous restraints* upon publications as had been practiced by other governments.' [[Footnote 5](#)]"

The principles enunciated in *Near* were so universally accepted that the precise issue did not come before us again until *Organization for a Better Austin v. Keefe*,

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[402 U. S. 415](#) (1971). There the state courts had enjoined the petitioners from picketing or passing out literature of any kind in a specified area. Noting the similarity to *Near v. Minnesota*, a unanimous Court held:

"Here, as in that case, the injunction operates not to redress alleged private wrongs, but to suppress, on the basis of previous publications, distribution of literature 'of any kind' in a city of 18,000."

"\* \* \* \*"

"Any prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity. *Carroll v. Princess Anne*, [393 U. S. 175](#), [393 U. S. 181](#) (1968); *Bantam Books, Inc. v. Sullivan*, [372 U. S. 58](#), [372 U. S. 70](#) (1963). Respondent thus carries a heavy burden of showing justification for the imposition of such a restraint. He has not met that burden. . . . Designating the conduct as an invasion of privacy, the apparent basis for the injunction here, is not sufficient to support an injunction against peaceful distribution of informational literature of the nature revealed by this record."

402 U.S. at [402 U. S. 418-420](#).

More recently in *New York Times Co. v. United States*, [403 U. S. 713](#) (1971), the Government sought to enjoin the publication of excerpts from a massive, classified study of this Nation's involvement in the Vietnam conflict, going back to the end of the Second World War. The dispositive opinion of the Court simply concluded that the Government had not met its heavy burden of showing justification for the prior restraint. Each of the six concurring Justices and the three dissenting Justices expressed his views separately, but

"every member of the Court, tacitly or explicitly, accepted the *Near* and *Keefe* condemnation of prior restraint as presumptively unconstitutional."

[\*Pittsburgh Press Co. v. Human Rel.\*](#)

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*Comm'n*, [413 U. S. 376](#), [413 U. S. 396](#) (1973) (BURGER, C.J., dissenting). The Court's conclusion in *New York Times* suggests that the burden on the Government is not reduced by the temporary nature of a restraint; in that case the Government asked for a temporary restraint solely to permit it to study and assess the impact on national security of the lengthy documents at issue.

The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights. A criminal penalty or a judgment in a defamation case is subject to the whole panoply of protections afforded by deferring the impact of the judgment until all avenues of appellate review have been exhausted. Only after judgment has become final, correct or otherwise, does the law's sanction become fully operative.

A prior restraint, by contrast and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication "chills" speech, prior restraint "freezes" it at least for the time. [[Footnote 6](#)]

The damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events. Truthful reports of public judicial proceedings have been afforded special protection against subsequent punishment. *See Cox Broadcasting Corp v. Cohn*, [420 U. S. 469](#), [420 U. S. 492-493](#)(1975); *see also, Craig v. Harney*, [331 U. S. 367](#), [331 U. S. 374](#) (1947). For the same reasons the protection against prior restraint should have particular force as

applied to reporting of criminal proceedings, whether the crime in question is a single isolated act or a pattern of criminal conduct.

"A responsible press has always been regarded as

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the handmaiden of effective judicial administration, especially in the criminal field. Its function in this regard is documented by an impressive record of service over several centuries. The press does not simply publish information about trials, but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."

*Sheppard v. Maxwell*, 384 U.S. at [384 U. S. 350](#). The extraordinary protections afforded by the First Amendment carry with them something in the nature of a fiduciary duty to exercise the protected rights responsibly -- a duty widely acknowledged but not always observed by editors and publishers. It is not asking too much to suggest that those who exercise First Amendment rights in newspapers or broadcasting enterprises direct some effort to protect the rights of an accused to a fair trial by unbiased jurors.

Of course, the order at issue like the order requested in *New York Times* -- does not prohibit, but only postpones, publication. Some news can be delayed, and most commentary can even more readily be delayed without serious injury, and there often is a self-imposed delay when responsible editors call for verification of information. But such delays are normally slight, and they are self-imposed. Delays imposed by governmental authority are a different matter.

"We have learned, and continue to learn, from what we view as the unhappy experiences of other nations where government has been allowed to meddle in the internal editorial affairs of newspapers. Regardless of how beneficent-sounding the purposes of controlling the press might be, we . . . remain intensely skeptical about those measures that would allow government to insinuate itself into the editorial

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rooms of. this Nation's press."

*Miami Herald Publishing Co. v. Tornillo*, [418 U. S. 241](#), [418 U. S. 259](#) (1974) (WHITE, J., concurring). See also *Columbia Broadcasting v. Democratic Comm.*, [412 U. S. 94](#) (1973). As a practical matter, moreover, the element of time is not unimportant if press coverage is to fulfill its traditional function of bringing news to the public promptly.

The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other. In this case, the petitioners would have us declare the right of an accused subordinate to their right to publish in all circumstances. But if the authors of these guarantees, fully aware of the potential conflicts between them, were unwilling or unable to resolve the issue by assigning to one priority over the other, it is not for us to rewrite

the Constitution by undertaking what they declined to do. It is unnecessary, after nearly two centuries, to establish a priority applicable in all circumstances. Yet it is nonetheless clear that the barriers to prior restraint remain high unless we are to abandon what the Court has said for nearly a quarter of our national existence and implied throughout all of it. The history of even wartime suspension of categorical guarantees, such as habeas corpus or the right to trial by civilian courts, See *Ex parte Milligan*, 4 Wall. 2 (1867), cautions against suspending explicit guarantees.

The Nebraska courts in this case enjoined the publication of certain kinds of information about the Simants case. There are, as we suggested earlier, marked differences in setting and purpose between the order entered here and the orders in *Near*, *Keefe*, and *New York Times*, but as to the underlying issue the right of the press to be free from prior restraints on publication -- those

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cases form the backdrop against which we must decide this case.

## VI

We turn now to the record in this case to determine whether, as Learned Hand put it, "the gravity of the evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *United States v. Dennis*, 183 F.2d 201, 212 (CA2 1950), *aff'd*, 341 U. S. 494 (1951); see also L. Hand, *The Bill of Rights* 58-61 (1958). To do so, we must examine the evidence before the trial judge when the order was entered to determine (a) the nature and extent of pretrial news coverage; (b) whether other measures would be likely to mitigate the effects of unrestrained pretrial publicity; and (c) how effectively a restraining order would operate to prevent the threatened danger. The precise terms of the restraining order are also important. We must then consider whether the record supports the entry of a prior restraint on publication, one of the most extraordinary remedies known to our jurisprudence.

### A

In assessing the probable extent of publicity, the trial judge had before him newspapers demonstrating that the crime had already drawn intensive news coverage, and the testimony of the County Judge, who had entered the initial restraining order based on the local and national attention the case had attracted. The District Judge was required to assess the probable publicity that would be given these shocking crimes prior to the time a jury was selected and sequestered. He then had to examine the probable nature of the publicity and determine how it would affect prospective jurors.

Our review of the pretrial record persuades us that the trial judge was justified in concluding that there would

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be intense and pervasive pretrial publicity concerning this case. He could also reasonably conclude, based on common human experience, that publicity might impair the defendant's right to a fair trial. He did not purport to say more, for he found only "a clear and present danger that pretrial publicity *could* impinge upon the defendant's right to a fair trial." (Emphasis added.) His conclusion as to the impact of such publicity on prospective jurors was, of necessity, speculative, dealing as he was with factors unknown and unknowable.

## B

We find little in the record that goes to another aspect of our task, determining whether measures short of an order restraining all publication would have insured the defendant a fair trial. Although the entry of the order might be read as a judicial determination that other measures would not suffice, the trial court made no express findings to that effect; the Nebraska Supreme Court referred to the issue only by implication. *See* 194 Neb. at 797-798, 236 N.W.2d at 803.

Most of the alternatives to prior restraint of publication in these circumstances were discussed with obvious approval in *Sheppard v. Maxwell*, 384 U.S. at [384 U. S. 357-362](#): (a) change of trial venue to a place less exposed to the intense publicity that seemed imminent in Lincoln County; [\[Footnote 7\]](#) (b) postponement of the trial to allow

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public attention to subside; (c) searching questioning of prospective jurors, as Mr. Chief Justice Marshall used in the *Burr* case, to screen out those with fixed opinions as to guilt or innocence; (d) the use of emphatic and clear instructions on the sworn duty of each juror to decide the issues only on evidence presented in open court. Sequestration of jurors is, of course, always available. Although that measure insulates jurors only after they are sworn, it also enhances the likelihood of dissipating the impact of pretrial publicity and emphasizes the elements of the jurors' oaths.

This Court has outlined other measures short of prior restraints on publication tending to blunt the impact of pretrial publicity. *See Sheppard v. Maxwell, supra* at [384 U. S. 361-362](#). Professional studies have filled out these suggestions, recommending that trial courts in appropriate cases limit what the contending lawyers, the police, and witnesses may say to anyone. *See American Bar Association Project on Standards for Criminal Justice, Fair Trial and Free Press 2-15* (App.Draft 168). [\[Footnote 8\]](#)

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We have noted earlier that pretrial publicity, even if pervasive and concentrated, cannot be regarded as leading automatically and in every kind of criminal case to an unfair trial. The decided cases

"cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process."

*Murphy v. Florida*, 421 U.S. at [421 U. S. 799](#). Appellate evaluations as to the impact of publicity take into account what other measures were used to mitigate the adverse effects of publicity. The more difficult prospective or predictive assessment that a trial judge must make also calls for a judgment as to whether other precautionary steps will suffice.

We have therefore examined this record to determine the probable efficacy of the measures short of prior restraint on the press and speech. There is no finding that alternative measures would not have protected Simants' rights, and the Nebraska Supreme Court did no more than imply that such measures might not be adequate. Moreover, the record is lacking in evidence to support such a finding.

C

We must also assess the probable efficacy of prior restraint on publication as a workable method of protecting Simants' right to a fair trial, and we cannot ignore the reality of the problems of managing and enforcing pretrial restraining orders. The territorial jurisdiction of the issuing court is limited by concepts of sovereignty, *see, e.g., Hanson v. Denckla*, [357 U. S. 235](#) (1958); *Pennoyer v. Neff*, [95 U. S. 714](#) (1878). The need for *in*

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*personam* jurisdiction also presents an obstacle to a restraining order that applies to publication at large a distinguished from restraining publication within a given Jurisdiction. [[Footnote 9](#)] *See generally* American Bar Association, Legal Advisory Committee on Fair Trial and Free Press, Recommended Court Procedure to Accommodate Rights of Fair Trial and Free Press (Rev. Draft, Nov.1975); Rendleman, Free Press-Fair Trial: Review of Silence Orders, 52 N.C.L.Rev. 127, 149-155 (1973). [[Footnote 10](#)]

The Nebraska Supreme Court narrowed the scope of the restrictive order, and its opinion reflects awareness of the tensions between the need to protect the accused as fully as possible and the need to restrict publication as little as possible. The dilemma posed underscores how

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difficult it is for trial judges to predict what information will, in fact, undermine the impartiality of jurors, and the difficulty of drafting an order that will effectively keep prejudicial information from prospective jurors. When a restrictive order is sought, a court can anticipate only part of what will develop that may injure the accused. But information not so obviously prejudicial may emerge, and what may properly be published in these "gray zone" circumstances may not violate the restrictive order and yet be prejudicial.

Finally, we note that the events disclosed by the record took place in a community of 850 people. It is reasonable to assume that, without any news accounts being printed or broadcast, rumors would travel swiftly by word of mouth. One can only speculate on the accuracy of such reports, given the generative propensities of rumors; they

could well be more damaging than reasonably accurate news accounts. But plainly a whole community cannot be restrained from discussing a subject intimately affecting life within it.

Given these practical problems, it is far from clear that prior restraint on publication would have protected Simants' rights.

#### D

Finally, another feature of this case leads us to conclude that the restrictive order entered here is not supportable. At the outset, the County Court entered a very broad restrictive order, the terms of which are not before us; it then held a preliminary hearing open to the public and the press. There was testimony concerning at least two incriminating statements made by Simants to private persons; the statement -- evidently a confession -- that he gave to law enforcement officials was also introduced. The State District Court's later order was entered after this public hearing and, as modified by the

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Nebraska Supreme Court, enjoined reporting of (1) "[c]onfessions or admissions against interest made by the accused to law enforcement officials"; (2) "[c]onfessions or admissions against interest, oral or written, if any, made by the accused to third parties, excepting any statements, if any, made by the accused to representatives of the news media"; and (3) all "[o]ther information strongly implicative of the accused as the perpetrator of the slayings." 194 Neb. at 801, 236 N.W.2d at 805.

To the extent that this order prohibited the reporting of evidence adduced at the open preliminary hearing, it plainly violated settled principles: "[T]here is nothing that proscribes the press from reporting events that transpire in the courtroom." *Sheppard v. Maxwell*, 384 U.S. at [384 U. S. 362-363](#). See also *Cox Broadcasting Corp. v. Cohn*, [420 U. S. 469](#) (1975); *Craig v. Harney*, [331 U. S. 367](#) (1947). The County Court could not know that closure of the preliminary hearing was an alternative open to it until the Nebraska Supreme Court so construed state law; but once a public hearing had been held, what transpired there could not be subject to prior restraint.

The third prohibition of the order was defective in another respect as well. As part of a final order, entered after plenary review, this prohibition regarding "implicative" information is too vague and too broad to survive the scrutiny we have given to restraints on First Amendment rights. See, e.g., *Hynes v. Mayor of Oradell*, [425 U. S. 610](#) (1976); *Buckley v. Valeo*, [424 U. S. 1](#), [424 U. S. 762](#) (1976); *NAACP v. Button*, [371 U. S. 415](#) (1963). The third phase of the order entered falls outside permissible limits.

#### E

The record demonstrates, as the Nebraska courts held, that there was indeed a risk that pretrial news accounts,

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true or false, would have some adverse impact on the attitudes of those who might be called as jurors. But, on the record now before us, it is not clear that further publicity, unchecked, would so distort the views of potential jurors that 12 could not be found who would, under proper instructions, fulfill their sworn duty to render a just verdict exclusively on the evidence presented in open court. We cannot say on this record that alternatives to a prior restraint on petitioners would not have sufficiently mitigated the adverse effects of pretrial publicity so as to make prior restraint unnecessary. Nor can we conclude that the restraining order actually entered would serve its intended purpose. Reasonable minds can have few doubts about the gravity of the evil pretrial publicity can work, but the probability that it would do so here was not demonstrated with the degree of certainty our cases on prior restraint require.

Of necessity, our holding is confined to the record before us. But our conclusion is not simply a result of assessing the adequacy of the showing made in this case; it results in part from the problems inherent in meeting the heavy burden of demonstrating, in advance of trial, that without prior restraint a fair trial will be denied. The practical problems of managing and enforcing restrictive orders will always be present. In this sense, the record now before us is illustrative, rather than exceptional. It is significant that, when this Court has reversed a state conviction because of prejudicial publicity, it has carefully noted that some course of action short of prior restraint would have made a critical difference. See *Sheppard v. Maxwell*, *supra* at [384 U. S. 363](#); *Estes v. Texas*, 381 U.S. at [381 U. S. 550-551](#); *Rideau v. Louisiana*, 373 U.S. at [373 U. S. 726](#); *Irwin v. Dowd*, 366 U.S. at [366 U. S. 728](#). However difficult it may be, we need not rule out the possibility of showing the kind of threat to fair trial rights that would possess

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the requisite degree of certainty to justify restraint. This Court has frequently denied that First Amendment rights are absolute and has consistently rejected the proposition that a prior restraint can never be employed. See *New York Times Co. v. United States*, [403 U. S. 713](#) (1971); *Organization for a Better Austin v. Keefe*, [402 U. S. 415](#) (1971); *Near v. Minnesota ex rel. Olson*, [283 U. S. 697](#) (1931).

Our analysis ends as it began, with a confrontation between prior restraint imposed to protect one vital constitutional guarantee and the explicit command of another that the freedom to speak and publish shall not be abridged. We reaffirm that the guarantees of freedom of expression are not an absolute prohibition under all circumstances, but the barriers to prior restraint remain high, and the presumption against its use continues intact. We hold that, with respect to the order entered in this case prohibiting reporting or commentary on judicial proceedings held in public, the barriers have not been overcome; to the extent that this order restrained publication of such material, it is clearly invalid. To the extent that it prohibited publication based on information gained from other sources, we conclude that the heavy burden imposed as a condition to securing a prior restraint was not met, and the judgment of the Nebraska Supreme Court is therefore

*Reversed.*

[\[Footnote 1\]](#)

These Guidelines are voluntary standards adopted by members of the state bar and news media to deal with the reporting of crimes and criminal trials. They outline the matters of fact that may appropriately be reported, and also list what items are not generally appropriate for reporting, including confessions, opinions on guilt or innocence, statements that would influence the outcome of a trial, the results of tests or examinations, comments on the credibility of witnesses, and evidence presented in the jury's absence. The publication of an accused's criminal record should, under the Guidelines, be "considered very carefully." The Guidelines also set out standards for taking and publishing photographs, and set up a joint bar-press committee to foster cooperation in resolving particular problems that emerge.

[\[Footnote 2\]](#)

In the interim, petitioners applied to MR. JUSTICE BLACKMUN as Circuit Justice for a stay of the State District Court's order. He postponed ruling on the application out of deference to the Nebraska Supreme Court, [423 U. S. 1319](#) (Nov. 13, 1975) (in chambers); when he concluded that the delay before that court had "exceed[ed] tolerable limits," he entered an order. [423 U. S. 1327](#), [423 U. S. 1329](#) (Nov. 20, 1975) (in chambers). We need not set out in detail MR. JUSTICE BLACKMUN's careful decision on this difficult issue. In essence he stayed the order insofar as it incorporated the admonitory Bar-Press Guidelines and prohibited reporting of some other matters. But he declined

"at least on an application for a stay and at this distance, [to] impose a prohibition upon the Nebraska courts from placing any restrictions at all upon what the media may report prior to trial."

*Id.* at 1332. He therefore let stand that portion of the District Court's order that prohibited reporting the existence or nature of a confession, and declined to prohibit that court from restraining publication of facts that were so "highly prejudicial" to the accused or "strongly implicative" of him that they would "irreparably impair the ability of those exposed to them to reach an independent and impartial judgment as to guilt." *Id.* at 1333. Subsequently, petitioners applied for a more extensive stay; this was denied by the full Court. [423 U. S. 1027](#) (1975).

[\[Footnote 3\]](#)

The Warren Commission conducting an inquiry into the murder of President Kennedy implied grave doubts whether, after the dissemination of "a great deal of misinformation" prejudicial to Oswald, a fair trial could be had. Report of the President's Commission on the Assassination of President John F. Kennedy 231 (1964). Probably the same could be said in turn with respect to a trial of Oswald's murderer even though a multitude were eyewitnesses to the guilty act. *See generally id.* at 231-242; Jaffe, Trial by Newspaper, 40 N.Y.U.L.Rev. 504 (1965); Powell, The Right to a Fair Trial, 51 A.B.A.J. 534 (1965).

[\[Footnote 4\]](#)

The record also reveals that counsel for both sides acted responsibly in this case, and there is no suggestion that either sought to use pretrial news coverage for partisan

advantage. A few days after the crime, newspaper accounts indicated that the prosecutor had announced the existence of a confession; we learned at oral argument that these accounts were false, although, in fact, a confession had been made. Tr. of Oral Arg. 337, 59.

[\[Footnote 5\]](#)

In *Near v. Minnesota*, Mr. Chief Justice Hughes was also able to say:

"There is also the conceded authority of courts to punish for contempt when publications directly tend to prevent the proper discharge of judicial functions."

283 U.S. at [283 U. S. 715](#). A subsequent line of cases limited sharply the circumstances under which courts may exact such punishment. *See Craig v. Harney*, [331 U. S. 367](#) (1947); *Pennekamp v. Florida*, [328 U. S. 331](#) (1946); *Bridges v. California*, [314 U. S. 252](#) (1941). Because these cases deal with punishment based on contempt, however, they deal with problems substantially different from those raised by prior restraint. *See also* Barist, *The First Amendment and Regulation of Prejudicial Publicity -- An Analysis*, 36 *Ford.L.Rev.* 425, 433-442 (1968).

[\[Footnote 6\]](#)

*See* A. Bickel, *The Morality of Consent* 61 (1975).

[\[Footnote 7\]](#)

The respondent and intervenors argue here that a change of venue would not have helped, since Nebraska law permits a change only to adjacent counties, which had been as exposed to pretrial publicity in this case as Lincoln County. We have held that state laws restricting venue must on occasion yield to the constitutional requirement that the State afford a fair trial. *Groppi v. Wisconsin*, [400 U. S. 505](#) (1971). We note also that the combined population of Lincoln County and the adjacent counties is over 80,000, providing a substantial pool of prospective jurors.

[\[Footnote 8\]](#)

Closing of pretrial proceedings with the consent of the defendant when required is also recommended in guidelines that have emerged from various studies. At oral argument, petitioners' counsel asserted that judicially imposed restraints on lawyers and others would be subject to challenge as interfering with press rights to news sources. Tr. of Oral Arg. 7-8. *See, e.g., Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (CA7 1975), *cert. denied sub nom. Cunningham v. Chicago Council of Lawyers, post*, p. 912. We are not now confronted with such issues.

We note that, in making its proposals, the American Bar Association recommended strongly against resort to direct restraints on the press to prohibit publication. American Bar Association Project on Standards for Criminal Justice, *Fair Trial and Free Press* 68-73 (App.Draft 1968). Other groups have reached similar conclusions. *See* Report of the Judicial Conference Committee on the Operation of the Jury System, "Free Press-Fair Trial" Issue, 45 *F.R.D.* 391, 401 403 (1968); Special

Committee on Radio, Television, and the Administration of Justice of the Association of the Bar of the City of New York, Freedom of the Press and Fair Trial 111 (1967).

[\[Footnote 9\]](#)

Here, for example, the Nebraska Supreme Court decided that the District Court had no jurisdiction of the petitioners except by virtue of their voluntary submission to the jurisdiction of that court when they moved to intervene. Except for the intervention which placed them within reach of the court, the Nebraska Supreme Court conceded, the petitioners "could have ignored the [restraining] order. . . ." *State v. Simants*, 194 Neb. 783, 795, 236 N.W.2d 794, 802 (1975).

[\[Footnote 10\]](#)

Assuming, *arguendo*, that these problems are within reach of legislative enactment, or that some application of evolving concepts of long-arm jurisdiction would solve the problems of personal jurisdiction, even a cursory examination suggests how awkwardly broad prior restraints on publication, directed not at named parties but at large, would fit into our jurisprudence. The British experience is in sharp contrast for a variety of reasons; Great Britain has a smaller and unitary court system permitting the development of a manageable system of prior restraints by the application of the constructive contempt doctrine. Cf. [n 5, supra at 557](#); see generally *Maryland v. Baltimore Radio Show*, [338 U. S. 912](#), [338 U. S. 921-936](#) (1950) (App. to opinion of Frankfurter, J., respecting denial of certiorari); Gillmor, *Free Press and Fair Trial in English Law*, 22 Wash. & Lee L.Rev. 17 (1965). Moreover, any comparison between the two systems must take into account that, although England gives a very high place to freedom of the press and speech, its courts are not subject to the explicit strictures of a written constitution.

MR. JUSTICE WHITE, concurring.

Technically, there is no need to go farther than the Court does to dispose of this case, and I join the Court's opinion. I should add, however, that, for the reasons which the Court itself canvasses, there is grave doubt in my mind whether orders with respect to the press such as were entered in this case would ever be justifiable.

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It may be the better part of discretion, however, not to announce such a rule in the first case in which the issue has been squarely presented here. Perhaps we should go no further than absolutely necessary until the federal courts, and ourselves, have been exposed to a broader spectrum of cases presenting similar issues. If the recurring result, however, in case after case is to be similar to our judgment today, we should at some point announce a more general rule, and avoid the interminable litigation that our failure to do so would necessarily entail.

MR. JUSTICE POWELL, concurring.

Although I join the opinion of the Court, in view of the importance of the case, I write to emphasize the unique burden that rests upon the party, whether it be the State or a

defendant, who undertakes to show the necessity for prior restraint on pretrial publicity. \*

In my judgment, a prior restraint properly may issue only when it is shown to be necessary to prevent the dissemination of prejudicial publicity that otherwise poses a high likelihood of preventing, directly and irreparably, the impaneling of a jury meeting the Sixth Amendment requirement of impartiality. This requires a showing that (i) there is a clear threat to the fairness of trial, (ii) such a threat is posed by the actual publicity to be restrained, and (iii) no less restrictive alternatives are available. Notwithstanding such a showing, a restraint may not issue unless it also is shown that previous publicity or publicity from unrestrained sources will not render the restraint inefficacious. The threat to the fairness

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of the trial is to be evaluated in the context of Sixth Amendment law on impartiality, and any restraint must comply with the standards of specificity always required in the First Amendment context.

I believe these factors are sufficiently addressed in the Court's opinion to demonstrate beyond question that the prior restraint here was impermissible.

\* In *Times-Picayune Pub. Corp. v. Schulingkamp*, [419 U. S. 1301](#), [419 U. S. 1307](#) (1974), an in-chambers opinion, I noted that there is a heavy presumption against the constitutional validity of a court order restraining pretrial publicity.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, concurring in the judgment.

The question presented in this case is whether, consistently with the First Amendment, a court may enjoin the press, in advance of publication, [[Footnote 2/1](#)] from reporting or commenting on information acquired from public court proceedings, public court records, or other sources about pending judicial proceedings. The Nebraska Supreme Court upheld such a direct prior restraint on the press, issued by the judge presiding over a sensational state murder trial, on the ground that there existed a

"clear and present danger that pretrial publicity could substantially impair the right of the defendant [in the murder trial] to a trial by an impartial jury unless restraints were imposed."

*State v. Simants*, 194 Neb. 783, 794, 236 N.W.2d 794, 802 (1975). The right to a fair trial by a jury of one's peers is unquestionably one of the most precious and sacred safeguards enshrined in the Bill of Rights. I would hold, however, that resort to prior restraints on the freedom of the press is a constitutionally impermissible method for enforcing that right; judges have at their disposal a broad spectrum of devices for ensuring that fundamental fairness is accorded the

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accused without necessitating so drastic an incursion on the equally fundamental and salutary constitutional mandate that discussion of public affairs in a free society cannot depend on the preliminary grace of judicial censors.

## I

The history of the current litigation highlights many of the dangers inherent in allowing any prior restraint on press reporting and commentary concerning the operations of the criminal justice system.

This action arose out of events surrounding the prosecution of respondent intervenor Simants for the premeditated mass murder of the six members of the Kellie family in Sutherland, Neb. on October 18, 1975. Shortly after the crimes occurred, the community of 850 was alerted by a special announcement over the local television station. Residents were requested by the police to stay off the streets and exercise caution as to whom they admitted into their houses, and rumors quickly spread that a sniper was loose in Sutherland. When an investigation implicated Simants as a suspect, his name and description were provided to the press and then disseminated to the public.

Simants was apprehended on the morning of October 19, charged with six counts of premeditated murder, and arraigned before the County Court of Lincoln County, Neb. Because several journalists were in attendance and "proof concerning bail . . . would be prejudicial to the rights of the defendant to later obtain a fair trial," App. 7, a portion of the bail hearing was closed, over Simants' objection, pursuant to the request of the Lincoln County Attorney. At the hearing, counsel was appointed for Simants, bail was denied, and October 22 was set as the date for a preliminary hearing to determine whether Simants should be bound over for trial in

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the District Court of Lincoln County, Neb. News of Simants' apprehension, which was broadcast over radio and television and reported in the press, relieved much of the tension that had built up during the night. During the period from October 19 until the first restrictive order was entered three days later, representatives of the press made accurate factual reports of the events that transpired, including reports of incriminating statements made by Simants to various relatives.

On the evening of October 21, the prosecution filed a motion that the County Court issue a restrictive order enjoining the press from reporting significant aspects of the case. The motion, filed without further evidentiary support, stated:

"The State of Nebraska hereby represents unto the Court that, *by reason of the nature of the above-captioned case*, there has been, and no doubt there will continue to be, mass coverage by news media not only locally, but nationally as well; that a preliminary hearing on the charges has been set to commence at 9:00 a.m. on October 22, 1975; and there is a *reasonable likelihood of prejudicial news which would make difficult, if not impossible, the impaneling of an impartial jury* and tend to prevent a fair trial should the defendant be bound over to trial in the District Court if testimony of witnesses at the preliminary hearing is reported to the public."

"Wherefore the State of Nebraska moves that the Court forthwith enter a Restrictive Order setting forth the matters that may or may not be publicly reported or disclosed to the public with reference to said case or with reference to the preliminary hearing thereon, and to whom said order shall apply."

App. 8. (Emphasis supplied.)

Half an hour later, the County Court Judge heard

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argument on the prosecution motion. Defense counsel joined in urging imposition of a restrictive order, and further moved that the preliminary hearing be closed to both the press and the public. No representatives of the media were notified of or called to testify at the hearing, and no evidence of any kind was introduced.

On October 22, when the autopsy results were completed, the County Attorney filed an amended complaint charging that the six premeditated murders had been committed by Simants in conjunction with the perpetration of or attempt to perpetrate a sexual assault. About the same time, at the commencement of the preliminary hearing, the County Court entered a restrictive order premised on its finding that there was

"a reasonable likelihood of prejudicial news which would make difficult, if not impossible, the impaneling of an impartial jury in the event that the defendant is bound over to the District Court for trial. . . ."

Amended Pet. for Cert. 1a. Accordingly, the County Court ordered that all parties to the case, attorneys, court personnel, public officials, law enforcement officials, witnesses, and "any other person present in Court" during the preliminary hearing, were not to

"release or authorize the release for public dissemination in any form or manner whatsoever any testimony given or evidence adduced during the preliminary hearing."

*Id.* at 2a. The court further ordered that no law enforcement official, public officer, attorney, witness, or "news media"

"disseminate any information concerning this matter apart from the preliminary hearing other than as set forth in the Nebraska Bar-Press Guidelines for Disclosure and Reporting of Information Relating to Imminent or Pending Criminal Litigation."

*Ibid.* [[Footnote 2/2](#)] The order was to

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remain in effect "until modified or rescinded by a higher court or until the defendant is ordered released from these charges." *Id.* at 3a. The court also denied the defense request to close the preliminary hearing, [[Footnote 2/3](#)] and an open hearing was then held, at which time various witnesses testified, disclosing significant factual

information concerning the events surrounding the alleged crimes. Upon completion of the hearing, the County Court bound the defendant over for trial in the District Court, since it found that the offenses charged in the indictment had been committed, and that there was probable cause to believe that Simants had committed them.

The next day, petitioners -- Nebraska newspaper publishers, broadcasters, journalists, and media associations,

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and national newswire services that report from and to Nebraska -- sought leave from the District Court to intervene in the criminal case and vacation of the County Court's restrictive order as repugnant to the First and Sixth Amendments to the United States Constitution as well as relevant provisions of the Nebraska Constitution. Simants' attorney moved that the order be continued, and that future pretrial hearings in the case be closed. The District Court then held an evidentiary hearing, after which it denied the motion to close any hearings, granted petitioners' motion to intervene, and adopted on an interim basis the County Court's restrictive order. The only testimony adduced at the hearing with respect to the need for the restrictive order was that of the County Court Judge, who stated that he had premised his order on his awareness of media publicity, "[c]onversation around the courthouse," and "statements of counsel." App. 64, 65. In addition, several newspaper clippings pertaining to the case were introduced as exhibits before the District Court.

Without any further hearings, the District Court, on October 27, terminated the County Court's order and substituted its own. The court found that,

*"because of the nature of the crimes charged in the complaint . . . , there is a clear and present danger that pretrial publicity could impinge upon the defendant's right to a fair trial, and that an order setting forth the limitations of pretrial publicity is appropriate. . . ."*

Amended Pet. for Cert. 9a (emphasis supplied). Respondent Stuart, the District Court Judge, then "adopted" as his order the Nebraska Bar-Press Guidelines as "clarified" by him in certain respects. [[Footnote 2/4](#)]

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On October 31, petitioners sought a stay of the order from the District Court and immediate relief from the Nebraska Supreme Court by way of mandamus, stay, or expedited appeal. When neither the District Court nor the Nebraska Supreme Court acted on these motions,

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petitioners on November 5 applied to MR. JUSTICE BLACKMUN, as Circuit Justice, for a stay of the District Court's order. Five days later, the Nebraska Supreme Court issued a per curiam statement that, to avoid being put in the position of "exercising parallel jurisdiction with the Supreme Court of the United States," it

would continue the matter until this Court "made known whether or not it will accept jurisdiction in the matter." *Id.* at 19a-20a.

On November 13, MR. JUSTICE BLACKMUN filed an in-chambers opinion in which he declined to act on the stay "at least for the immediate present." [423 U. S. 1319](#), [423 U. S. 1326](#). He observed:

"[I]f no action on the [petitioners'] application to the Supreme Court of Nebraska could be anticipated before December 1, [as was indicated by a communication from that court's clerk before the court issued the per curiam statement,] . . . a definitive decision by the State's highest court on an issue of profound constitutional implications, demanding immediate resolution, would be delayed for a period so long that the very day-to-day duration of that delay would constitute and aggravate a deprivation of such constitutional rights, if any, that the [petitioners] possess and may properly assert. Under those circumstances, I would not hesitate promptly to act."

*Id.* at [423 U. S. 1324](#)-1325. However, since the Nebraska Supreme Court had indicated in its per curiam statement that it was only declining to act because of uncertainty as to what this Court would do, and since it was deemed appropriate for the state court to pass initially on the validity of the restrictive order, MR. JUSTICE BLACKMUN, "without prejudice to the [petitioners] to reapply to me should prompt action not be forthcoming," *id.* at [423 U. S. 1326](#), denied the stay

"[o]n the expectation . . . that the Supreme Court of Nebraska, forthwith and without delay will entertain the

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[petitioners'] application made to it, and will promptly decide it in the full consciousness that 'time is of the essence.'"

*Id.* at 1325.

When, on November 18, the Supreme Court of Nebraska set November 25 as the date to hear arguments on petitioners' motions, petitioners reapplied to MR. JUSTICE BLACKMUN for relief. On November 20, MR. JUSTICE BLACKMUN, concluding that each passing day constituted an irreparable infringement on First Amendment values and that the state courts had delayed adjudication of petitioners' claims beyond "tolerable limits," [423 U. S. 1327](#), [423 U. S. 1329](#), granted a partial stay of the District Court's order. First, the "wholesale incorporation" of the Nebraska Bar-Press Guidelines was stayed on the ground that they "constitute a *voluntary code*' which was not intended to be mandatory" and which was "sufficiently riddled with vague and indefinite admonitions -- understandably so in view of the basic nature of 'guidelines,'" that they did "not provide the substance of a permissible court order in the First Amendment area." *Id.* at 1330, 1331. However, the state courts could

"reimpose particular provisions included in the Guidelines so long as they are deemed pertinent to the facts of this particular case and so long as they are adequately specific and in keeping with the remainder of this order."

*Id.* at 1331. Second, the portion of the District Court order prohibiting reporting of the details of the crimes, the identities of the victims, and the pathologist's testimony at the preliminary hearing was stayed because there was "[n]o persuasive justification" for the restraint; such "facts in themselves do not implicate a particular putative defendant," *ibid.*, and,

"until the bare facts concerning the crimes are related to a particular accused, . . . their being reported in the media [does not appear to] irreparably infringe the accused's right

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to a fair trial of the issue as to whether he was the one who committed the crimes."

*Id.* at 1332. Third, believing that prior restraints of this kind "are not necessarily and in all cases invalid," MR. JUSTICE BLACKMUN concluded that

"certain facts that strongly implicate an accused may be restrained from publication by the media prior to his trial. A confession or statement against interest is the paradigm,"

*id.* at 1332-1333, and other such facts would include "those associated with the circumstances of his arrest," those

"that are not necessarily implicative, but that are highly prejudicial, as, for example, facts associated with the accused's criminal record, if he has one,"

and "statements as to the accused's guilt by those associated with the prosecution." *Id.* at 1333. [Footnote 2/5] Finally, the restrictive order's limitation on disclosure of the nature of the limitations themselves was stayed "to the same extent" as the limitations. *Ibid.* [Footnote 2/6]

The following day petitioners filed a motion that the Court vacate MR. JUSTICE BLACKMUN's order to the extent it permitted the imposition of any prior restraint on publication. Meanwhile, on November 25, the Supreme Court of Nebraska heard oral argument as scheduled,

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and, on December 1, filed a per curiam opinion. [Footnote 2/7] Initially, the court held that it was improper for petitioners or any other third party to intervene in a criminal case, and that the appeal from that case must therefore be denied. However, the court concluded that it had jurisdiction over petitioners' mandamus action against respondent Stuart, and that respondents Simants and State of Nebraska had properly intervened in that action. [Footnote 2/8] Addressing the merits of the prior restraint issued by the District Court, the Nebraska Supreme Court acknowledged that this Court

"has not yet had occasion to speak definitively where a clash between these two preferred rights [the First Amendment freedom of speech and of the press and the

Sixth Amendment right to trial by an impartial jury] was sought to be accommodated by a prior restraint on freedom of the press."

194 Neb. at 791, 236 N.W.2d at 800. However, relying on dictum in *Branzburg v. Hayes*, [408 U. S. 665](#) (1972), [[Footnote 2/9](#)] and our statement in *New York Times Co. v. United States*, [403 U. S. 713](#) (1971), that a prior restraint on the

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media bears "a heavy presumption against its constitutional validity," *id.* at [403 U. S. 714](#), the court discerned an "implication"

"that, if there is only a presumption of unconstitutionality, then there must be some circumstances under which prior restraints may be constitutional, for otherwise there is no need for a mere presumption."

194 Neb. at 793, 236 N.W.2d at 801. The court then concluded that there was evidence "to overcome the heavy presumption" in that the State's obligation to accord Simants an impartial jury trial "may be impaired" by pretrial publicity, and that pretrial publicity "might make it difficult or impossible" to accord Simants a fair trial. *Id.* at 794, 797, 236 N.W.2d at 802, 803. [[Footnote 2/10](#)] Accordingly, the court held, *id.* at 801, 236 N.W.2d at 805:

"[T]he order of the District Court of October 27, 1975, is void insofar as it incorporates the voluntary guidelines and in certain other respects in that it impinges too greatly upon freedom of the press. The guidelines were not intended to be contractual, and cannot be enforced as if they were."

"The order of the District Court of October 27, 1975, is vacated, and is modified and reinstated in the

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following respects: it shall be effective only as to events which have occurred prior to the filing of this opinion, and only as it applies to the relators herein, and only insofar as it restricts publication of the existence or content of the following, if any such there be: (1) Confessions or admissions against interest made by the accused to law enforcement officials. (2) Confessions or admissions against interest, oral or written, if any, made by the accused to third parties, excepting any statements, if any, made by the accused to representatives of the news media. (3) Other information strongly implicative of the accused as the perpetrator of the slayings. [[Footnote 2/11](#)]"

On December 4, petitioners applied to this Court for a stay of that order and moved that their previously filed papers be treated as a petition for a writ of certiorari. On December 8, we granted the latter motion and deferred consideration of the petition for a writ and application for a stay pending responses from respondents on the close of business the following day. 423 U.S. 1011. [[Footnote 2/12](#)] On December 12, we granted the petition for a writ of certiorari, denied the motion to expedite, and denied the application for a stay. [423 U. S. 1027](#). [[Footnote 2/13](#)]

## II

### A

The Sixth Amendment to the United States Constitution guarantees that,

"[i]n 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. . . ."

The right to a jury trial, applicable to the States through the Due Process Clause of the Fourteenth Amendment, *see, e.g., Duncan v. Louisiana*, [391 U. S. 145](#) (1968), is essentially

the right to a "fair trial by a panel of impartial, *indifferent*' jurors," *Irvin v. Dowd*, [366 U. S. 717](#), [366 U. S. 722](#)(1961), *jurors who are "indifferent as [they] stand unsworn."* *Reynolds v. United States*, [98 U. S. 145](#), [98 U. S. 154](#)(1879), quoting *E. Coke, A Commentary upon Littleton 155b* (19th ed. 1832). *See also, e.g., Ristaino v. Ross*, [424 U. S. 589](#), [424 U. S. 597](#) n. 9 (1976); *Rideau v. Louisiana*, [373 U. S. 723](#) (1963); *Irvin v. Dowd*, *supra* at [366 U. S. 722](#); *In re Murchison*, [349 U. S. 133](#), [349 U. S. 136](#) (1955); *In re Oliver*, [333 U. S. 257](#) (1948). *So basic to our jurisprudence is the right to a fair trial that it has been called "the most fundamental of all freedoms."* *Estes v. Texas*, [381 U. S. 532](#), [381 U. S. 540](#) (1965). *It is a right essential to the preservation and enjoyment of all other rights, providing a necessary means of safeguarding personal liberties against government oppression. See, e.g., Rideau v. Louisiana, supra at 726-727. See generally Duncan v. Louisiana, supra at 373 U. S. 149-158.*

The First Amendment to the United States Constitution, however, secures rights equally fundamental in our jurisprudence, and its ringing proclamation that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." has been both applied through the Fourteenth Amendment to invalidate restraints on freedom of the press imposed by the States, *see, e.g., Miami Herald Publishing Co. v. Tornillo*, [418 U. S. 241](#) (1974); *New York Times Co. v. Sullivan*, [376 U. S. 254](#) (1964); *Near v. Minnesota ex rel. Olson*, [283 U. S. 697](#) (1931), and interpreted to interdict such restraints imposed by the courts, *see, e.g., New York Times Co. v. United States*, [403 U. S. 713](#) (1971); *Craig v. Harney*, [331 U. S. 367](#) (1947); *Bridges v. California*, [314 U. S. 252](#)(1941). Indeed, it has been correctly perceived that a

"responsible press has always been regarded as the handmaiden of effective judicial administration, especially in the criminal field. . . . The

press does not simply publish information about trials, but guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."

*Sheppard v. Maxwell*, [384 U. S. 333](#), [384 U. S. 350](#) (1966). *See also, e.g., Cox Broadcasting Corp. v. Cohn*, [420 U. S. 469](#), [420 U. S. 491-496](#) (1975). Commentary and reporting on the criminal justice system is at the core of First Amendment values, for the operation and integrity of that system is of crucial import to citizens concerned with the administration of government. Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and robust reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability. *See, e.g., In re Oliver, supra*, at [333 U. S. 270-271](#); L. Brandeis, *Other People's Money* 62 (1933) ("Sunlight is said to be the best of disinfectants; electric light the most efficient policeman").

No one can seriously doubt, however, that uninhibited prejudicial pretrial publicity may destroy the fairness of a criminal trial, *see, e.g., Sheppard v. Maxwell, supra*, and the past decade has witnessed substantial debate, colloquially known as the Free Press/Fair Trial controversy, concerning this interface of First and Sixth Amendment rights. In effect, we are now told by respondents that the two rights can no longer coexist when the press possesses and seeks to publish "confessions or admissions against interest" and other information "strongly implicative" [[Footnote 2/14](#)] of a criminal defendant as the

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perpetrator of a crime, and that one or the other right must therefore be subordinated. I disagree. Settled case law concerning the impropriety and constitutional invalidity of prior restraints on the press compels the conclusion that there can be no prohibition on the publication by the press of any information pertaining to pending judicial proceedings or the operation of the criminal justice system, no matter how shabby the means by which the information is obtained. [[Footnote 2/15](#)] This does not imply, however, any subordination of Sixth Amendment rights, for an accused's right to a fair trial may be adequately assured through methods that do not infringe First Amendment values.

*B*

"[I]t has been generally, if not universally, considered that it is the chief purpose of the [First Amendment's] guaranty to prevent previous restraints upon publication.

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*Near v. Minnesota ex rel. Olson*, 283 U.S. at [283 U. S. 713](#). *See also, e.g., id.* at [283 U. S. 716-717](#); *Patterson v. Colorado ex rel. Attorney General*, [205 U. S. 454](#), [205 U. S. 462](#) (1907); *Grosjean v. American Press Co.*, [297 U. S. 233](#), [297 U. S. 249](#) (1936). [[Footnote 2/16](#)] Prior restraints are 'the essence of censorship,' *Near v. Minnesota ex*

*rel. Olson, supra* at [283 U. S. 713](#), and '[o]ur distaste for censorship -- reflecting the natural distaste of a free people -- is deep-written in our law.' *Southeastern Promotions, Ltd. v. Conrad*, [420 U. S. 546](#), [420 U. S. 553](#) (1975). The First Amendment thus accords greater protection against prior restraints than it does against subsequent punishment for a particular speech, *see, e.g., Carroll v. Princess Anne*, [393 U. S. 175](#), [393 U. S. 180](#)-181 (1968); *Near v. Minnesota ex rel. Olson, supra*;"

"a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of free-wheeling censorship are formidable."

*Southeastern Promotions, Ltd. v. Conrad, supra* at [420 U. S. 559](#). A commentator has cogently summarized many of the reasons for this deep-seated American hostility to prior restraints:

"A system of prior restraint is in many ways more inhibiting than a system of subsequent punishment: it is likely to bring under government scrutiny a far wider range of expression; it shuts off communication before it takes place; suppression by a stroke of the pen is more likely to be applied than suppression through a criminal process; the procedures

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do not require attention to the safeguards of the criminal process; the system allows less opportunity for public appraisal and criticism; the dynamics of the system drive toward excesses, as the history of all censorship shows."

T. Emerson, *The System of Freedom of Expression* 506 (1970). [[Footnote 2/17](#)]

Respondents correctly contend that "the [First Amendment] protection even as to previous restraint is not absolutely unlimited." *Near v. Minnesota ex rel. Olson, supra* at [283 U. S. 716](#). However, the exceptions to the rule have been confined to "exceptional cases." *Ibid.* The Court in *Near*, the first case in which we were faced with a prior restraint against the press, delimited three such possible exceptional circumstances. The first two exceptions were that "the primary requirements of decency may be enforced against obscene publications," and that

"[t]he security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government [for] [t]he constitutional guaranty of free speech does not 'protect a man from an injunction against uttering words that may have all the effect of force. . . .'"

*Ibid.* These exceptions have since come to be interpreted as situations in which the "speech" involved is not encompassed within the meaning of the First Amendment. *See, e.g., Roth v. United States*, [354 U. S. 476](#), [354 U. S. 481](#) (1957); *Miller v. California*, [413 U. S. 15](#) (1973); *Chaplinsky v. New Hampshire*, [315 U. S. 568](#) (1942). *See also New York Times Co. v. United States*, 403

U.S. at [403 U. S. 726](#) n. (BRENNAN, J., concurring); *id.* at [403 U. S. 731](#) n. 1 (WHITE, J., concurring).

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And even in these situations, adequate and timely procedures are mandated to protect against any restraint of speech that does come within the ambit of the First Amendment. *See, e.g., Southeastern Promotions, Ltd. v. Conrad, supra; United States v. Thirty-seven Photographs, 402 U. S. 363 (1971); *Freedman v. Maryland, 380 U. S. 51* (1965); *Bantam Books, Inc. v. Sullivan, 372 U. S. 58* (1963); *Speiser v. Randall, 357 U. S. 513* (1958); *Kingsley Books, Inc. v. Brown, 354 U. S. 436* (1957). Thus, only the third category in *Near* contemplated the possibility that speech meriting and entitled to constitutional protection might nevertheless be suppressed before publication in the interest of some overriding countervailing interest:*

"When a nation is at war, many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.' *Schenck v. United States, 249 U. S. 47, 249 U. S. 52*. No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops."

283 U.S. at [283 U. S. 716](#).

Even this third category, however, has only been adverted to in dictum, and has never served as the basis for actually upholding a prior restraint against the publication of constitutionally protected materials. In *New York Times Co. v. United States, supra*, we specifically addressed the scope of the "military security" exception alluded to in *Near*, and held that there could be no prior restraint on publication of the "Pentagon Papers" despite the fact that a majority of the Court believed that release of the documents, which were

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classified "Top Secret-Sensitive" and which were obtained surreptitiously, would be harmful to the Nation and might even be prosecuted after publication as a violation of various espionage statutes. To be sure, our brief per curiam declared that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity," *id.* at [283 U. S. 714](#), quoting *Bantam Books, Inc. v. Sullivan, supra* at [372 U. S. 70](#), and that the "Government `thus carries a heavy burden of showing justification for the imposition of such a restraint.'" 403 U.S. at [403 U. S. 714](#), quoting *Organization for a Better Austin v. Keefe, 402 U. S. 415, 402 U. S. 419* (1971). This does not mean, as the Nebraska Supreme Court assumed, [[Footnote 2/18](#)] that prior restraints can be justified on an ad hoc balancing approach that concludes that the "presumption" must be overcome in light of some perceived "justification." Rather, this language refers to the fact that, as a matter of procedural safeguards and burden of proof, prior restraints, even within a recognized exception to the rule against prior restraints, will be extremely difficult to justify; but, as an initial matter, the purpose for which a prior restraint is sought to be imposed "must fit within one of the narrowly defined exceptions to the prohibition

against prior restraints." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. at [420 U. S. 559](#); see also, e.g., *id.* at [420 U. S. 555](#); *Pittsburgh Press Co. v. Human Rel. Comm'n*, [413 U. S. 376](#), [413 U. S. 382](#) (1973); *Organization for a Better Austin v. Keefe*, *supra* at [402 U. S. 419-420](#); cf., e.g., *Healy v. James*, [408 U. S. 169](#) (1972); *Freedman v. Maryland*, 380 U.S. at [380 U. S. 58-59](#). Indeed, two Justices in *New York Times* apparently controverted the existence of even a limited "military security" exception to the rule against prior restraints on the publication of otherwise protected material, see 403 U.S.

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at [403 U. S. 714](#) (Black, J., concurring); *id.* at [403 U. S. 720](#) (Douglas, J., concurring). And a majority of the other Justices who expressed their views on the merits made it clear that they would take cognizance only of a "single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden." *Id.* at [403 U. S. 726](#) (BRENNAN, J., concurring). Although variously expressed, it was evident that even the exception was to be construed very, very narrowly: when disclosure "will surely result in direct, immediate, and irreparable damage to our Nation or its people," *id.* at [403 U. S. 730](#) (STEWART, J., joined by WHITE, J., concurring) (emphasis supplied) or when there is

"governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea. . . . [But] [i]n no event may mere conclusions be sufficient."

*Id.* at [403 U. S. 726-727](#) (BRENNAN, J., concurring) (emphasis supplied). See also *id.* at [403 U. S. 730-731](#) (WHITE, J., joined by STEWART, J., concurring) ("concededly extraordinary protection against prior restraints enjoyed by the press under our constitutional system" is not overcome even by a showing that "revelation of these documents will do substantial damage to public interests"). [[Footnote 2/19](#)] It is thus clear that, even within the sole possible exception to the prohibition against prior restraints on publication of constitutionally protected materials,

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the obstacles to issuance of such an injunction are formidable. What respondents urge upon us, however, is the creation of a new, potentially pervasive exception to this settled rule of virtually blanket prohibition of prior restraints. [[Footnote 2/20](#)]

I would decline this invitation. In addition to the almost insuperable presumption against the constitutionality of prior restraints even under a recognized exception, and however laudable the State's motivation for imposing restraints in this case, [[Footnote 2/21](#)] there are compelling

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reasons for not carving out a new exception to the rule against prior censorship of publication.

Much of the information that the Nebraska courts

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enjoined petitioners from publishing was already in the public domain, having been revealed in open court proceedings or through public documents. Our prior cases have foreclosed any serious contention that further disclosure of such information can be suppressed before publication or even punished after publication.

"A trial is a public event. What transpires in the court room is public property. . . . Those who see and hear what transpired can report it with impunity. There is no special perquisite of the judiciary which enables it, as distinguished from other institutions of democratic government, to suppress, edit, or censor events which transpire in proceedings before it."

*Craig v. Harney*, 331 U.S. at [331 U. S. 374](#). Similarly, *Estes v. Texas*, 381 U.S. at [381 U. S. 541-542](#), a case involving the Sixth Amendment right to a fair trial, observed:

"[R]eporters of all media . . . are plainly free to report whatever occurs in open court through their respective media. This was settled in *Bridges v. California*, [314 U. S. 252](#) (1941), and *Pennekamp v. Florida*, [328 U. S. 331](#) (1946), which we reaffirm."

See also *id.* at [381 U. S. 583-585](#) (Warren, C.J., concurring). And *Sheppard v. Maxwell*, 384 U.S. at [384 U. S. 362-363](#), a case that detailed numerous devices that could be employed for ensuring fair trials, explicitly reiterated that, "[o]f course, there is nothing that proscribes the press from reporting events that transpire in the courtroom." See also *id.* at [384 U. S. 350](#); *Stroble v. California*, [343 U. S. 181](#), [343 U. S. 193](#) (1952). The continuing vitality of these statements was reaffirmed only last Term in *Cox Broadcasting Corp. v. Cohn*, a case involving a suit for damages brought after publication under state law recognizing the privacy interest of its citizens. In holding that

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a "State may [not] impose sanctions on the accurate publication of the name of a rape victim obtained from public records," 420 U.S. at [420 U. S. 491](#), we observed:

"[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. *Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations.* Without the information provided by the press, most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. *With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.* See *Sheppard v. Maxwell*, [384 U. S. 333](#), [384 U. S. 350](#) (1966)."

"Appellee has claimed in this litigation that the efforts of the press have infringed his right to privacy by broadcasting to the world the fact that his daughter was a rape victim. *The commission of crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions, however, are, without question, events of legitimate concern to the public, and consequently fall within the responsibility of the press to report the operations of government.*"

*"The special protected nature of accurate reports of judicial proceedings has repeatedly been recognized."*

*Id.* at [420 U. S. 491](#)-492 (emphasis supplied).

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"By placing the information in the public domain on official court records, the State must be presumed to have concluded that the public interest was thereby being served. *Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business.* In preserving that form of government the First and Fourteenth Amendments command nothing less than that the States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection."

*Id.* at [420 U. S. 495](#) (emphasis supplied). *See also id.* at [420 U. S. 496](#). Prior restraints are particularly anathematic to the First Amendment, and any immunity from punishment subsequent to publication of given material applies *a fortiori* to immunity from suppression of that material before publication. Thus, in light of *Craig*, which involved a contempt citation for a threat to the administration of justice, and *Cox Broadcasting*, which similarly involved an attempt to establish civil liability after publication, it should be clear that no injunction against the reporting of such information can be permissible.

2

The order of the Nebraska Supreme Court also applied, of course to "confessions" and other information "strongly implicative" of the accused which were obtained from sources other than official records or open

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court proceedings. But for the reasons that follow -- reasons equally applicable to information obtained by the press from official records or public court proceedings -- I believe that the same rule against prior restraints governs any information pertaining to the criminal justice system, even if derived from nonpublic sources and regardless of the means employed by the press in its acquisition.

The only exception that has thus far been recognized even in dictum to the blanket prohibition against prior restraints against publication of material which would

otherwise be constitutionally shielded was the "military security" situation addressed in *New York Times Co. v. United States*. But unlike the virtually certain, direct, and immediate harm required for such a restraint under *Near* and *New York Times*, the harm to a fair trial that might otherwise eventuate from publications which are suppressed pursuant to orders such as that, under review must inherently remain speculative.

A judge importuned to issue a prior restraint in the pretrial context will be unable to predict the manner in which the potentially prejudicial information would be published, the frequency with which it would be repeated or the emphasis it would be given, the context in which or purpose for which it would be reported, the scope of the audience that would be exposed to the information, [[Footnote 2/22](#)]

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or the impact, evaluated in terms of current standards for assessing juror impartiality, [[Footnote 2/23](#)] the information would have on that audience. These considerations would render speculative the prospective impact on a fair trial of reporting even an alleged confession or other information "strongly implicative" of the accused. Moreover, we can take judicial notice of the fact that, given the prevalence of plea bargaining, few criminal cases proceed to trial, and the judge would thus have to predict what the likelihood was that a jury would even have to be impaneled. [[Footnote 2/24](#)] Indeed, even in cases that do proceed to trial, the material sought to be suppressed before trial will often be admissible and may be admitted in any event. [[Footnote 2/25](#)]

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And, more basically, there are adequate devices for screening from jury duty those individuals who have, in fact, been exposed to prejudicial pretrial publicity.

Initially, it is important to note that, once the jury is impaneled, the techniques of sequestration of jurors and control over the courtroom and conduct of trial should prevent prejudicial publicity from infecting the fairness of judicial proceedings. [[Footnote 2/26](#)] Similarly, judges may stem much of the flow of prejudicial publicity at its source, before it is obtained by representatives of the press. [[Footnote 2/27](#)] But even if the press nevertheless obtains potentially prejudicial information and decides to publish that information,

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the Sixth Amendment rights of the accused may still be adequately protected. In particular, the trial judge should employ the *voir dire* to probe fully into the effect of publicity. The judge should broadly explore such matters as the extent to which prospective jurors had read particular news accounts or whether they had heard about incriminating data such as an alleged confession or statements by purportedly reliable sources concerning the defendant's guilt. See, e.g., *Ham v. South Carolina*, [409 U. S. 524](#), [409 U. S. 531-534](#) (1973) (opinion of MARSHALL, J.); *Swain v. Alabama*, [380 U. S. 202](#), [380 U. S. 209-222](#) (1965). Particularly in cases of extensive publicity, defense counsel should be accorded more latitude in personally asking or tendering

searching questions that might root out indications of bias, both to facilitate intelligent exercise of peremptory challenges and to help uncover factors that would dictate disqualification for cause. Indeed, it may sometimes be necessary to question on *voir dire* prospective jurors individually or in small groups, both to maximize the likelihood that members of the venire will respond honestly to questions concerning bias, and to avoid contaminating unbiased members of the venire when other members disclose prior knowledge of prejudicial information. Moreover, *voir dire* may indicate the need to grant a brief continuance [Footnote 2/28] or to grant a change of venue, [Footnote 2/29] techniques that can effectively

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mitigate any publicity at a particular time or in a particular locale. Finally, if the trial court fails or refuses to utilize these devices effectively, there are the "palliatives" of reversals on appeal and directions for a new trial. *Sheppard v. Maxwell*, 384 U.S. at 384 U. S. 363. [Footnote 2/30] We have indicated that, even in a case involving outrageous publicity and a "carnival atmosphere" in the courtroom, "these procedures would have been sufficient to guarantee [the defendant] a fair trial. . . ." *Id.* at 384 U. S. 358. See generally *id.* at 384 U. S. 358-363; cf. *Times-Picayune Pub. Corp. v. Schulingkamp*, 419 U. S. 1301, 419 U. S. 1308, and n. 3 (1974) (POWELL, J., in chambers). For this reason, the one thing *Sheppard* did not approve was "any direct limitations on the freedom traditionally exercised by the news media." 384 U.S. at 384 U. S. 350. [Footnote 2/31] Indeed, the

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traditional techniques approved in *Sheppard* for ensuring fair trials would have been adequate in every case in which we have found that a new trial was required due to lack of fundamental fairness to the accused.

For these reasons alone, I would reject the contention that speculative deprivation of an accused's Sixth Amendment right to an impartial jury is comparable to the damage to the Nation or its people that *Near* and *New York Times* would have found sufficient to justify a prior restraint on reporting. Damage to that Sixth Amendment right could never be considered so direct, immediate and irreparable, and based on such proof, rather than speculation, that prior restraints on the press could be justified on this basis.

C

There are additional, practical reasons for not starting down the path urged by respondents. [Footnote 2/32] The exception

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to the prohibition of prior restraints adumbrated in *Near* and *New York Times* involves no judicial weighing of the countervailing public interest in receiving the suppressed information; the direct, immediate, and irreparable harm that would result from disclosure is simply deemed to outweigh the public's interest in knowing, for example, the specific details of troop movements during wartime. As the Supreme

Court of Nebraska itself admitted, [[Footnote 2/33](#)] however, any attempt to impose a prior restraint on the reporting of information concerning the operation of the criminal justice system will inevitably involve the courts in an *ad hoc* evaluation of the need for the public to receive particular information that might nevertheless implicate the accused as the perpetrator of a crime. For example, disclosure of the

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circumstances surrounding the obtaining of an involuntary confession or the conduct of an illegal search resulting in incriminating fruits may be the necessary predicate for a movement to reform police methods, pass regulatory statutes, or remove judges who do not adequately oversee law enforcement activity; publication of facts surrounding particular plea-bargaining proceedings or the practice of plea bargaining generally may provoke substantial public concern as to the operations of the judiciary or the fairness of prosecutorial decisions; reporting the details of the confession of one accused may reveal that it may implicate others as well, and the public may rightly demand to know what actions are being taken by law enforcement personnel to bring those other individuals to justice; commentary on the fact that there is strong evidence implicating a government official in criminal activity goes to the very core of matters of public concern, and even a brief delay in reporting that information shortly before an election may have a decisive impact on the outcome of the democratic process, *see Carroll v. Princess Anne*, 393 U.S. at [393 U. S. 182](#); dissemination of the fact that indicated individuals who had been accused of similar misdeeds in the past had not been prosecuted or had received only mild sentences may generate crucial debate on the functioning of the criminal justice system; revelation of the fact that despite apparently overwhelming evidence of guilt, prosecutions were dropped or never commenced against large campaign contributors or members of special interest groups may indicate possible corruption among government officials; and disclosure of the fact that a suspect has been apprehended as the perpetrator of a heinous crime may be necessary to calm community fears that the actual perpetrator is still at large. *Cf. Times-Picayune Pub. Corp. v. Schulingkamp*, 419 U.S. at [419 U. S. 1302](#)

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(POWELL, J., in chambers). [[Footnote 2/34](#)] In all of these situations, judges would be forced to evaluate whether the public interest in receiving the information outweighed the speculative impact on Sixth Amendment rights.

These are obviously only some examples of the problems that plainly would recur, not in the almost theoretical situation of suppressing disclosure of the location of troops during wartime, but on a regular basis throughout the courts of the land. Recognition of any judicial authority to impose prior restraints on the basis of harm to the Sixth Amendment rights of particular defendants, especially since that harm must remain speculative, will thus inevitably interject judges at all levels into censorship roles that are simply inappropriate and impermissible under the First Amendment. Indeed, the potential for arbitrary and excessive judicial utilization of any such power would be exacerbated by the fact that judges and committing magistrates might in some cases be determining the propriety of publishing information that reflects on their competence, integrity, or general performance on the bench.

There would be, in addition, almost intractable procedural difficulties associated with any attempt to impose prior restraints on publication of information relating to pending criminal proceedings, and the ramifications of these procedural difficulties would accentuate the burden on First Amendment rights. The incentives and dynamics of the system of prior restraints would inevitably lead to overemployment of the technique. In order to minimize pretrial publicity against

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his clients and preempt "ineffective assistance of counsel" claims, counsel for defendants might routinely seek such restrictive orders. Prosecutors would often acquiesce in such motions to avoid jeopardizing a conviction on appeal. And, although judges could readily reject many such claims as frivolous, there would be a significant danger that judges would nevertheless be predisposed to grant the motions, both to ease their task of ensuring fair proceedings and to insulate their conduct in the criminal proceeding from reversal. We need not raise any specter of floodgates of litigation or drain on judicial resources to note that the litigation with respect to these motions will substantially burden the media. For, to bind the media, they would have to be notified and accorded an opportunity to be heard. *See, e.g., Carroll v. Princess Anne, supra; McKinney v. Alabama*, [424 U. S. 669](#) (1976). This would at least entail the possibility of restraint proceedings collateral to every criminal case before the courts, and there would be a significant financial drain on the media involuntarily made parties to these proceedings. Indeed, small news organs on the margin of economic viability might choose not to contest even blatantly unconstitutional restraints or to avoid all crime coverage, with concomitant harm to the public's right to be informed of such proceedings. [[Footnote 2/35](#)] Such acquiescence might also mean that significant erroneous precedents will remain unchallenged, to be relied on for even broader restraints in the future. Moreover, these collateral restraint proceedings would be unlikely to result in equal treatment of all

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organs of the media [[Footnote 2/36](#)] and, even if all the press could be brought into the proceeding, would often be ineffective, since disclosure of incriminating material may transpire before an effective restraint could be imposed. [[Footnote 2/37](#)]

To be sure, because the decision to impose such restraints even on the disclosure of supposedly narrow categories of information would depend on the facts of each case, and because precious First Amendment rights are at stake, those who could afford the substantial costs would seek appellate review. But that review is often inadequate, since delay inherent in judicial proceedings could itself destroy the contemporary news value of the information the press seeks to disseminate. [[Footnote 2/38](#)] As one commentator has observed:

"Prior restraints fall on speech with a brutality and a finality all their own. Even if they are ultimately lifted they cause irremediable loss -- a loss in the immediacy, the impact, of speech. . . . Indeed, it is the hypothesis of the First Amendment that injury is inflicted on our society when we stifle the immediacy of speech."

A. Bickel, *The Morality of Consent* 61 (1975). [[Footnote 2/39](#)]

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And, as noted, given the significant financial disincentives, particularly on the smaller organs of the media, [[Footnote 2/40](#)] to challenge any restrictive orders once they are imposed

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by trial judges, there is the distinct possibility that many erroneous impositions would remain uncorrected. , [[Footnote 2/41](#)]

### III

I unreservedly agree with Mr. Justice Black that

"free speech and fair trials are two of the most cherished policies of our civilization, and it would be a trying task to choose between them."

*Bridges v. California*, 314 U.S. at [314 U. S. 260](#). But I would reject the notion that a

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choice is necessary, that there is an inherent conflict that cannot be resolved without essentially abrogating one right or the other. To hold that courts cannot impose any prior restraints on the reporting of or commentary upon information revealed in open court proceedings, disclosed in public documents, or divulged by other sources with respect to the criminal justice system is not, I must emphasize, to countenance the sacrifice of precious Sixth Amendment rights on the altar of the First Amendment. For although there may in some instances be tension between uninhibited and robust reporting by the press and fair trials for criminal defendants, judges possess adequate tools short of injunctions against reporting for relieving that tension. To be sure, these alternatives may require greater sensitivity and effort on the part of judges conducting criminal trials than would the stifling of publicity through the simple expedient of issuing a restrictive order on the press; but that sensitivity and effort is required in order to ensure the full enjoyment and proper accommodation of both First and Sixth Amendment rights.

There is, beyond peradventure, a clear and substantial damage to freedom of the press whenever even a temporary restraint is imposed on reporting of material concerning the operations of the criminal justice system, an institution of such pervasive influence in our constitutional scheme. And the necessary impact of reporting even confessions can never be so direct, immediate, and irreparable that I would give credence to any notion that prior restraints may be imposed on that rationale. It may be that such incriminating material would be of such slight news value or so inflammatory in particular cases that responsible organs of the media, in an exercise of self-restraint, would choose not to publicize that material, and not make the judicial task of safeguarding

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precious rights of criminal defendants more difficult. Voluntary codes such as the Nebraska Bar-Press Guidelines are a commendable acknowledgment by the media that constitutional prerogatives bring enormous responsibilities, and I would encourage continuation of such voluntary cooperative efforts between the bar and the media. However, the press may be arrogant, tyrannical, abusive, and sensationalist, just as it may be incisive, probing, and informative. But at least in the context of prior restraints on publication, the decision of what, when, and how to publish is for editors, not judges. *See, e.g., Near v. Minnesota ex rel. Olson*, 283 U.S. at [283 U. S. 720](#); *Cox Broadcasting Corp. v. Cohn*, 420 U.S. at [420 U. S. 496](#); *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. at [418 U. S. 258](#); *id.* at [418 U. S. 259](#) (WHITE, J., concurring); *cf. New York Times Co. v. Sullivan*, 376 U.S. at [376 U. S. 269-283](#). Every restrictive order imposed on the press in this case was accordingly an unconstitutional prior restraint on the freedom of the press, and I would therefore reverse the judgment of the Nebraska Supreme Court and remand for further proceedings not inconsistent with this opinion.

[427 U.S. 539app]

*APPENDIX TO OPINION OF BRENNAN, J.,*

*CONCURRING IN JUDGMENT*

*NEBRASKA BAR-PRESS GUIDELINES FOR DISCLOSURE*

*AND REPORTING OF INFORMATION RELATING TO*

**I**

**IMMINENT OR PENDING CRIMINAL LITIGATION**

These voluntary guidelines reflect standards which bar and news media representatives believe are a reasonable means of accommodating, on a voluntary basis, the correlative constitutional rights of free speech and free press with the right of an accused to a fair trial. They

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are not intended to prevent the news media from inquiring into and reporting on the integrity, fairness, efficiency and effectiveness of law enforcement, the administration of justice, or political or governmental questions whenever involved in the judicial process.

As a voluntary code, these guidelines do not necessarily reflect in all respects what the members of the bar or the news media believe would be permitted or required by law.

**I**

Information Generally Appropriate for

### *Disclosure, Reporting*

Generally, it is appropriate to disclose and report the following information:

1. The arrested person's name, age, residence, employment, marital status and similar biographical information.
2. The charge, its text, any amendments thereto, and, if applicable, the identity of the complainant.
3. The amount or conditions of bail.
4. The identity of and biographical information concerning the complaining party and victim, and, if a death is involved, the apparent cause of death unless it appears that the cause of death may be a contested issue.
5. The identity of the investigating and arresting agencies and the length of the investigation.
6. The circumstances of arrest, including time, place, resistance, pursuit, possession of and all weapons used, and a description of the items seized at the time of arrest. It is appropriate to disclose and report at the time of seizure the description of physical evidence subsequently seized other than a confession, admission or statement. It is appropriate to disclose and report the subsequent finding of weapons, bodies, contraband, stolen property and similar physical items if, in view

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of the time and other circumstances, such disclosure and reporting are not likely to interfere with a fair trial.

7. Information disclosed by the public records, including all testimony and other evidence adduced at the trial.

### **I**

Information Generally Not Appropriate for

### *Disclosure, Reporting*

Generally, it is not appropriate to disclose or report the following information because of the risk of prejudice to the right of an accused to a fair trial:

1. The existence or contents of any confession, admission or statement given by the accused, except it may be stated that the accused denies the charges made against him. This paragraph is not intended to apply to statements made by the accused to representatives of the news media or to the public.
2. Opinions concerning the guilt, the innocence or the character of the accused.

3. Statements predicting or influencing the outcome of the trial.
4. Results of any examination or tests or the accused's refusal or failure to submit to an examination or test.
5. Statements or opinions concerning the credibility or anticipated testimony of prospective witnesses.
6. Statements made in the judicial proceedings outside the presence of the jury relating to confessions or other matters which, if reported, would likely interfere with a fair trial.

#### *Prior Criminal Records*

Lawyers and law enforcement personnel should not volunteer the prior criminal records of an accused except to aid in his apprehension or to warn the public of any dangers he presents. The news media can obtain prior criminal records from the public records of the courts,

#### [Page 427 U. S. 616](#)

police agencies and other governmental agencies and from their own files. The news media acknowledge, however, that publication or broadcast of an individual's criminal record can be prejudicial, and its publication or broadcast should be considered very carefully, particularly after the filing of formal charges and as the time of the trial approaches, and such publication or broadcast should generally be avoided because readers, viewers and listeners are potential jurors and an accused is presumed innocent until proven guilty.

#### *Photographs*

1. Generally, it is not appropriate for law enforcement personnel to deliberately pose a person in custody for photographing or televising by representatives of the news media.
2. Unposed photographing and televising of an accused outside the courtroom is generally appropriate, and law enforcement personnel should not interfere with such photographing or televising except in compliance with an order of the court or unless such photographing or televising would interfere with their official duties.
3. It is appropriate for law enforcement personnel to release to representatives of the news media photographs of a suspect or an accused. Before publication of any such photographs, the news media should eliminate any portions of the photographs that would indicate a prior criminal offense or police record.

#### *Continuing Committee for Cooperation*

The members of the bar and the news media recognize the desirability of continued joint efforts in attempting to resolve any areas of differences that may arise in their

mutual objective of assuring to all Americans both the correlative constitutional rights to freedom

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of speech and press and to a fair trial. The bar and the news media, through their respective associations, have determined to establish a permanent committee to revise these guidelines whenever this appears necessary or appropriate, to issue opinions as to their application to specific situations, to receive, evaluate and make recommendations with respect to complaints and to seek to effect through educational and other voluntary means a proper accommodation of the constitutional correlative rights of free speech, free press and fair trial.

rj:

June, 1970

lj:

[\[Footnote 2/1\]](#)

In referring to the "press" and to "publication" in this opinion, I of course use those words as terms of art that encompass broadcasting by the electronic media as well.

[\[Footnote 2/2\]](#)

A copy of the "Nebraska Bar-Press Guidelines," ostensibly a voluntary code formulated by representatives of the media and the bar, was attached to the order. The Guidelines, which are similar to voluntary codes adhered to by the press in several States, are attached as an appendix to this opinion.

Excepted from the scope of the County Court's order were: (1) factual statements of the accused's name, age, residence, occupation, and family status; (2) the circumstances of the arrest (time and place, identity of the arresting and investigating officers and agencies, and the length of the investigation); (3) the nature, substance, and text of the charge; (4) quotations from, or any reference without comment to, public records or communications heretofore disseminated to the public; (5) the scheduling and result of any stage of the judicial proceeding held in open court; (6) a request for assistance in obtaining evidence; and (7) a request for assistance in obtaining the names of possible witnesses. The court also ordered that a copy of the preliminary hearing proceedings was to be made available to the public at the expiration of the order.

[\[Footnote 2/3\]](#)

The court apparently believed that a public preliminary hearing was required by state law. The Nebraska Supreme Court subsequently held that the pertinent state statute did not require that pretrial hearings be open to the public. Both petitioners and the State of Nebraska agree that the question whether preliminary hearings may be closed

to the public consistently with the "Public Trial" Clause of the Sixth Amendment is not before us, and it is therefore one on which I would express no views.

[\[Footnote 2/4\]](#)

The Nebraska Bar-Press Guidelines, *see* appendix to this opinion, were "clarified" as follows, Amended Pet. for Cert. 10a-11a:

"1. It is hereby stated the trial of the case commences when a jury is empaneled to try the case, and that all reporting prior to that event, specifically including the preliminary hearing is 'pretrial' publicity."

"2. It would appear that defendant has made a statement or confession to law enforcement officials and it is inappropriate to report the existence of such statement or the contents of it."

"3. It appears that the defendant may have made statements against interest to James Robert Boggs, Amos Simants and Grace Simants, and may have left a note in the William Boggs residence, and that the nature of such statements, or the fact that such statements were made, or the nature of the testimony of these witnesses with reference to such statements in the preliminary hearing will not be reported."

"4. The non-technical aspects of the testimony of Dr. Miles Foster may be reported within the guidelines and at the careful discretion of the press. The testimony of this witness dealing with technical subjects, tests or investigations performed or the results thereof, or his opinions or conclusions as a result of such tests or investigations will not be reported."

"5. The general physical facts found at the scene of the crime may be reported within the guidelines and at the careful discretion of the press. However, the identity of the person or persons allegedly sexually assaulted or the details of any alleged assault by the defendant will not be reported."

"6. The exact nature of the limitations of publicity as entered by this order will not be reported. That is to say, the fact of the entering of this order limiting pretrial publicity and the adoption of the Bar-Press Guidelines may be reported, but specific reference to confessions, statements against interest, witnesses or type of evidence to which this order will apply will not be reported."

An additional portion of the order relating to the press' accommodations in the courtroom and the taking of photographs in the courthouse was not contested below, and is not before this Court. The full order, including its references to confessions, was read in open court.

[\[Footnote 2/5\]](#)

MR. JUSTICE BLACKMUN's view of the burden of proof for imposing such restraints was as follows:

"The accused, and the prosecution if it joins him, bears the burden of showing that publicizing particular facts will irreparably impair the ability of those exposed to them to reach an independent and impartial judgment as to guilt."

423 U.S. at [423 U. S. 1333](#).

[\[Footnote 2/6\]](#)

The in-chambers opinion also stayed any prohibition concerning reporting of the pending application for relief in the Supreme Court of Nebraska, but permitted a prohibition of reporting of the two in-chambers opinions to the extent they contained "facts properly suppressed." *Id.* at 1334. Nothing in the opinion was to be

"deemed as barring what the District Judge may impose by way of restriction on what the parties and officers of the court may say to any representative of the media."

*Ibid.*

[\[Footnote 2/7\]](#)

Two justices of the Supreme Court of Nebraska dissented on jurisdictional grounds similar to those that formed the predicate for that court's earlier per curiam statement, and two other justices who agreed with those jurisdictional claims nevertheless joined the per curiam to avoid a procedural deadlock.

[\[Footnote 2/8\]](#)

These rulings resulted in the paradoxical situation that "[p]etitioners could have ignored the [County Court's] order" because that court had not obtained personal jurisdiction over them and because "courts have no general power in any kind of case to enjoin or restrain 'everybody,'" *State v. Simants*, 194 Neb. 783, 795, 236 N.W.2d 794, 802 (1975). However, because they had improperly intervened in the criminal case (from which they could not appeal), a prior restraint could issue against them. Indeed, the court noted that the prior restraint "applies only to [petitioners]" and not to any other organs of the media. *Id.* at 788, 236 N.W.2d at 798.

[\[Footnote 2/9\]](#)

*See* n. 21, *infra*.

[\[Footnote 2/10\]](#)

The evidence relied on by the Nebraska Supreme Court included the following: the fact that, before entry of the restrictive order, certain newspapers had reported information "which, if true, tended clearly to connect the accused with the slayings," 194 Neb. at 796, 236 N.W.2d at 802; the fact that "counsel for the media stated that it is already doubtful that an unbiased jury can be found to hear the Simants case in Lincoln County," *id.* at 797, 236 N.W.2d at 803; the fact that Nebraska law required the trial to transpire within six months of the date the information was filed, *ibid.*; the relatively small population of the counties to which Nebraska law would permit a

change of venue, *id.* at 797-798, 236 N.W.2d at 803; the "mere heinousness or enormity of a crime"; and "the trial court's own knowledge of the surrounding circumstances," *id.* at 798, 236 N.W.2d at 803.

[\[Footnote 2/11\]](#)

The Nebraska Supreme Court also "adopted" American Bar Association Project on Standards for Criminal Justice, Fair Trial and Free Press § 3.1, Pretrial Hearings (App.Draft 1968) which provides for exclusion of the press and public from pretrial hearings under certain circumstances, and remanded the case to the District Court to consider any applications to close future pretrial proceedings under that standard. The constitutionality of closing pretrial proceedings under specific conditions is not before us, and is a question on which I would intimate no views.

[\[Footnote 2/12\]](#)

JUSTICES STEWART and MARSHALL and I noted that we would have granted the application for a stay.

[\[Footnote 2/13\]](#)

JUSTICES STEWART and MARSHALL and I dissented from denial of the motions to expedite and to grant a stay; MR. JUSTICE WHITE dissented from the latter motion to the extent the state courts had prohibited the reporting of information publicly disclosed during the preliminary hearing in the underlying criminal proceeding.

Although the order of the Nebraska Supreme Court expired when the jury in *State v. Simants* was impaneled and sequestered on January 7, 1976, this case is not moot. This is a paradigmatic situation of "short term orders, capable of repetition, yet evading review." *E.g., Southern Pacific Terminal Co. v. ICC*, [219 U. S. 498](#), [219 U. S. 515](#) (1911). It is evident that the decision of the Nebraska Supreme Court will subject petitioners to future restrictive orders with respect to pretrial publicity, and that the validity of these orders, which typically expire when the jury is sequestered, generally cannot be fully litigated within that period of time. *See, e.g., Weinstein v. Bradford*, [423 U. S. 147](#), [423 U. S. 149](#) (1975). *See also Carroll v. Princess Anne*, [393 U. S. 175](#), [393 U. S. 178-179](#) (1968).

Counsel informs us that Simants has subsequently been tried, convicted, and sentenced to death, and that his appeal is currently pending in the Nebraska Supreme Court. Simants' defense rested on a plea of not guilty by reason of insanity, and all of the information which remained unreported during the pretrial period was ultimately received in evidence. The trial judge also declined to close further pretrial hearings, granted Simants' requests to sequester the jury and conduct *voir dire* with no more than four prospective jurors present at one time, and denied Simants' request for a change of venue. A *Jackson v. Denno* (378 U.S. 368 (1964)) hearing and the first day of *voir dire* were also closed to the public. Petitioners have challenged the latter rulings, and that litigation is still pending in the state courts.

[\[Footnote 2/14\]](#)

The precise scope of these terms is not, of course, self-evident. Almost any statement may be an "admission against interest" if, for example, it can be shown to be false, and thus destructive of the accused's credibility. This would even be true with respect to exculpatory statements made by an accused, such as those relating to alleged alibi defenses. Similarly, there is considerable vagueness in the phrase "strongly implicative" of the accused's guilt. The Nebraska Supreme Court did not elaborate on its meaning, and counsel for the State suggests it only covers the existence of the accused's prior criminal record, if any. Tr. of Oral Arg. 54. Others might view the phrase considerably more expansively. *See supra* at [427 U. S. 581](#); *cf.* 194 Neb. at 789-790, 236 N.W.2d at 799. Indeed, even the fact the accused was indicated might be viewed as "strongly implicative" of his guilt by reporters not schooled in the law, and the threat of contempt for transgression of such directives would thus tend to self-censorship even as to materials not intended to be covered by the restrictive order.

[\[Footnote 2/15\]](#)

Of course, even if the press cannot be enjoined from reporting certain information, that does not necessarily immunize it from civil liability for libel or invasion of privacy or from criminal liability for transgressions of general criminal laws during the course of obtaining that information.

[\[Footnote 2/16\]](#)

The only criticism of this statement is that it does not embrace all of the protection accorded freedom of speech and of the press by the First Amendment. *See, e.g., Near v. Minnesota ex rel. Olson*, 283 U.S. at [283 U. S. 714-715](#).

[\[Footnote 2/17\]](#)

Thus the First Amendment constitutes a direct repudiation of the British system of licensing. *See, e.g., Near v. Minnesota ex rel. Olson, supra* at [283 U. S. 713-714](#); *Grosjean v. American Press Co.*, [297 U. S. 233](#), [297 U. S. 245-250](#) (1936); *Bridges v. California*, [314 U. S. 252](#), [314 U. S. 263-264](#) (1941); *Wood v. Georgia*, [370 U. S. 375](#), [370 U. S. 384](#), and n. 5 (1962).

[\[Footnote 2/18\]](#)

*See* n. 33, *infra*; *supra* at [427 U. S. 582-583](#).

[\[Footnote 2/19\]](#)

The rarity of prior restraint cases of any type in this Court's jurisprudence has also been noted. *See, e.g., New York Times Co. v. United States*, 403 U.S. at [403 U. S. 733](#); *Near v. Minnesota ex rel. Olson*, 283 U.S. at [283 U. S. 718](#) ("The fact that, for approximately one hundred and fifty years, there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right").

[\[Footnote 2/20\]](#)

The Nebraska Supreme Court denigrated what it termed the "extremist and absolutist" position of petitioners for assuming that "each and every exercise of freedom of the press is equally important" and that "there can be no degree of values for the particular right in which the absolutist has a special interest." 194 Neb. at 799, 800, 236 N.W.2d at 804. This seriously mischaracterizes petitioners' contentions, for petitioners do not assert that First Amendment freedoms are paramount in all circumstances. For example, this case does not involve the question of when, if ever, the press may be held in contempt subsequent to publication of certain material, *see Wood v. Georgia*, [370 U. S. 375](#) (1962); *Craig v. Harney*, [331 U. S. 367](#), [331 U. S. 376](#) (1947); *Pennekamp v. Florida*, [328 U. S. 331](#) (1946); *Bridges v. California*, [314 U. S. 252](#) (1941). Nor does it involve the question of damages actions for malicious publication of erroneous material concerning those involved in the criminal justice system, *see New York Times Co. v. Sullivan*, [376 U. S. 254](#) (1964). *See also Time, Inc. v. Firestone*, [424 U. S. 448](#) (1976); *Gertz v. Robert Welch, Inc.*, [418 U. S. 323](#) (1974). And no contention is made that the press would be immune from criminal liability for crimes committed in acquiring material for publication. However, to the extent petitioners take a forceful stand against the imposition of any prior restraints on publication, their position is anything but "extremist," for the history of the press under our Constitution has been one in which freedom from prior restraint is all but absolute.

[\[Footnote 2/21\]](#)

One can understand the reasons why the four prior restraint orders issued in this case. The crucial importance of preserving Sixth Amendment rights was obviously of uppermost concern, and the question had not been definitively resolved in this Court. Our language concerning the "presumption" against prior restraints could have been misinterpreted to condone an *ad hoc* balancing approach, rather than merely to state the test for assessing the adequacy of procedural safeguards and for determining whether the high burden of proof had been met in a case falling within one of the categories that constitute the exceptions to the rule against prior restraints. Indeed, in *Branzburg v. Hayes*, [408 U. S. 665](#) (1972), there was even an intimation that such restraints might be permissible, since the Court stated that

"[n]ewsmen have no constitutional right of access to the scenes of crime or disaster when the general public is excluded, and *they may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant a fair trial before an impartial tribunal.*"

*Id.* at [408 U. S. 684](#)-685 (emphasis supplied). However, the Court in *Branzburg* had taken pains to emphasize that the case, which presented the question whether the First Amendment accorded a reporter a testimonial privilege for an agreement not to reveal facts relevant to a grand jury's investigation of a crime or the criminal conduct of his source, did not involve any "prior restraint or restriction on what the press may publish." *Id.* at [408 U. S. 681](#). It was evident from the full passage in which the sentence appeared, which focused on the fact that there is no "constitutional right of special access [by the press] to information not available to the public generally," *id.* at [408 U. S. 684](#), that the passage is best regarded as indicating that, to the extent newsmen are properly excluded from judicial proceedings, they would probably be unable to report about those proceedings. *See generally id.* at [408 U. S.](#)

[683-685](#). See also *id.* at [408 U. S. 691](#) (decision "involves no restraint on what newspapers may publish or on the type or quality of information reporters may seek to acquire"); *Pell v. Procunier*, [417 U. S. 817](#), [417 U. S. 833-834](#) (1974). It is clear that the passage was not intended to decide the important question presented by this case. In any event, in light of my views respecting prior restraints, it should be unmistakable that the First Amendment stands as an absolute bar even to the imposition of interim restraints on reports or commentary relating to the criminal justice system, and that to the extent anything in *Branzburg* could be read as implying a different result, I think that it should be disapproved. Cf. *New York Times Co. v. United States*, *supra* at [403 U. S. 724-725](#) (BRENNAN, J., concurring).

[\[Footnote 2/22\]](#)

It is suggested that prior restraints are really only necessary in "small towns," since media saturation would be more likely and incriminating materials that are published would therefore probably come to the attention of all inhabitants. Of course, the smaller the community, the more likely such information would become available through rumors and gossip, whether or not the press is enjoined from publication. For example, even with the restrictive order in the *Simants* case, all residents of Sutherland had to be excluded from the jury. Indeed, the media in such situations could help dispel erroneous conceptions circulating among the populace. And the smaller the community, the more likely there will be a need for a change of venue in any event when a heinous crime is committed. There is, in short, no justification for conditioning the scope of First Amendment protection the media will receive on the size of the community they serve.

[\[Footnote 2/23\]](#)

Some exposure to the facts of a case need not, under prevailing law concerning the contours of the Sixth Amendment right to an impartial jury, disqualify a prospective juror or render him incapable of according the accused a fair hearing based solely on the competent evidence adduced in open court.

"[E]xposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged [does not] alone presumptively deprive the defendant of due process."

*Murphy v. Florida*, [421 U. S. 794](#), [421 U. S. 799](#) (1975). See also, e.g., *id.* at [421 U. S. 800](#), and n. 4; *Beck v. Washington*, [369 U. S. 541](#), [369 U. S. 555-558](#) (1962); *Irvin v. Dowd*, [366 U. S. 717](#), [366 U. S. 722-723](#) (1961); *Reynolds v. United States*, [98 U. S. 145](#), [98 U. S. 165-156](#) (1879).

[\[Footnote 2/24\]](#)

Of course, judges accepting guilty pleas must guard against the danger that pretrial publicity has effectively coerced the defendant into pleading guilty.

[\[Footnote 2/25\]](#)

*Cf. Stroble v. California*, [343 U. S. 181](#), [343 U. S. 195](#) (1952). For example, all of the material that was suppressed in this case was eventually admitted at Simants' trial. Indeed, even if Simants' statements to police officials had been deemed involuntary and thus suppressed, no one has suggested that confessions or statements against interest made by an accused to private individuals, for example, would be inadmissible.

[\[Footnote 2/26\]](#)

Failure of the trial judge to take such measures was a significant factor in our reversals of the convictions in *Sheppard v. Maxwell*, [384 U. S. 333](#) (1966), and *Estes v. Texas*, [381 U. S. 532](#) (1965).

[\[Footnote 2/27\]](#)

A significant component of prejudicial pretrial publicity may be traced to public commentary on pending cases by court personnel, law enforcement officials, and the attorneys involved in the case. In *Sheppard v. Maxwell*, *supra*, we observed that

"the trial court might well have proscribed extrajudicial statements by any lawyer, party, witness, or court official which divulged prejudicial matters."

384 U.S. at [384 U. S. 361](#). *See also id.* at [384 U. S. 360](#) ("[T]he judge should have further sought to alleviate this problem [of publicity that misrepresented the trial testimony] by imposing control over the statements made to the news media by counsel, witnesses, and especially the Coroner and police officers"); *id.* at [384 U. S. 359](#), [384 U. S. 363](#). As officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will redound to the detriment of the accused or that will obstruct the fair administration of justice. It is very doubtful that the court would not have the power to control release of information by these individuals in appropriate cases, *see In re Sawyer*, [360 U. S. 622](#) (1959), and to impose suitable limitations whose transgression could result in disciplinary proceedings. *Cf. New York Times Co. v. United States*, 403 U.S. at [403 U. S. 728-730](#) (STEWART, J., joined by WHITE, J., concurring). Similarly, in most cases, courts would have ample power to control such actions by law enforcement personnel.

[\[Footnote 2/28\]](#)

Excessive delay, of course, would be impermissible in light of the Sixth Amendment right to a speedy trial. *See, e.g., Barker v. Wingo*, [407 U. S. 514](#) (1972). However, even short continuances can be effective in attenuating the impact of publicity, especially as other news crowds past events off the front pages. And somewhat substantial delays designed to ensure fair proceedings need not transgress the speedy trial guarantee. *See Groppi v. Wisconsin*, [400 U. S. 505](#), [400 U. S. 510](#) (1971); *cf.* 18 U.S.C. § 3161(h)(8) (1970 ed., Supp. IV).

[\[Footnote 2/29\]](#)

In *Rideau v. Louisiana*, [373 U. S. 723](#) (1963), we held that it was a denial of due process to deny a request for a change of venue that was necessary to preserve the accused's Sixth Amendment rights. And state statutes may not restrict changes of venue if to do so would deny an accused a fair trial. *Groppi v. Wisconsin*, *supra*.

[\[Footnote 2/30\]](#)

To be sure, as the Supreme Court of Nebraska contended, society would be paying a heavy price if an individual who is in fact guilty must be released. But in no decision of this Court has it been necessary to release an accused on the ground that an impartial jury could not be assembled; we remanded for further proceedings, assuming that a retrial before an impartial forum was still possible.

As to the contention that pretrial publicity may result in conviction of an innocent person, surely the trial judge has adequate means to control the *voir dire*, the conduct of trial, and the actions of the jury, so as to preclude that untoward possibility. Indeed, where the evidence presented at trial is insufficient, the trial judge has the responsibility not even to submit the case to the jury.

[\[Footnote 2/31\]](#)

Although various committees that have recently analyzed the "Free Press/Fair Trial" issue have differed over the devices that they believed could properly be employed to ensure fair trials, they have unanimously failed to embrace prior restraints on publication as within the acceptable methods. *See, e.g.*, Report of the Judicial Conference Committee on the Operation of the Jury System, "Free Press-Fair Trial" Issue, 45 F.R.D. 396, 401-402 (1968) (Judicial Conference Committee headed by Judge Kaufman); Special Committee on Radio, Television, and the Administration of Justice of the Association of the Bar of the City of New York, Freedom of the Press and Fair Trial: Final Report with Recommendations 10-11 (1967); American Bar Association Project on Standards for Criminal Justice, Fair Trial and Free Press 68-73 (App.Draft 1968); *see also* American Bar Association, Legal Advisory Committee on Fair Trial and Free Press, Recommended Court Procedure to Accommodate Rights of Fair Trial and Free Press 7 (Rev. Draft, Nov.1975).

[\[Footnote 2/32\]](#)

I include these additional considerations, many of which apply generally to any system of prior restraints, only because of the fundamentality of the Sixth Amendment right invoked as the justification for imposition of the restraints in this case; the fact that there are such overwhelming reasons for precluding any prior restraints even to facilitate preservation of such a fundamental right reinforces the longstanding constitutional doctrine that there is effectively an absolute prohibition against prior restraints of publication of *any* material otherwise covered within the meaning of the free press guarantee of the First Amendment. *See supra* at [427 U. S. 588-594](#).

[\[Footnote 2/33\]](#)

For example, in addition to numerous comments about accommodating First and Sixth Amendment rights in each case, the court observed:

"That the press be absolutely free to report corruption and wrongdoing, actual or apparent, or incompetence of public officials of whatever branch of government is vastly important to the future of our state and nation cannot be denied as anyone who is familiar with recent events must be well aware. Prior restraint of the press, however slight, in such instances is unthinkable. *Near v. Minnesota ex rel. Olson, supra*. In these instances and many others no preferred constitutional rights collide."

"In cases where equally important constitutional rights may collide then it would seem that, under some circumstances, rare though they will be, that an accommodation of some sort must be reached."

194 Neb. at 798-799, 236 N.W.2d at 803-804. Thus, at least when reporting of information "strongly implicative" of the accused also reflects on official actions, a particularized analysis of the need to disseminate the information is contemplated even by those who believe prior restraints might sometimes be justifiable with respect to commentary on the criminal justice system.

[\[Footnote 2/34\]](#)

Prior restraints may also effectively curtail the incentives for independent investigative work by the media which could otherwise uncover evidence of guilt or exonerating evidence that nevertheless threatens the Sixth Amendment rights of others by strongly implicating them in illegal activity.

[\[Footnote 2/35\]](#)

Indeed, to the extent media notified of the restraint proceedings choose not to appear in light of the cost and time potentially involved in overturning any restraint ultimately imposed, there will be no presentation of the countervailing public interest in maintaining a free flow of information, as opposed to the interests of prosecution, defense, and judges in maintaining fair proceedings.

[\[Footnote 2/36\]](#)

For example, in this case the restraints only applied to petitioners, who improperly intervened in the criminal case, and thus subjected themselves to the court's jurisdiction. The numerous *amici*, however, were not subject to the restraining orders and were free to disseminate prejudicial information in the same areas in which petitioners were precluded from doing so.

[\[Footnote 2/37\]](#)

*Cf. New York Times Co. v. United States*, 403 U.S. at [403 U. S. 733](#) (WHITE, J., joined by STEWART, J., concurring).

[\[Footnote 2/38\]](#)

In this case, prior restraints were in effect for over 11 weeks, and yet by the time those restraints expired, appellate review had not yet been exhausted. Moreover, appellate courts might not accord these cases the expedited hearings they so clearly would merit. *See* Tr. of Oral Arg. 43-48.

[\[Footnote 2/39\]](#)

As we observed in *Bridges v. California*, 314 U.S. at [314 U. S. 268](#), which held that the convictions of a newspaper publisher and editor for contempt, based on editorial comment concerning pending cases, were violative of the First Amendment:

"It must be recognized that public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist. Since they punish utterances made during the pendency of a case, the judgments below therefore produce their restrictive results at the precise time when public interest in the matters discussed would naturally be at its height. Moreover, the ban is likely to fall not only at a crucial time but upon the most important topics of discussion."

"No suggestion can be found in the Constitution that the freedom there guaranteed for speech and the press bears an inverse ratio to the timeliness and importance of the ideas seeking expression. Yet, it would follow as a practical result of the decisions below that anyone who might wish to give public expression to his views on a pending case involving no matter what problem of public interest, just at the time his audience would be most receptive, would be as effectively discouraged as if a deliberate statutory scheme of censorship had been adopted. . . ."

"This unfocussed threat is, to be sure, limited in time, terminating as it does upon final disposition of the case. But this does not change its censorial quality. An endless series of moratoria on public discussion, even if each were very short, could hardly be dismissed as an insignificant abridgment of freedom of expression. And to assume that each would be short is to overlook the fact that the 'pendency' of a case is frequently a matter of months or even years rather than days or weeks."

*Id.* at [314 U. S. 269](#). *See also id.* at [314 U. S. 277-278](#); *Carroll v. Princess Anne*, 393 U.S. at [393 U. S. 182](#); *Wood v. Georgia*, 370 U.S. at [370 U. S. 392](#); *Pennekamp v. Florida*, 328 U.S. at [328 U. S. 346-347](#).

[\[Footnote 2/40\]](#)

The editor and publisher of *amicus* Anniston (Ala.) Star poignantly depicted in a letter to counsel the likely plight of such small, independent newspapers if the power to impose prior restraints against pretrial publicity were recognized:

"Small town dailies would be the unknown, unseen and friendless victims if the Supreme Court upholds the order of Judge Stuart. If the already irresistible powers of the judiciary are swollen by absorbing an additional function, that of government censor, the chilling effect upon vigorous public debate would be deepest in the thousands of small towns where independent, locally owned, daily and weekly newspapers are published."

"Our papers are not read in the White House, the Congress, the Supreme Court or by network news executives. The causes for which we contend and the problems we face are invisible to the world of power and intellect. We have no in-house legal staff. We retain no great, national law firms. We do not have spacious profits with which to defend ourselves and our principles, all the way to the Supreme Court, each and every time we feel them to be under attack."

"Our only alternative is obedient silence. You hear us when we speak now. Who will notice if we are silenced? The small town press will be the unknown soldier of a war between the First and Sixth Amendments, a war that should never have been declared, and can still be avoided."

"Only by associating ourselves in this brief with our stronger brothers are we able to raise our voices on this issue at all, but I am confident that the Court will listen to us because we represent the most defenseless among the petitioners."

Brief for Washington Post Co. *et al.* as *Amici Curiae* 31-32.

[\[Footnote 2/41\]](#)

There is also the danger that creation of a second "narrow" category of exceptions to the rule against prior restraints would be interpreted as a license to create further "narrow" exceptions when some "justification" for overcoming a mere "presumption" of unconstitutionality is presented. Such was the reasoning which eventuated in this litigation in the first place. *See supra* at [427 U. S. 582-583](#).

MR. JUSTICE STEVENS, concurring in the judgment.

For the reasons eloquently stated by MR. JUSTICE BRENNAN, I agree that the judiciary is capable of protecting the defendant's right to a fair trial without enjoining the press from publishing information in the public domain, and that it may not do so. Whether the same absolute protection would apply no matter how shabby or illegal the means by which the information is obtained, no matter how serious an intrusion on privacy might be involved, no matter how demonstrably false the information might be, no matter how prejudicial it might be to the interests of innocent persons, and no matter how perverse the motivation for publishing it, is a question I would not answer without further argument. *See Ashwander v. TVA*, [297 U. S. 288](#), [297 U. S. 346-347](#) (Brandeis, J., concurring). I do, however, subscribe to most of what MR. JUSTICE BRENNAN says and, if ever required to face the issue squarely, may well accept his ultimate conclusion.

Supreme Court of India

R.K.Anand vs Registrar,Delhi High Court on 29 July, 2009

Author: A Alam

Bench: B.N. Agrawal, G.S. Singhvi, Aftab Alam

REPORTABLE  
IN THE SUPREME COURT OF INDIA  
CRIMINAL APPELLATE JURISDICTION  
CRIMINAL APPEAL NO. 1393 OF 2008

R.K. Anand

....Appellant

Registrar,  
.....Respondent

Delhi

Versus  
High

Court

WITH

I.U. Khan

CRIMINAL APPEAL NO. 1451 OF 2008  
....Appellant

Registrar, Delhi High Court

Versus  
....Respondent

JUDGMENT

AFTAB ALAM, J.

1. The present is a fall out from a criminal trial arising from a hit and run accident on a cold winter morning in Delhi in which a car travelling at reckless speed crashed through a police check post and crushed to death six people, including three policemen. Facing the trial, as the main accused, was a young person called Sanjeev Nanda coming from a very wealthy business family. According to the prosecution, the accident was caused by Sanjeev Nanda who, in an inebriated state, was driving a black BMW car at very high speed. The trial, commonly called as the BMW case, was meandering endlessly even after eight years of the accident and in the year 2007, it was not proceeding very satisfactorily at all from the point of view of the prosecution. The status of the main accused coupled with the flip flop of the prosecution witnesses evoked considerable media attention and public interest. To the people who watch TV and read newspapers it was yet another case that was destined to end up in a fiasco. It was in this background that a well known English language news channel called New Delhi Television (NDTV) telecast a programme on May 30, 2007 in which one Sunil Kulkarni was shown meeting with IU Khan, the Special Public Prosecutor and RK Anand, the Senior Defence Counsel (and two others) and negotiating for his sell out in favour of the defence for a very high price. Kulkarni was at one time considered the most valuable witness for the prosecution but afterwards, at an early stage in the trial, he was dropped by the prosecution as one of its witnesses. Nearly eight years later, the trial court had summoned him to appear and give his testimony as a court witness. The telecast came a few weeks after the court order and even as his evidence in the trial was going on. According to NDTV, the programme was based on a clandestine operation carried out by means of a concealed camera with Kulkarni acting as the mole. What appeared in the telecast was outrageous and tended to

confirm the cynical but widely held belief that in this country the rich and the mighty enjoyed some kind of corrupt and extra-constitutional immunity that put them beyond the reach of the criminal justice system. Shocked by the programme the Delhi High Court suo moto initiated a proceeding (Writ Petition (Criminal) No.796 of 2007). It called for from the news channel all the materials on which the telecast was based and after examining those materials issued show cause notices to RK Anand, IU Khan and Bhagwan Sharma, an associate advocate with RK Anand why they should not be convicted and punished for committing criminal contempt of court as defined under section 2 (c) of the [Contempt of Courts Act](#). (In the sting operations there was another person called Lovely who was apparently sent to meet Kulkarni as an emissary of RK Anand. But he died in a freak accident even before the stage of issuance of notice in the proceeding before the High Court). On considering their show cause and after hearing the parties the High Court expressed its displeasure over the role of Bhagwan Sharma but acquitted him of the charge of contempt of court. As regards RK Anand and IU Khan, however, the High Court found and held that their acts squarely fell within the definition of contempt under clauses (ii) & (iii) of [section 2\(c\)](#) of the Contempt of Courts Act. It, accordingly, held them guilty of committing contempt of Court vide judgment and order dated August 21, 2008 and in exercise of power under [Article 215](#) of the Constitution of India prohibited them, by way of punishment, from appearing in the Delhi High Court and the courts subordinate to it for a period of four months from the date of the judgment. It, however, left them free to carry on their other professional work, e. g., 'consultations, advises, conferences, opinion etc'. It also held that RK Anand and IU Khan had forfeited their right to be designated as Senior Advocates and recommended to the Full Court to divest them of the honour. In addition to this the High Court also sentenced them to fine of rupees two thousand each.

2. These two appeals by RK Anand and IU Khan respectively are filed under [section 19](#) (1) of the [Contempt of Courts Act](#) against the judgment and order passed by the Delhi High Court.  
THE CONTEXT:

3. Before proceeding to examine the different issues arising in the case it is necessary to first know the context in which the whole sordid episode took place. It will be, therefore, useful to put together the basic facts and circumstances of the case at one place. The occurrence in which six people lost their lives was reconstructed by the prosecution on the basis of police investigation as follows:

The crime, the Police investigation & proceedings before the Trial court:

4. On January 10, 1999 at about half past four in the morning a speeding vehicle crashed through a police check-post on one of the Delhi roads and drove away leaving behind six people dead or dying. As the speeding car hit the group of persons standing on the road some were thrown away but two or three persons landed on the car's bonnet and rolled down to the ground under it. The car, however, did not stop. It moved on dragging along the persons who were caught in its underside. It halted only after the driver lost control and going down a distance of 200-300 feet hit the road divider. At this point the occupants came down from the car to inspect the scene. They looked at the front and the rear of the car and would not have failed to notice the persons caught under the car who were still crying for help and who perhaps might have been saved if they were taken out even at that stage. But the anxiety of the car's occupants to leave the accident site without delay seemed to override all other considerations. They got back into the car, reversed it and drove on. The car went on

dragging the unfortunate victims trapped under it to certain and ghastly death and left behind at the accident site dismembered limbs and dead bodies of men.

5. The police investigation brought to light that the accident was caused by a black BMW car which was being driven by Sanjeev Nanda. He was returning from a late night party, under the influence of liquor, along with some friend(s).

6. Five days after the accident, on January 15, 1999 one Sunil Kulkarni contacted the Joint Commissioner of Police, Delhi, and claimed to be an eye witness to the occurrence. According to his story, at the time of the accident he was passing through the spot, on foot, on his way to the Nizamuddin Railway Station for catching a train for Bhopal. He described the accident in considerable detail and stated that at the sight of so many people being mowed down by the car he got completely unnerved. He proceeded for the railway station and on reaching there tried to ring up the police or the emergency number 100 but was unable to get through. He finally went to Bhopal and on coming back to Delhi, being bitten by conscience, he contacted the police. What was of significance in Kulkarni's statement is that the accident was caused by a car and when it stopped after hitting the people a man alighted from the driving seat and examined the front and rear of the car. Then, another person got down from the passenger seat called the other, "Sanjeev", and urged that they should go. On the same day his statement was recorded by the police under [section 161](#) of the Code of Criminal Procedure (CrPC). The following day he was shown Nanda's BMW car at Lodhi Colony Police Station and he identified it as the one that had caused the accident. On January 21, 1999 Kulkarni's statement was recorded before a magistrate under [section 164](#) of CrPC. Before the magistrate, in regard to the accident, he substantially reiterated the statement made before the police, lacing it up with details about his stay in Delhi from January 7 and his movements on the evening before the accident. In the statement before the magistrate the manner of identification of Sanjeev Nanda was also the same with the addition that after the accident when the car moved again the person on the driving seat was trying to look for the way by craning out his head out of the broken glass window and thus he was able to see him from a distance of no more than three and a half feet when the car passed by his side. The police wanted to settle the question of the driver's identification by having Kulkarni identify Sanjeev Nanda in a test identification parade but Sanjeev Nanda refused to take part in any identification parade. Then, on March 31, 1999 when Sanjeev Nanda was produced in court Kulkarni also happened to be there. He identified him to the investigating officer as the driver of the car causing accident.

7. Kulkarni's arrival on the scene as an eye witness of the tragic accident got wide publicity and he was generally acclaimed as a champion of the public cause. He must have appeared to the police too as godsend but soon there were reasons for the police to look at him completely differently. He had given as his address a place in Mumbai. A summons issued by the trial court on the Mumbai address given by him returned unserved. The report dated August 30, 1999 on the summons disclosed that he had given a wrong address and his actual address was not known to anyone. It also stated that he was a petty fraudster who had defrauded several people in different ways. The report concluded by saying that he seemed to be a person of shady character.

8. At the same time Kulkarni also turned around. On August 31, 1999 a Habeas Corpus petition (Writ Petition (Crl) No.846/99) was filed in the Delhi High Court making the allegation that he was being held by the Delhi Police in wrongful confinement. On the following day (September 1, 1999) when the writ petition was taken up the allegations were

denied on behalf of the police. Moreover, Kulkarni was personally present in Court. The Court, therefore, dismissed the writ petition without any directions. Next, Kulkarni filed a petition (through a lawyer) before the trial court on September 13, 1999. In this petition, he stated that on the date of occurrence, that is, January 10, 1999 itself he had told the police that the accident was caused by a truck. But the police was adamant not to change the version of the FIR that was already registered and on the basis of which five persons were arrested. The police forced him to support its story, and his earlier statements were made under police coercion.

9. On September 23, 1999 a clash took place between some policemen and some members of the bar in the Patiala House court premises for the 'custody' of Kulkarni. A complaint about the alleged high handed actions of the police was formally lodged before the court and a notice was issued to the Jt. Commissioner. In response to the notice the Jt. Commissioner submitted a long and detailed report to the court on September 27, 1999. In the report, apart from defending the action of the policemen the Jt. Commissioner had a lot of things to say about Kulkarni's conduct since he became a witness for the prosecution in the BMW case. He noted that he would never give his address or any contact number to any police official. His life style had completely changed. He lived in expensive hotels and moved around in big cars. The Jt. Commissioner enclosed with his report a copy of the print-out of the cell phone of Kulkarni (the number of which he had given to one of the police officers) that showed that as early as on July 17, 1999 he was in touch with the counsel for the defence RK Anand (one of the appellants) and his junior Mr. Jai Bhagwan, Advocate and even with Suresh Nanda, father of Sanjeev Nanda. He cited several other instances to show Kulkarni's duplicity. The long and short of the report was that Kulkarni was bought off by the defence. He was in collusion with the defence and was receiving fat sums of money from the family of the accused. He was trying to play the two ends against the middle and he was completely unreliable.

10. On September 30, the date fixed for his examination, Kulkarni was duly present in court. He was, however, represented by his own lawyer and not by the prosecuting counsel. He was quite eager to depose. But the prosecution no longer wanted to examine him. IU Khan, the Special Prosecutor filed a petition stating that on the instructions of the State he gave up Kulkarni as one of the prosecution witness on the ground that he was won over by the accused. He also submitted before the court the report of the Joint Commissioner dated September 27. The allegation that he was won over was of course, denied both by Kulkarni and the accused. The court, however, discharged him leaving the question open as to what inference would it draw as a result of his non- examination by the prosecution.

11. Earlier to Kulkarni's exit from the case, the prosecution had lost two other key witnesses. To begin with there were three crucial witnesses for the prosecution. One was Hari Shankar Yadav, an attendant on a petrol pump near the site of the tragedy; the other was one Manoj Malik who was the lone survivor among the victims of the accident and the third of course was Kulkarni. Hari Shankar Yadav was examined before the court on August 18, 1999 and he resiled from his earlier statement made before the police. Manoj Malik was scheduled to be examined on August 30, 1999 but he seemed to have disappeared and the police was unable to trace him out either in Delhi or at his home address in Orissa. On the date fixed in the case, however, he appeared in court, not with the prosecution team but with two other lawyers. He was examined as a witness notwithstanding the strong protest by the prosecution who asked for an adjournment. Not surprisingly, he too turned hostile. Lastly, Kulkarni too had to be dropped as one of the prosecution witness in the circumstances as noted above.

12. The trial proceeded in this manner and over a period of the next four years the prosecution examined around sixty witnesses on the forensic and other circumstantial aspects of the case. The prosecution finally closed its evidence on August 22, 2003. Thereafter, the accused were examined under [section 313](#) of CrPC and a list of defence witnesses was furnished on their behalf. While the case was fixed for defence evidence two applications came to be filed before the trial court, one was at the instance of the prosecution seeking a direction to the accused Sanjeev Nanda to give his blood sample for analysis and comparison with the blood stains found in the car and on his clothes, and the other by the defence under [section 311](#) of CrPC for recalling nine prosecution witnesses for their further cross-examination. By order dated March 19, 2007 the trial court rejected both the applications. It severely criticised the police for trying to seek its direction for something for which the law gave it ample power and authority. It also rejected the petition by the defence for recall of witnesses observing that the power under [section 311](#) of CrPC was available to the court and not to the accused. At the end of the order the court observed that the only witness in the case whose statement was recorded under [section 164](#) of CrPC was Kulkarni and even though he was given up by the prosecution, the court felt his examination essential for the case. It, accordingly, summoned Kulkarni to appear before the court on May 14, 2007. Kulkarni thus bounced back on the stage with greater vigour than before.

#### MEDIA INTERVENTION:

13. In the trial court the matter was in this state when another chapter was opened up by a TV channel with which we are primarily concerned in this case. On April 19, 2007 one Vikas Arora, Advocate, an assistant of IU Khan sent a complaint in writing to the Chief Editor, NDTV with copies to the Commissioner of Police and some other authorities. In the complaint it was alleged that one Ms Poonam Agarwal, a reporter of the TV Channel was demanding copies of statements of witnesses and the Police Case-diary of the BMW case and was also seeking an interview with IU Khan or the complainant, his junior. On their refusal to meet the demands she had threatened to expose them through some unknown person and to let the people know that the police and the public prosecutor had been influenced and bribed by the accused party. He requested the authorities to take appropriate action against Poonam Agarwal.

14. On April 20, 2007 NDTV telecast a half hour special programme on how the BMW case was floundering endlessly even after more than seven years of the occurrence. Apparently, the telecast on April 20, 2007 brought Poonam Agarwal and Kulkarni together. According to Poonam Agarwal, on April 22, 2007 she received a phone call from Kulkarni who said that he was deeply impressed by the programme telecast by her channel and requested for a meeting with her. (The version of Kulkarni is of course quite different). She met him on April 22 and 23. He told her that in the BMW case the prosecution was hand in glove with the defence; he wanted to expose the nexus between the prosecution and the defence and needed her help in that regard. Poonam Agarwal obtained the approval of her superiors and the idea to carry out the sting operation using Kulkarni as the decoy was thus conceived.

15. Even while the planning for the sting operation was going on, NDTV on April 26 gave reply to the notice by Vikas Arora. In their reply it was admitted that Poonam Agarwal had sought an interview with Arora's senior which was denied for reasons best known to him. All other allegations in Arora's notice were totally denied and it was loftily added that the people at NDTV were conscious of their responsibilities and obligations and would make continuous efforts to unravel the truth as a responsible news channel.

16. On April 28, 2007 Kulkarni along with one Deepak Verma of NDTV went to meet IU Khan in the Patiala House court premises. For the mission Poonam Agarwal 'wired' Kulkarni, that is to say, she equipped him with a concealed camera and a small electronic device that comprised of a tiny black button-shaped lens attached to his shirt front connected through a wire to a small recorder with a microchip hidden at his backside. Before sending off Kulkarni she switched on the camera and waited outside the court premises in a vehicle. Deepak Verma from the TV channel was sent along to ensure that everything went according to plan. He was carrying another concealed camera and the recording device in his handbag. Kulkarni and Deepak Verma were able to meet IU Khan while he was sitting in the chamber of another lawyer. Kulkarni entered into a conversation with IU Khan inside the crowded chamber (the details of the conversation we will examine later on at its proper place in the judgment). The conversation between the two that took place inside the chamber was recorded on the microchips of both the devices, one worn by Kulkarni and the other carried by Deepak Verma in his bag. After a while, on Kulkarni's request, both IU Khan and Kulkarni came out of the chamber and some conversation between the two took place outside the chamber. The recording on the microchip of Kulkarni's camera was copied onto magnetic tapes and from there to compact discs (CDs). The microchip in Kulkarni's camera used on April 28, 2007 was later reformatted for other uses. Thus, admittedly that part of the conversation between Kulkarni and IU Khan that took place on April 28, 2007 outside the chamber is available only on CD and the microchip on which the original recording was made is no longer available. The second operation was carried out on May 6, 2007 when Kulkarni met RK Anand in the VIP lounge at the domestic terminal of IGI Airport. The recording of the meeting was made on the microchip of the concealed camera carried by Kulkarni.

17. On May 8, 2007 the third sting operation was carried out when Kulkarni got into the back seat of RK Anand's car that was standing outside the Delhi High Court premises. RK Anand was sitting on the back seat of the car from before. The recording shows Kulkarni and RK Anand in conversation as they travelled together in the car from Delhi High Court to South Extension.

18. In the evening of the same day the fourth and final sting operation was carried out in South Extension Part II market where Kulkarni met one Bhagwan Sharma, Advocate and another person called Lovely. Bhagwan Sharma is one of the juniors working with RK Anand and Lovely appears to be his handyman who was sent to negotiate with Kulkarni on behalf of RK Anand.

19. According to Poonam Agarwal, in all these operation she was only at a little distance from the scene and was keeping Kulkarni, as far as possible, within her sight.

20. According to NDTV, in all these operations a total of five microchips were used. Four out of those five chips are available with them in completely untouched and unaltered condition. One microchip that was used in the camera of Kulkarni on April 28, 2007, as noted above, was reformatted after its contents were transferred onto a CD.

21. On May 13, 2007 NDTV recorded an interview by Kulkarni in its studio in which Kulkarni is shown saying that after watching the NDTV programme (on the BMW case) he got in touch with the people from the channel and told them that the prosecution and the defence in the case were in league and he knew how witnesses in the case were bought over by the accused and their lawyers. He also told NDTV that he could expose them through a sting operation. He further said that he carried out the sting operation with the help of NDTV.

He first met IU Khan who referred him to RK Anand. He then met some people sent by RK Anand, including someone whose name was 'Lovely or something like that'. As to his objective he said quite righteously that he did the sting operation 'in the interest of the judiciary'. In answer to one of the questions by the interviewer he replied rather grandly that he would ask the court to provide him security by the NSG and he would try to go and depose as soon as security was provided to him. In the second part of the interview the interviewer asked him about the accident and in that regard he said briefly and in substance what he had earlier stated before the police and the magistrate. Back to the Court:

22. It is noted above that by order dated March 19, 2007 the trial court had summoned Kulkarni to appear before it as a court witness on May 14, 2007. The defence took the matter to the Delhi High Court (in CrI. M. C. No.1035/2007 with CrI. M. 3562/2007) assailing the trial court order rejecting their prayer to recall some prosecution witnesses for further cross-examination and suo moto summoning Kulkarni under [section 311](#) of CrPC, to be examined as a court witness. The matter was heard in the High Court on several dates. In the meanwhile Kulkarni was to appear before the trial court on May 14, 2007. Hence, the High Court gave interim directions allowing Kulkarni to be examined by the court but not to put him to any cross-examinations till the disposal of the petition being argued before it. The petition was finally disposed of by a detailed order dated May 29, 2007. The High Court set aside the trial court order rejecting the defence petition for recall of certain prosecution witnesses and asked the trial court to reconsider the matter. It also held that the trial court's criticism of the police was unwarranted and accordingly, expunged those passages from its order. However, insofar as summoning of Kulkarni was concerned the High Court held that there was no infirmity in the trial court order and left it undisturbed.

23. On May 14, 2007 Kulkarni appeared before the trial court but on that date, despite much persuasion, the court was not able to get any statement from him. From the beginning he asked for an adjournment on the plea that he was not well. In the end the court adjourned the proceedings to May 17 with the direction to provide him police protection. On May 17, the examination of Kulkarni commenced and he described the accident more or less in the same way as in his statements before the police and the magistrate. He said that the accident was caused by a black car (and not by a truck) but added that the car was coming from his front and its light was so strong that he could not see much. He said about his identification of the car at the Lodhi Colony police station. But on the question of identification of the driver there was a significant shift from his earlier statements. He told the court that what he had heard was one of the occupants urging the other to go calling him "Sanch or Sanz". He had also heard another name 'Sidh' being mentioned among the car's occupants. In reply to the court's question he said that in his statement before the magistrate under [section 164](#) of CrPC he had stated the name 'Sanjeev', and not the nick names that he actually heard, under pressure from some police officials. He said that he was also put under pressure not to take the name of Sidharth Gupta and some police official told him that he was not in the car at the time of the accident. He said that apart from the name that he heard being uttered by the occupant(s) of the car and the number of persons he saw getting down from the car the rest of his statement under [section 164](#) was correct. He said that actually three, and not two, persons had got down from the car. The court then asked him to identify the persons who came out of the offending car. Kulkarni identified Sanjeev Nanda who was present in court. He further said that the third occupant of the car was a hefty boy whom he did not see in the court. At this point IU Khan explained that he might be referring to Sidharth Gupta who was discharged by the order of the High Court. Kulkarni added that he was unable to identify the second occupant of the car and went on to declare, even without being asked, he could not say who came out of the

driver's side. He was shown Manik Kapoor, another accused in the case, as one of the occupants of the car but he said that after lapse of nine years he was not in a position to identify him.

24. On May 29 Kulkarni was cross examined on behalf of the Prosecution by IU Khan. The prosecutor confronted him with his earlier statements recorded under [sections 161](#) and [164](#) of CrPC and he took it as opportunity to move more and more away from the prosecution case. He admitted that Sanjeev Nanda was one of the occupants of the car but positively denied that he came out from the driving seat of the offending car. He elaborated that the one to come out from the driving seat of the car was a fat, hefty boy who was not present on that date. (It does not take much imagination to see that he was trying to put Sidharth Gupta on the driving seat of the car who had been discharged from the case by the order of the Delhi High Court and was thus in no imminent danger from his deposition!). He denied that he disowned or changed some portions from his earlier statements under the influence of the accused persons. On May 29 Kulkarni's cross-examination by IU Khan was incomplete and it was deferred to May 31. But before that NDTV telecast the sting programme that badly jolted not only everyone connected with the BMW trial but the judicial system as well. THE TELECAST:

25. Based on the sting operations NDTV telecast a programme called India 60 Minutes (BMW Special) on May 30, 2007 at 8.00 p.m. It was followed at 9.00 pm, normally reserved for news, as 'BMW Special'. From a purely journalistic point of view it was a brilliant programme designed to have the greatest impact on the viewers. The programmes commenced with the anchors (Ms. Sonia Singh in the first and Ms. Barkha Dutt in the second telecast) making some crisp and hard hitting introductory remarks on the way the BMW case was proceeding which, according to the two anchors, was typical of the country's legal system. The introductory remarks were followed by some clips from the sting recordings and comments by the anchors, interspersed with comments on what was shown in the programme by a host of well known legal experts.

26. It is highly significant for our purpose that both the telecasts also showed live interviews with RK Anand. According to the channel's reporter, who was posted at RK Anand's residence with a mobile unit, he initially declined to come on the camera or to make any comments on the programme saying that he would speak only the following day in the court at the hearing of the case. According to the reporter, in course of the telecast Sanjeev Nanda also arrived at the residence of RK Anand and joined him in his office. He too refused to make any comments on the on-going telecast. But later on RK Anand came twice on the TV and spoke with the two anchors giving his comments on what was being shown in the telecasts. We shall presently examine whether the programmes aired to the viewers were truly and faithfully based on the sting operations or whether in the process of editing for preparing the programmes any slant was given, prejudicial to the two appellants. This is of course subject to the premise that the Court has no reason to suspect the original materials on which the programme was based and it is fully satisfied in regard to the integrity and authenticity of the recordings made in the sting operations. That is to say, the recordings of the sting operations were true and pure and those were not fake, fabricated, doctored or morphed.

27. In regard to the telecast it needs to be noted that though the sting operations were complete on May 8, 2007 and all the materials on which the telecast would be based were available with the TV channel, the programme came on air much later on May 30. The reason for withholding the telecast was touched upon by the anchors who said in their introductory remarks that after the sting operations were complete and just before his testimony began in

court Kulkarni withdrew his consent for telecasting the programmes. Nevertheless, after taking legal opinion on the matter NDTV was going ahead with the airing of programme in larger public interest. Towards the end of the nine o'clock programme the anchor had a live discussion with Poonam Agarwal in which she elaborated upon the reason for withholding the telecast for about three weeks. Concerning Kulkarni, Poonam Agarwal said that he was the main person behind the stings and the sting operation was planned at his initiative. He had approached her and said to her that he wished to bring out into the open the nexus between the prosecution and the defence in the BMW case. He had also said to her that in connection with the case he was under tremendous pressure from both sides. But after the stings were complete he changed his stand and would not agree to the telecast of the programme based on the stings. In the discussion between the anchor and Poonam Agarwal it also came to light that initially NDTV had seen Kulkarni as one of the victims of the system but later on he appeared in highly dubious light. The anchor said that they had no means to know if he had received any money from any side. Poonam Agarwal who had the occasion to closely see him in course of the sting operations gave instances to say that he appeared to her duplicitous, shifty and completely unreliable.

28. NDTV took the interview of RK Anand even as the first telecasts were on and thus what he had to say on what was being shown on the TV was fully integrated in the eight o'clock and nine o'clock programmes on May 30. IU Khan was interviewed on the following morning when a reporter from the TV channel met him at his residence with a mobile transmission unit. The interview was live telecast from around eight to twenty three past eight on the morning of May 31. But that was the only time his interview was telecast in full. In the programmes telecast later on, one or two sentences from his interview were used by the anchor to make her comments.

29. In his interview IU Khan basically maintained that from the clandestine recording of his conversation with Kulkarni, pieces, were used out of context and selectively for making the programme and what he spoke to Kulkarni was deliberately misinterpreted to derive completely wrong inferences. He further maintained that in his meeting with Kulkarni he had said nothing wrong much less anything to interfere with the court's proceeding in the pending BMW case. Impact of the telecast:

30. On the same day IU Khan withdrew from the BMW case as Special Public Prosecutor. Before his withdrawal, however, he produced before the trial court a letter that finds mention in the trial court order passed on that date, written in the hand of Kulkarni stating that he collected the summons issued to him by the court from SHO, Lodhi Colony Police Station on the advice of IU Khan.

31. The trial court viewed the telecast by NDTV very seriously and issued notice to its Managing Director directing to produce 'the entire unedited original record of the sting operation as well as the names of the employees/reporters of NDTV who were part of the said sting operation' by the following day.

32. The further cross-examination of Kulkarni was deferred to another date on the request of the counsel replacing IU Khan as Special Public Prosecutor.

33. On June 1, 2007, RK Anand had a legal notice sent to NDTV, its Chairman, Directors and a host of other staff asking them to stop any further telecasts of their BMW programme and to tender an unconditional apology to him failing which he would take legal action against

them inter alia for damages amounting to rupees fifty crores. NDTV gave its reply to the legal notice on July 20, 2007. No further action was taken by RK Anand in pursuance of the notice. HIGH COURT TAKES NOTICE:

34. On the same day (May 31, 2007) a Bench of the Delhi High Court presided over by the Chief Justice took cognisance of the programme telecast by NDTV the previous evening and felt compelled to examine all the facts. The Court, accordingly, directed the Registrar General 'to collect all materials that may be available in respect of the telecast including copies of CDs/Video and transcript and submit the same for consideration within 10 days'. The court further directed NDTV 'to preserve the original material including the CDs/Video pertaining to the aforesaid sting operation.'

35. In response to the notice issued by the trial court, NDTV produced before it on June 1, 2007 two microchips and a recorder with the third chip inside it. The chips were said to contain the original recordings. In addition to the chips and the recorder NDTV also produced 5 CDs that were copies of the original, unedited recordings on the three chips. It was brought to the notice of the trial court that the High Court had also issued notice to NDTV in the same matter. The trial court, accordingly, stopped its inquiry and returned everything back to NDTV for production before the High Court.

36. On June 2, 2007, Ms. Poonam Agarwal of NDTV submitted before the High Court six CDs; one of the CDs (marked '1') was stated to be edited and the remaining five (marked '2'- '6') unedited. In a written statement given on the same day she declared that NDTV News Channel did not have any other material in connection with the sting operation. She also stated that in accordance with the direction of the Court, NDTV was preserving the original CDs/ Videos relating to the sting operation. On June 6, 2007, Poonam Agarwal submitted true transcripts of the CDs duly signed by her on each page. She also gave a written statement on that date stating that the CDs submitted by her earlier were duplicated from a tape-recording prepared from four spy camera chips which were recorded on different occasions. (As we shall see later on, the total number of microchips used in all the four stings was actually five and not four). She also gave the undertaking, on behalf of NDTV that those original chips would be duly preserved.

37. On June 11 (during summer vacation) the Court recorded the statement of the counsel appearing for NDTV that its order dated May 31 had been fully complied with. On July 9 after hearing counsel for NDTV and on going through the earlier orders passed in the matter the Court felt the need for a further affidavit regarding the telecast based on the sting operation. It, accordingly, directed NDTV to file an affidavit 'concerning the sting operation from the stage it was conceived and the attendant circumstances, details of the recording done, i.e., the time and place etc. and other relevant circumstances'. In compliance with the Court's direction, Poonam Agarwal filed an affidavit on July 23, 2007.

Poonam Agarwal's Affidavit:

38. In her affidavit Poonam Agarwal stated that she was a reporter working with NDTV. She had joined the TV channel two years ago. She stated that NDTV was covering the BMW trial and had telecast a special programme on the case on April 20, 2007. Two days later Kulkarni contacted her on telephone and requested for a meeting saying that he had something important to tell her about the case. She met him on April 22 and 23. In the second meeting he was accompanied by his wife. He told her that there was a strong nexus between the

prosecution and the defence in that case and that he had suffered a lot due to his involvement in the case. He was determined to expose the nexus. He said that he needed the help of NDTV to do a sting operation in order to bring out the complicity between the prosecution and the defence into open. She discussed the plan mooted by Kulkarni with her superiors in the organisation and got their permission to carry out the sting operation. In this regard she stated in the affidavit that the people at NDTV were greatly concerned over the manner in which a number of trials had ended up in acquittal on account of witnesses turning hostile, especially in cases in which accused were influential people. NDTV, as a news channel, was trying to uncover the causes behind this malaise and it was in this spirit that the channel decided to help Kulkarni. She duly told Kulkarni that NDTV was willing to help him in doing the sting operation. Kulkarni informed her that he was going to meet IU Khan in his chamber to seek his direction in connection with the court summons issued to him and that would be good a opportunity for doing the sting. Accordingly, she along with one Deepak Verma (a camera person from the TV channel) met Kulkarni outside the Patiala House court premises. She fitted Kulkarni with a button camera and a recording device and also gave her a cell phone to communicate with her in any emergency. Then Kulkarni and Deepak Verma went to meet IU Khan. Deepak Verma carried another concealed camera and a recording device in his bag. Deepak Verma was sent along with Kulkarni to ensure that he did not in any manner tamper with the hidden camera. Before sending them off she switched on Kulkarni's camera. After meeting with IU Khan both came back and she then switched off Kulkarni's camera. She stated in the affidavit that after copying its contents onto a compact disc the microchip used in Kulkarni's camera was formatted for other projects but the microchip in the camera in Deepak Verma's bag was available undisturbed. Kulkarni next called to tell her that he was meeting RK Anand at the IGI Airport (Domestic Terminal) and suggested to do a sting there. She, accordingly, took her to the airport on May 6, 2007. There she fitted him with the hidden camera and the recording device, switched the camera on and send him off to meet RK Anand. She herself waited for him in her car. After meeting with RK Anand, Kulkarni came out of the airport building and contacted her on the cell phone to find out where her car was parked. He then came back to the car. She switched off the camera and brought her back to her office. Kulkarni again contacted her to say that he was meeting RK Anand on May 8. This time she met him near the Delhi High Court and in her vehicle equipped him with the hidden camera and switched it on. She waited in her vehicle while Kulkarni got into the back seat of a black car outside the Delhi High Court in which RK Anand was sitting from before. The car with Kulkarni and RK Anand drove off and she followed them in her vehicle. They went to South Extension, New Delhi where Kulkarni was dropped. He came back to her vehicle and joined her. She then switched off the camera. She stated in the affidavit that all along the way from outside the Delhi High Court to South Extension the car in which Kulkarni and RK Anand were travelling did not stop anywhere except at the red lights on the crossings. She also averred that all along the way she followed the car in her own vehicle and it always remained in her sight. On the same day Kulkarni told her that he was scheduled to meet RK Anand in his office at South Extension Part II. They together went to South Extension and from there Kulkarni telephoned RK Anand. He told her that he was asked to wait there at a particular spot where someone would come to meet him. After a short while Bhagwan Sharma arrived there whom she knew from before as an advocate associated with RK Anand. At that time they were in her vehicle. She 'wired' Kulkarni, like the earlier occasions, and he went to meet Bhagwan Sharma at the fixed spot. For a little while she lost them from her sight. She then contacted Kulkarni on his cell phone and he, feigning to be talking to his wife, indicated to her the exact spot where he was at that moment. She approached that spot and found that Bhagwan Sharma had gone away and Kulkarni was talking with a Sikh person whom he later identified as 'Lovely'. They moved around and

talked for a pretty long time. In the end Lovely got into his car and drove away. Kulkarni then called her on the cell phone to find out where her vehicle was parked. He came back to her. She switched off the camera. He narrated to her what transpired in the meetings with Bhagwan Sharma and Lovely. She stated in the affidavit that the entire episode lasted for over an hour and a half. All through she had Kulkarni in her sight except for the short period as indicated above. She also stated that as the episode went on for a long time the batteries of the hidden camera got exhausted and, therefore, the recording of the meeting ended abruptly. Once all the material collected in course of the sting operations came in possession of NDTV it was carefully examined and evaluated and the editorial team at NDTV came to the view that in the larger public interest it was their duty to put the whole matter in the public domain. The decision was thus taken to telecast a special programme under the caption 'BMW expose'. The recordings made in the sting operations were then very carefully edited for making a programme that could be telecast. The process of editing took three days. The chips were copied onto CDs in her presence and under her supervision. She, at all time, retained the custody of the original chips. At all successive stages she was personally present to ensure the factual accuracy of the edited version incorporated in the programme. But once the programme was made Kulkarni completely changed his position and strongly opposed the telecast of the programme. He asked her not to telecast the programme saying that he and his wife were facing threat to their lives. He would not clearly spell out the nature of the threat or its source but simply oppose the telecast. In view of his plea that he and his wife faced threat to their lives it was decided to defer the telecast till his examination-in-chief in the court was over. She then stated about Kulkarni's interview (without stating the date on which it was recorded) on camera in the NDTV studio in which he spoke about why and how he carried out the stings. Coming back to the telecast she said that she met Kulkarni on the dates of his appearance in the trial court on May 14, 17 and 29 but was not able to persuade him to agree to the telecast. He was not willing to give his consent even on May 29 but then the people at NDTV felt that his stand was quite contradictory to the objective avowed by him for carrying out the stings with the help of NDTV; by that date his examination-in-chief was over and he was also provided with police protection. Taking all those facts and circumstances into account it was decided to go ahead with the telecast regardless of Kulkarni's objections. The programme was, accordingly, telecast on May 30, 2007. In course of the telecast the anchor of the show engaged with RK Anand and presented his version too before the viewers. IU Khan was similarly tried to be contacted but he was indisposed. In the end the affidavit gave a list of all the materials submitted in the court along with it.

39. In Poonam Agarwal's affidavit NDTV took the stand that the stings were conceived and executed by Kulkarni. Its own role was only that of the facilitator. Kulkarni would choose the date and time and venue of the meetings where he would like to do the sting. He would fix up the meetings not in consultation with Poonam Agarwal but on his own. He would simply tell her about the meetings and she would provide him with the wherewithal to do the sting. She would not ask him when and how and for what purpose the meeting was fixed even though it may take place at such strange places as the VIP lounge of the airport or a car travelling from outside the Delhi High Court to South Extension. She would not ask him even about any future meetings or his further plans.

Proceeding resumes:

40. On July 25, 2007 when the matter next came up before the Court the affidavit of Poonam Agarwal was already submitted before it. On that date the counsel for NDTV took the Court through the transcripts of the sting recordings and submitted that the three advocates and the

other person Lovely, the subjects of the sting, had prima facie interfered with the due administration of criminal justice. The Court, however, deferred any further action in the matter till it viewed for itself the original sting recordings. On that date it appointed Mr. Arvind K. Nigam, Advocate as amicus curiae to assist the court in the matter.

41. On July 31, 2007, one Mr. Vinay Bhasin, Senior Advocate, tried to intervene stating that the action of NDTV in telecasting a programme based on sting operations in connection with a pending criminal trial itself amounted to interference with the administration of criminal justice. On the same day both RK Anand and IU Khan also tried to intervene in the Court proceedings and sought to put forward their point of view. The Court, however, declined to hear them, pointing out that there was no occasion for it at that stage since no notice was issued to them.

42. On August 7, 2007, the Court on a consideration of all the materials coming before it came to the view that prima facie the actions of RK Anand, IU Khan, Bhagwan Sharma and Lovely (who was dead by then) were aimed at influencing the testimony of a witness in a manner so as to interfere with the due legal process. Their actions thus clearly amounted to criminal contempt of court as defined under clause (ii) & (iii) of [section 2\(c\)](#) of the Contempt of Courts Act. The Court accordingly passed the following order:

"From your aforesaid acts and conduct as discerned from the CDs and their transcripts, the affidavit 23rd July, 2007 of Ms. Poonam Agarwal along with its annexures, we are, prima facie, satisfied that you Mr. R.K. Anand, Senior Advocate, Mr. I. U. Khan, Senior Advocate, Mr. Sri Bhagwan, Advocate and Mr. Lovely have wilfully and deliberately tried to interfere with the due course of judicial proceedings and administration of justice by the courts. Prima facie your acts and conduct as aforesaid was intended to subvert the administration of justice in the pending trial and in particular influence the outcome of the pending judicial proceedings.

"Accordingly, in exercise of the powers under [Article 215](#) of the Constitution of India, we do hereby direct initiation of proceedings for contempt and issuance of notice to you, Mr. RK Anand, Senior Advocate, Mr. IU Khan, Senior Advocate, Mr. Shri Bhagwan, Advocate and Mr. Lovely to show cause as to why you should not be proceeded and punished for contempt of court as defined under [Section 2\(c\)](#) of the Contempt of Courts Act and under [Article 215](#) of the Constitution of India.

"You are, therefore, required to file your reply showing cause, if any, against the action as proposed within four weeks.

"Noticees and contemnors shall be present in Court on the next date of hearing i.e. 24 September, 2007.

th "Registry is directed to supply under mentioned material to the noticees:- "(i) Copy of the order dated 7th August, 2007;

"(ii) Affidavit of Ms. Poonam Agarwal dated 23rd July, 2007 together with annexures including the four copies of CDs filed along with the affidavit;

"(iii) Copies of the corrected transcripts filed on 6th August, 2007 in terms of the order dated 31st July, 2007;

"(iv) Copies of 6 CDs, including one edited and five unedited containing the original footage which were produced on 6th June, 2007.

"NDTV shall make available to the Registry sufficient number of copies of the CDs. and transcripts, which the Registry has to supply to the noticees as above."

43. In response to the notice RK Anand, instead of filing a show cause, first filed a petition (on September 5, 2007) asking one of the judges on the Bench, namely, Manmohan Sarin J. to recuse himself from the hearing of the matter. The recusal petition and the review petition arising from it were rejected by the High Court by orders dated October 4 and November 29, 2007. We will be required to consider the unpleasant business of the recusal petition in greater detail at its proper place later in the judgment.

44. While the matter of recusal was still pending a grievance was made before the Court (on September 24) that along with the notice the proceedees were given only five CDs, though the number of CDs submitted by NDTV before the Court was six. Counsel for NDTV explained that the contents of two of the CDs were copied onto a single CD and hence, the number of CDs furnished to the noticees had come down to five. Counsel for the TV channel, however, undertook to provide fresh sets of six CDs to each of the noticees.

45. On September 28, 2007 counsel for IU Khan was granted permission for viewing the six CDs submitted by NDTV on the courts record.

46. On October 1, IU Khan filed his affidavit in reply to the notice issued by the High Court and RK Anand and Bhagwan Sharma filed their affidavits on October 3, 2007. YET ANOTHER TELECAST:

47. In the evening of December 3, 2007 NDTV telecast yet another programme from which it appeared that RK Anand and Kulkarni were by no means strangers to each other and the association between the two went back several years in the past. Kulkarni, under the assumed name of Nishikant, had stayed in RK Anand's villa in Shimla for some time. There he also had a brush with the law and was arrested by the police in Una (HP). He had spent about forty five days in jail. From the HP police record it appeared that after coming on the scene in the BMW case he spent some time in hotels in Rajasthan and Gurgaon with the Nanda's paying the bills.

48. This time RK Anand did not give any legal notice to NDTV seeking apology or claiming damages etc. but on the following day (December 4) he made a complaint about the telecast before the Court. The Court directed NDTV to produce all the original materials concerning the telecast and its transcript. The Court further directed NDTV to file an affidavit giving details in regard to the collection of the materials and the making of the programme.

49. In response to the High Court's direction one Deepak Bajpai, Principal Correspondent with NDTV filed an affidavit on its behalf on December 11, 2007. In the affidavit it was stated that following a reference to HP in the conversation between RK Anand and Kulkarni in the second sting that took place in the car he went to Shimla and other places in Himachal Pradesh and made extensive investigations there. Kulkarni was easily identified by the people there through his photograph. On making enquiries he came to learn that in the year 2000 Kulkarni lived in RK Anand's villa called `Schilthorn' in Shimla for about a year under the assumed name of Nishikant. While staying there he corresponded with an insurance company

on behalf of RK Anand, using his letter-head, in connection with some insurance claim. Interestingly, there he also obtained a driving licence describing himself as Nishikant Anand son of RK Anand. In Shimla and in other places in Himachal he also duped a number of traders and businessmen. In Una he was arrested by Police on suspicion and he had to spend about 45 days in jail.

50. In reply to the affidavit filed by Deepak Bajpai, RK Anand filed an affidavit on January 10, 2008 in which he mostly tried to point out the discrepancies in the sting recordings and contended that those were inadmissible in evidence.

#### PROCEEDINGS BEFORE THE HIGH COURT:

51. After putting the recusal petition and the review application out of its way, the Court took up the hearing of the main matter that was held on many dates spread over a period of four months from December 4, 2007 to May 2, 2008. RK Anand appeared in person while IU Khan was represented through lawyers. Neither RK Anand nor IU Khan (nor for that matter Bhagwan Sharma) tendered apology or expressed regret or contrition for their acts. IU Khan simply denied the charge of trying to interfere with the due course of judicial proceedings and administration of justice by the Courts. He took the stand that the expressions and words he is shown to have uttered in his meeting with Kulkarni were misinterpreted and a completely different meaning was given to them to suit the story fabricated by the TV channel for its programme.

52. RK Anand on his part took a posture of defiant denial and tried to present himself as one who was more sinned against than a sinner. Before coming to his own defence he raised a number of issues concerning the role of the mass media in general and, in particular, in reporting about the BMW case. He contended that it was NDTV that was guilty of committing contempt of Court as the programmes telecast by it on May 30, 2007 (and on subsequent dates) clearly violated the sub-judice rule. On this issue, however, he was strangely ambivalent; he would not file an application before the Court for initiating contempt proceedings against the TV channel but 'invite' the Court to suo moto take appropriate action against it. He next submitted that the Court should rein in and control the mass media in reporting court matters, especially live cases pending adjudication before the court, arguing that media reports mould public opinion and thereby tend to goad the court to take a certain view of the matter that may not necessarily be the correct view. He also urged the Court to lay down the law and guidelines in respect of stings or undercover operations by media. After an elaborate discussion the High Court rejected all the contentions of the contemnors based on these issues. Before us these issues were not raised on behalf of the appellants. But we must observe we fail to see how those issues could be raised before the High Court as pleas in defence of a charge of criminal contempt for suborning a witness in a criminal trial. In the overall facts and circumstances of the case it was perfectly open to the High Court to deal with those issues as well. But it certainly did not lie with anyone facing the charge of criminal contempt to plead any alleged wrong doing by the TV channel as defence against the charge. If the telecast of the programme concerning a pending trial could be viewed as contempt of Court; or if the stings preceding it, in any way, violated the rights of the subjects of the stings those would be separate issues to be dealt with separately. In case of the former the matter was between the Court and the TV channel and in the latter case it was open to the aggrieved person(s) to seek his remedies under the civil and/or criminal law. As a matter of fact RK Anand had given a legal notice to NDTV that he did not pursue. But neither the stings nor the telecast would absolve the contemnors of the grave charge of

suborning a witness in a criminal trial. We have, therefore, not the slightest doubt that the High Court was quite right in rejecting the contemnors' contentions based on those so called preliminary issues.

53. The contemnors then raised the issues of the nature of contempt jurisdiction and the onus and the standard of proof in a proceeding for criminal contempt. They further questioned the admissibility of the sting recordings and contended that those recordings were even otherwise unreliable. In course of hearing RK Anand tried to assail the integrity of the CDs furnished to him that were the reproductions from the original of the sting recordings. According to him, there were several anomalies and discrepancies in those recordings and (on January 29, 2008) he submitted before the Court that from the CDs furnished to him he had got another CD of eight minutes duration prepared in order to highlight the tampering in the original recording. He sought the Court's permission to play his eight minute CD before it. On RK Anand's request the Court viewed the eight minute CD submitted by him on February 5, 2008. On February 27, 2008 the Court directed NDTV to file an affidavit giving its response to the CD prepared by RK Anand. As directed, NDTV filed the affidavit, sworn by one Dinesh Singh, on March 7, 2008. The affidavit explained all the objections raised by RK Anand in his eight minute CD. RK Anand then filed a petition (Crl. M. 4012/2008) on March 31, 2008 for sending the original CDs for examination by the Central Forensic Science Laboratory.

54. Besides this, RK Anand filed a number of interlocutory applications in course of the proceedings. Only three of those are relevant for us having regard to the points raised in the hearing of the appeal. Those were: (I) Crl.M. No. 13782 of 2007 filed on December 3, 2007 for summoning Poonam Agarwal for cross-examination, (II) Crl.M. No. 4010 of 2008 filed on March 31, 2008 for initiating proceeding of perjury against NDTV and Poonam Agarwal for deliberately making false statements on affidavits and fabricating evidence and (III) Crl.M. No. 4150 of 2008 filed on April 2, 2008 asking the Court to direct NDTV to place all the original microchips before it and to furnish him copies directly reproduced from those chips. Apart from the above, RK Anand also filed before the High Court on March 31, 2008 an application in the nature of written arguments.

55. On conclusion of oral submissions, on April 5, 2008 the Court, in presence of the three contemnors and their counsel, viewed all the original materials of the sting operations submitted before it by NDTV. In the order passed on that date it recorded the proceeding of the day as under:

"The under mentioned recordings were played in court today in the presence of noticees, their counsel and the amicus curiae:

- (i) Bag camera chip of conversation with Shri I. U. Khan on 28.4.2007;
- (ii) Button camera DVD of conversation with Shri I. U. Khan on 28.4.2007;
- (iii) Button camera chip of conversation with Shri R. K. Anand on 6.5.2007;
- (iv) Button camera chip of conversation with Shri R. K. Anand on 8.5.2007;
- (v) Button Camera Chip of conversation with Sri Bhagwan Sharma; Shri Lovely;

(vi) Telecast of second expose of 3.12.2007 at H.P. stay of Sunil Kulkarni Mr. Huzefa Ahmedi for noticee Mr. I. U. Khan and Mr. R. K. Anand for himself and Sri Bhagwan offered their comments on the inferences to be drawn from the video recordings and the conversations therein.

Re-notify on 10th April, 2008 at 2.30 p.m. for conclusion of submissions on behalf of noticees."

56. On the next date April 10, 2008 RK Anand concluded his submission and the counsel for IU Khan filed reply to the written submission of amicus curiae. The matter came up once more before the Court on May 2, 2008 when the Court after giving some direction to NDTV and amicus curiae, reserved judgment in the case which was finally pronounced on August 21, 2008. The Court held that the contempt jurisdiction of a Court is sui generis. The provisions of [CrPC](#) and the [Evidence Act](#) are not applicable to a proceeding of contempt. In dealing with contempt, the Court was entitled to devise its own procedure but it must firmly adhere to the principles of natural justice. The Court also found and held that the recordings of the stings on the microchips and their reproduction on the CDs were completely genuine and unimpeachable and hence, those materials could not only be taken in evidence but fully relied on in support of the charge.

57. The High Court rejected all the interlocutory applications filed by RK Anand. As to the request to call Poonam Agarwal for cross-examination the Court observed that what transpired between RK Anand and Kulkarni in the sting meetings was there on the microchips and the CDs, copied from those chips, for anyone to see and no statement by Poonam Agarwal in her cross- examination would alter that even slightly. The Court further recorded its finding that the microchips were not subjected to any tampering etc. and hence, rejected the petition for proceeding against NDTV for perjury. In regard to the other petitions the Court observed that those were moved in desperation and for exerting pressure on NDTV and Poonam Agarwal. The Court further observed that the original chips were in the safe custody of NDTV and there was no need for those chips to be deposited in Court. The contents of the microchips were viewed by the proceedees and the CDs onto which the microchips were copied were handed over to them. The proceedees, therefore, had no cause for grievance and the submission to send the microchips for forensic examination or for directing NDTV to submit the original microchips before the High Court had no substance or merit.

58. In the end the Court held that the circumstances and the manner in which the meetings took place between the proceedees and Kulkarni and the exchanges that took place in those meetings as evidenced from the sting recordings fully established that both IU Khan and RK Anand were guilty of the charges framed against them. It accordingly convicted them for criminal contempt of Court and sentenced them as noticed above.

#### SOME OF THE ISSUES ARISING IN THE CASE:

59. These are broadly all the facts of the case. We have set out the relevant facts in considerable detail since we do not see this case as simply a matter of culpability, or otherwise, of two individuals. Inherent in the facts of the case are a number of issues, some of which go to the very root of the administration of justice in the country and need to be addressed by this Court. The two appeals give rise to the following questions:

1. Whether the conviction of the two appellants for committing criminal contempt of court is justified and sustainable?
2. Whether the procedure adopted by the High Court in the contempt proceedings was fair and reasonable, causing no prejudice to the two appellants?
3. Whether it was open to the High Court to prohibit the appellants from appearing before the High Court and the courts sub-ordinate to it for a specified period as one of the punishments for criminal contempt of court?
4. Whether in the facts and circumstances of the case the punishments awarded to the appellants can be said to be adequate and commensurate to their misdeeds?

Apart from the above, some other important issues arise from the facts of the case that need to be addressed by us. These are:

5. The role of NDTV in carrying out sting operations and telecasting the programme based on the sting materials in regard to a criminal trial that was going on before the court.
6. The declining professional standards among lawyers, and
7. The root-cause behind the whole affair; the way the BMW trial was allowed to go directionless

60. On these issues we were addressed at length by Mr. Altaf Ahmed, learned Senior Advocate appearing for RK Anand and Mr. P. P. Rao, learned Senior Advocate appearing on behalf of IU Khan. We also heard Mr. Harish Salve, learned Senior Advocate representing NDTV, which though not a party in the appeals was, nevertheless issued notice by us. We also received valuable assistance from Mr. Gopal Subramaniam, Senior Advocate and Mr. Nageshwar Rao, Senior advocate, the amici appointed by us having regard to the important issues involved in the case. We spent a full day viewing all the sting recordings, the recording of the programmes telecast by NDTV on May 30, 2007 and the eight minute CD prepared by RK Anand. Present at the viewing were all the counsel and one of the appellants, namely RK Anand.

#### RK ANAND'S APPEAL

61. Before advertng to anything else we must deal with the appeals proper. In order to judge the charge of criminal contempt against the appellants it needs to be seen what actually transpired between Kulkarni and the two appellants in the stings to which they were subjected. And for that we shall have to examine the raw sting recordings.

62. Taking the case of RK Anand first we go to the sting done on him on May 6, 2007 when Kulkarni met him in the VIP lounge at the domestic terminal of IGI Airport, Delhi. Here, it needs to be recalled that as Kulkarni was behind the camera (which was fixed to his shirt front) he is not seen in the picture. What one sees and hears are the pictures of whomsoever he is engaged with and their voices. The video begins with Kulkarni approaching the guard at the entrance of the airport building and asking him about the public address system from where he could contact RK Anand who was inside the airport building in the VIP lounge. The following are the extracts from the transcript of the sting recording of the meeting that would give an idea how the meeting between the two took place and what was said in the meeting.

#### THE EXCHANGE BETWEEN KULKARNI & RK ANAND:









Anand: You were enjoying..

Kulkarni: Kya,...

Anand: You were enjoying. Not that you were in a problem..uski to dikkat hai bechare kixxxx

Kulkarni: Nahi Nahi..I'm also not interested. Aisi baat nahi hai..

Anand: Kabhi kisi ka bura nahi kara karo..aise bhala karne se hi aadmi to acha rehta hai..kisi ko jhoota nahi phasana chahiye..nikal dena chahiye...

Kulkarni: Chalo theek hai. Aap ke kehne par main kuch bhi karne ke liye tayaar hoo..aur inki saari galat information hai.

Anand: Aage jake bhi bhagwan ko jawaab dena hota hai yaar..aage bhi jawaab.... kya fayda karne..xxx Anand: Chhuraane se phir bhi ache rehta hai..phasane seto (abuses) bura hi kaam hota hai... main to kisi main interested hi nahi hoo..kisiko phasane main...

Kulkarni: nahi vo to mujhe bhi pata hai...

Anand: In logo ne Narsimha Rao ko phasaya..acha thodi hua tah vo..vaapis chhuraya tha

humne..kya fayda hua..

Kulkarni: Main aajo baajo main paune aath baje..aap mere ko bula lena Anand: Give me a call at seven forty five..

Kulkarni: Ji..

Anand: On my office number.

XXXXXXXXXXXXXXXXXXXXXXXXXXXX



65. Mr. Altaf Ahmed, learned senior counsel appearing for RK Anand, submitted that the High Court founded the appellant's conviction under the [Contempt of Courts Act](#) on facts that were electronically recorded, even without having the authenticity of the recording properly proved. The High Court simply assumed the sting recordings to be correct and proceeded to pronounce the appellant guilty of criminal contempt on that basis. Hence, the genuineness and accuracy of what appeared in the sting recordings always remained questionable. Mr. Ahmed submitted that the judgment and order coming under appeal was quite untenable for the simple reason that the integrity of its factual foundation was never free from doubt. Learned counsel further submitted that the procedure followed by the High Court was not fair and the appellant was denied a fair trial. He also submitted that the High Court arrived at its conclusions without taking into consideration the appellant's defence and that was yet another reason for setting aside the impugned judgment and order.

Nature of Contempt Proceeding:

66. Mr. Ahmed submitted that under the [Contempt of Courts Act](#) the High Court exercised extra-ordinary jurisdiction. A proceeding under the Act was quasi criminal in nature and it demanded the same standard of proof as required in a criminal trial to hold a person guilty of criminal contempt. In support of the proposition he cited two decisions of this Court, one in *Mritunjoy Das Vs. Sayed Hasibur Rahman*, (2001) 3 SCC 739 and the other in *Chotu Ram Vs. Urvashi Gulati and ors.*, (2001) 7 SCC 530. In both the decisions the Court observed that the common English phrase, "he who asserts must prove" was equally applicable to contempt proceedings. In both the decisions the Court cited a passage from a decision by Lord Denning in *Re Bramblevale Ltd.*, (ALL ER pp. 1063H and 1064B) on the nature and standard of evidence required in a proceeding of contempt.

"A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt. It is not proved by showing that, when the man was asked about it, he told lies. There must be some further evidence to incriminate him. Once some evidence is given, then his lies can be thrown into the scale against him. But there must be some other evidence. Where there are two equally consistent possibilities open to the court, it is not right to hold that the offence is proved beyond reasonable doubt."

67. Seeking to buttress the point learned Counsel also referred to some more decisions of this Court in: (i) [Anil Rattan Sarkar vs. Hirak Ghosh](#), (2002) 4 SCC 21 (ii) [Bijay Kumar Mahanty vs. Jadu @ Ram Chandra Sahoo](#), (2003) 1 SCC 644 (iii) [J. R. Parashar, Advocate vs. Prashant Bhushan, Advocate](#) (2001) 6 SCC 735 and (iv) *S. Abdul Karim vs. NK Prakash and others* (1976) 1 SCC 975

68. There cannot be any disagreement with the proposition advanced by Mr. Ahmed but as noted above if the sting recordings are true and correct no more evidence is required to see that RK Anand was trying to suborn a witness, that is, a particularly vile way of interfering with due course of a judicial proceeding especially if indulged in by a lawyer of long standing. Admissibility of electronically recorded & stored materials in evidence:

69. This leads us to consider the main thrust of Mr. Ahmed's submissions in regard to the integrity, authenticity, and reliability of the electronic materials on the basis of which the appellants were held guilty of committing contempt of Court. Learned counsel submitted that the way the High Court proceeded in the matter it was impossible to say with any certainty

that the microchips that finally came before it for viewing were the same microchips that were used in the spy cameras for the stings or those were not in any way manipulated or interfered with before production in court.

He further submitted that the admissibility in evidence of electronic recordings or Electronically Stored Information (ESI) was subject to stringent conditions but the High Court completely disregarded those conditions and freely used the sting recordings as the basis for the appellants' conviction.

70. In support of the submissions Mr. Ahmed submitted a voluminous compilation of decisions (of this Court and of some foreign courts) and some technical literature and articles on ESI. We propose to take note of only those decisions/articles that Mr. Ahmed specifically referred to us and that have some relevance to the case in hand.

71. Two of the decisions of this Court referred by Mr. Ahmed, one in *S A Khan vs. Bhajan Lal*, (1993) 3 SCC 151 and the other in [Quamarul Islam vs. S. K. Kanta](#), (1973) 1 SCC 471 relate to newspaper reports. In these two decisions it was held that news paper report is hearsay secondary evidence which cannot be relied on unless proved by evidence aliunde. Even absence of denial of statement appearing in newspaper by its maker would not absolve the obligation of the applicant of proving the statement. These two decisions have evidently no relevance to the case before us.

72. In regard to the admissibility in evidence of tape recorded statements Mr. Ahmed cited a number of decisions of this Court in (i) [N. Shri Rama Reddy vs. V. Giri](#) (1970) 2 SCC 340 (ii) [R. M. Malkani vs. State of Maharashtra](#) (1973) 1 SCC 471 (iii) [Mahabir Prasad Verma vs. Dr. Surinder Kaur](#) (1982) 2 SCC 258 and (iv) [Ram Singh vs. Col. Ram Singh](#) (1985) Suppl SCC 611. He also referred to two foreign decisions on the point, one in (i) *R vs. Stevenson*, 1971 (1) All ER 678, and the other of the Supreme Court, Appellate Division of the State of New York in *The People of State of New York vs. Francis Bell* (taken down from the internet). We need here refer to the last among the decisions of this Court and the English decisions in *R vs. Stevenson*. In *Ram Singh*, a case arising from an election trial the Court examined the question of admissibility of tape recorded conversations under the relevant provisions of the [Indian Evidence Act](#). The Court lay down that a tape recorded statement would be admissible in evidence subject to the following conditions "Thus, so far as this Court is concerned the conditions for admissibility of a tape- recorded statement may be stated as follows:

(1) The voice of the speaker must be duly identified by the maker of the record or by other who recognise his voice. In other words, it manifestly follows as a logical corollary that in the first condition for the admissibility of such a statement is to identify the voice of the speaker. Where the voice has been denied by the maker it will require very strict proof to determine whether or not it was really the voice of the speaker.

(2) The accuracy of the tape-recorded statement has to be proved by the maker of the record by satisfactory evidence-direct or circumstantial.

(3) Every possibility of tampering with or erasure of a part of a tape-recorded statement must be ruled out otherwise it may render the said statement out of context and, therefore, inadmissible.

(4) The statement must be relevant according to the rules of [Evidence Act](#). (5) The recorded cassette must be carefully sealed and kept in a safe or official custody.

(6) The voice of the speaker should be clearly audible and not lost or distorted by other sounds or disturbances."

73. In R vs. Stevenson too the Court was dealing with a tape recorded conversation in a criminal case. In regard to the admissibility of the tape recorded conversation the court observed as follows:

"Just as in the case of photographs in a criminal trial the original un-retouched negatives have to be retained in strict custody so in my views should original tape recordings. However one looks at it, whether, as counsel for the Crown argues, all the prosecution have to do on this issue is to establish a prima facie case, or whether, as counsel for the defendant Stevenson in particular, and counsel for the defendant Hulse joining with him, argues for the defence, the burden of establishing an original document is a criminal burden of proof beyond reasonable doubt, in the circumstances of this case it seems to me that the prosecution have failed to establish this particular type of evidence. Once the original is impugned and sufficient details as to certain peculiarities in the proffered evidence have been examined in court, and once the situation is reached that it is likely that the proffered evidence is not the original-is not the primary and the best evidence -that seems to me to create a situation in which, whether on reasonable doubt or whether on a prima facie basis, the judge is left with no alternative but to reject the evidence. In this case on the facts as I have heard them such doubt does arise. That means that no one can hear this evidence and it is inadmissible."

(emphasis added)

74. Mr. Ahmed also referred to another decision by a US Court on the admissibility of video tapes. This is by the Court of Appeal of the State of North Carolina in State of North Carolina vs. Michael Odell Sibley (downloaded from the internet). In this decision there is a reference to an earlier decision of the same court in State vs. Cannon. 92 N C App. 246 etc. in which the conditions for admissibility of video tape in evidence were laid down as under:

"The prerequisite that the offer or lay a proper foundation for the videotape can be met by: (1) testimony that the motion picture or videotape fairly and accurately illustrates the events filmed (illustrative purpose); (2) "proper testimony concerning the checking and operation of the video camera and the chain of evidence concerning the videotape..."; (3) testimony that "the photographs introduced at trial were the same as those [ the witness] had inspected immediately after processing," (substantive purposes); or (4) "testimony that the videotape had not been edited, and that the picture fairly and accurately recorded the actual appearance of the area `photographed."

75. On the different issues germane to the admissibility of ESI Mr. Ahmed also referred to a decision of the District Court of Maryland, United State in [Civil Action](#) No. PWG-06-1893, Jack R. Lorraine and Beverly Mack vs. Markel American Insurance Company (downloaded from the internet). Mr. Ahmed also cited before us an article captioned `The Sedona Conference . Commentary on ESI Evidence & Admissibility': A Project of The Sedona Conference Working Group on Electronic Document Retention & Production (WGI)., published in Sedona Conference Journal, Fall 2008. The article deals extensively with the different questions relating to admissibility in evidence of ESI and one of its basic premises is that the mere fact that the information was created and stored within a computer system would not make that information reliable and authentic.

76. He also invited our attention to an article appearing in The Indian Police Journal, July-September 2004 issue under the caption "Detection Technique of Video Tape Alteration on the Basis of Sound Track Analysis". From this article Mr. Ahmed read out the following passages:

"The acceptance of recorded evidence in the court of law depends solely on the establishment of its integrity. In other words, the recorded evidence should be free from intentional alteration. Generally, examination of recorded evidence for establishing the integrity/authenticity is performed to find out whether it is a one-time recording or an edited version or copy of the original."

And further:

"Alteration on an audio recording can be of Addition, Deletion, Obscuration, Transformation and Synthesis. In video recordings the alteration may be with the intention to change either on the audio track or on the video track. In both the ways there is always disturbance on both the track. Alterations in a video track are usually made by adding or removing some frames, by rearranging few frames, by distorting certain frames and lastly by introducing artificially generated frames. Alteration on a video recording"

77. In light of the decisions and articles cited above Mr Ahmed contended that the High Court freely used the copies of the sting recordings and the transcripts of those recordings made and supplied by NDTV without caring to first establish the authenticity of the sting recordings. Learned counsel submitted that the use of the CDs of the sting recordings and their transcripts by the High Court was in complete violation of the conditions laid down by this Court in Ram Singh.

78. Learned counsel pointed out that at the threshold of the proceeding, started suo moto, the High Court, instead of taking the microchips used for the sting operations in its custody directed NDTV 'to preserve the original material including the CDs/Video' pertaining to the sting operations and to submit to the Court copies and transcripts made from those chips. Thus the microchips remained all along with NDTV, allowing it all the time and opportunity to make any alterations and changes in the sting recordings (even assuming there were such recording in the first place!) to suit its purpose. The petition filed by RK Anand for directing NDTV to submit the original microchips before the Court and to give him copies made in Court directly from those chips remained lying on the record unattended till it was rejected by the final judgment and order passed in the case. Another petition requesting to send the microchips for forensic examination also met with the same fate.

79. Mr. Ahmed further submitted that the procedure followed by the High Court was so flawed that even the number of chips used for the different sting operations remained indeterminate. The trial court order dated June 1, 2007 referred to three chips produced on behalf of NDTV. The written statement of Poonam Agarwal made before the High Court on June 6, 2007 mentioned four chips and finally their number became five in her affidavit dated October 1, 2007.

80. He further submitted that the audio and the video recording on the basis of which the NDTV telecast was based and that was produced before the High Court was done by Kulkarni and it was he who was the maker of those materials. The Court never got Kulkarni brought before it either for the formal proof of the electronic materials or for cross-examination by the contemnors. The finding of the High Court was thus based on materials of

which neither the authenticity was proved nor the veracity of which was tested by cross-examination. He further submitted that the affidavit of the NDTV reporter (Poonam Agarwal) doesn't cure this basic flaw in the proceedings. The recordings were not done by the TV channel's reporter: her participation in the process was only to the extent that she 'wired' Kulkarni and received from him the recorded materials. What she received from Kulkarni was also not identified, much less formally proved before the High Court. According to Mr. Ahmed, therefore, the finding of the High Court was wholly untenable and fit to be set aside.

SUBMISSIONS CONSIDERED:

81. The legal principles advanced by Mr. Ahmed are unexceptionable but the way he tried to apply those principles to the present case appear to us to be completely misplaced.

82. Here, we must make it clear that we are dealing with a proceeding under the [Contempt of Courts Act](#). Now, it is one thing to say that the standard of proof in a contempt proceeding is no less rigorous than a criminal trial but it is something entirely different to insist that the manner of proof for the two proceedings must also be the same. It is now well settled and so also the High Court has held that the proceeding of contempt of court is sui generis. In other words, it is not strictly controlled by the provisions of the [CrPC](#) and the [Indian Evidence Act](#). What, however, applies to a proceeding of contempt of court are the principles of natural justice and those principles apply to the contempt proceeding with greater rigour than any other proceeding. This means that the Court must follow a procedure that is fair and objective; that should cause no prejudice to the person facing the charge of contempt of court and that should allow him/her the fullest opportunity to defend himself/herself. (See In Re Vinay Mishra (1995) 2 SCC 584, [Daroga Singh and Ors. vs. B.K. Pandey](#) (2004) 5 SCC 26)

CORRECTNESS OF STING RECORDINGS NEVER DISPUTED OR DOUBTED:

83. Keeping this in mind when we turn to the facts of this case we find that the correctness of the sting recordings was never in doubt or dispute. RK Anand never said that on the given dates and time he never met Kulkarni at the airport lounge or in the car and what was shown in the sting recordings was fabricated and false. He did not say that though he met Kulkarni on the two occasions, they were talking about the weather or the stock market or the latest film hits and the utterances put in their mouth were fabricated and doctored. Where then is the question of proof of authenticity and integrity of the recordings? It may be recalled that both in the eight o'clock and nine o'clock programmes, RK Anand was interviewed by the programme anchors and the live exchange was integrated into the programmes. Let us see what his first response to the telecast was when the anchor of the eight o'clock programme brought him on the show.

[Following are the extracts from the exchange between the anchor and RK Anand] LIVE EXCHANGE BETWEEN TV ANCHOR & RK ANAND:

"India 60 Minutes (BMW Special) 8 PM"

Segment 2 Sonia: We have RK Anand, on line with us. Mr. RK Anand, you have watched that report, what's your defence?

RK Anand: My defence, what can be the defence you tell me. See, he just came to me and he was making a joke that should I make a demand for Rs. 2.5 crores and I said what the hell are you talking, you would want any amount you want ten, I meant this jokingly I'd not serious manner. I thought what the hell you want and I never invited him I was going out he must

have come there to meet me and I don't know what kind of story if being made my NDTV on this channel. xxxxxxxxxxxxxxxxxxxxxxxx Sonia: But Mr. Anand if you have a witness who has come up, you have a witness of the prosecution who has come up to you he has claimed that he wants this much money and you may've laughed it off but you then met him again, you've again discussed details of the case, surely that is not appropriate behaviour for a defence lawyer with a prosecution witness. RK Anand: See, did I ask him to sit in the car? Did I ask him to come to my office? Did I ever give him a call to come to me? We never called. I think it's a trap being laid by the NDTV people and sending the Kulkarni to me. It's nothing that we have done anything. xxxxxxxxxxxxxxxxxxxxxxxx Sonia: But Mr Anand, let me come back to the central point once again why should a defence lawyer and a prosecution witness be meeting and discussing the case even if it's at the behest of the witness, surely as a senior defence lawyer you should've thrown him out and not entertained this conversation?

RK Anand: Just listen to me now; somebody comes up and talks to you, what do you do, you throw him out?

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx

Sonia: But you met him again in your car?

RK Anand: HE was saying 2.5 and I said make a demand for 5. I was making a joke of him. Could you not understand the language in which I said it? I was laughing at that time. Listen to me, he is a blackmailer, he is trying to blackmail at your instance.

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx Sonia: Mr Anand, if you were joking the questions that we are raising as we've said many times, we have no evidence that money changed hands or didn't change hands, what we are showing you is what was caught on camera. Money being discussed whether it was jokingly or not jokingly has to be investigated and two meetings between you and the key prosecution witness, that seems to be what is currently on camera, what actually happened has to be investigated. But how do you justify these two meetings?

RK Anand: You are trying again to ask questions after questions. I am saying that you know when he said about 2.5 crores, I laughed at him and said bloody you are joking. I was smiling at him; he was making a fool of himself.

xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx Next is his response in course of the second telecast immediately following the first one: [Following are the extracts from the exchange between the anchor and RK Anand] 30th May - 9 PM BMW Special Barkha Dutt: Mr RK Anand if you can hear me, by now you have watched over two times on NDTV. The camera doesn't lie sir, u were meeting the prosecution's witness not once but twice, sir, how was this appropriate, how can you defend this sir?

Anand: Barkha, we should talk in the right perspective. One must understand that this witness is a blackmailer, we have been fighting in the High Court even today that this witness should not be examined because he has been blackmailing us for the last so many years and when I was going out of Delhi, he appeared suddenly at the airport, and starts talking to me and say should I make it 2.5 crores. I laughed at him and what the hell are you talking, u demand 5 crores, I'll cross-examine you. This is my first reaction to that one.



85. We have gone through the transcripts of the exchange between the two anchors and RK Anand a number of times and we have also viewed the programme recorded on CDs. To us, RK Anand, in his interactions with the programme anchors, appeared to be quite stunned at being caught on the camera in the wrong act, rather than outraged at any false accusations.

86. It is noted above that immediately after the telecast RK Anand sent a legal notice to NDTV threatening legal actions against them and demanding a huge sum as compensation. NDTV gave its replay to the legal notice and thereafter RK Anand didn't pursue the matter any further. Meeting with Kulkarni in car admitted:

87. RK Anand filed his reply affidavit in response to the notice issued by the Court on October 3, 2007. In paragraph B of the affidavit he denied, "each and every part of alleged tape conversation and CDs produced before the Court in response to order passed by this Court in relation to telecast of BMW exposing thereby denying each part of the conversation". He further stated that the whole tape was fabricated, distorted, edited in such a manner to tarnish his image and to suit and project the TV channel's story in particular manner.

In paragraph 'O' of the affidavit, however, he stated as follows:

"O. That the Deponent was awfully busy in Court on 8.5.2007. He finished his arguments in a bride burning case at 5.45 p.m. While he was sitting in his car, Sunil Kulkarni made entry in the car. The Deponent was unwilling to talk and to allow him to sit in the car. The opening lines would make it clear that the Deponent never wanted to talk to Sunil Kulkarni.

"Kulkarni: Kyon office mein, ghar pe bhi mat milo....

Anand: Yahan Kyon milto ho phir."

"After reaching office, the deponent had meeting with clients i.e. Sanjeev Nanda and his father. Lovely had come to meet Mr. Suresh Nanda. All the colleagues of the deponent and Nanda's were apprised of development in the car about Sunil Kulkarni. After some time, the deponent left the office. The deponent was informed that Lovely offered to record the conversation of Kulkarni so as to trap him. The deponent was informed later that not only Lovely was successful in recording the demand of Sunil Kulkarni but Shri Bhagwan also recorded another conversation subsequent to that of Lovely. The said conversation is reproduced below."

88. This is followed by a transcript of some alleged conversation between Shri Bhagwan and Kulkarni.

89. In the above quoted paragraph there is plain and clear admission in regard to the second meeting taking place in the car between RK Anand and Kulkarni on the evening of May 8, 2007. The statement made on oath before the High Court thus completely falsifies his denial in the live interview with the anchor of the TV programme about the second meeting with Kulkarni in the car. As to the later part of the paragraph regarding the alleged sting on Sunil Kulkarni by Shri Bhagwan, we don't have the slightest doubt that it was an afterthought and concoction. Had there been such a sting recording RK Anand was duty bound to inform the High Court about it when the Criminal Revision against the trial court order summoning Kulkarni as court witness was heard on several dates in May 2007 before the telecast of the programme by NDTV. He was equally duty bound to inform the trial court about Kulkarni's

approaches and the sting done on him by Shri Bhagwan when Kulkarni was examined before it on May 14, 17 & 29.

Referring to sting recordings to show innocence:

90. Further, interestingly, though calling the sting recordings fabricated, manufactured, and distorted, he also relies on the very same sting recordings to make out some point or the other in his defence. For example, in paragraph S of the affidavit it is stated as follows:

"S. That in fact, this alleged witness Sunil Kulkarni had earlier attempted to meet the Respondent in his office. It is a matter of chance that Shri Amod Kanth the then Director General of Police, Arunachal Pradesh was present with the Respondent in his office. Sunil Kulkarni was rebuffed, rebuked and was asked to leave Respondent's office in the presence of Shri Kanth. Thereafter, Sunil Kulkarni was physically thrown out from the office of Respondent. Shri Amodh Kanth also rebuked him for his conduct.

This fact stands corroborated by the transcript in which it has been stated by Sunil Kulkarni as under:-

"Kul: mujhe koi to message nahi mil raha tha. Phir panga yeh ho raha ki when u told me I don't want to discuss

(mujhe koi message nahi mil raha tha phir panga yeh ho raha ki when u told me I don't want to discuss."

"Kul: "beech main aap par gussa ho gaya tha.

(Beech me aap par gussa ho gaya tha, aap ka koi neta log hain, ek aaddmi jisne mere ko aisa kheencha tha).

Kul: vo aapka ek neta log hain ek Neta isne mereko aisa Kheecha tha

(Ek neta tha usne mere kko aisa kheencha tha, aisa kheencha tha, bola sahib ne milne ko manakar diya, bigar gaya, kaha bhag jao, bhag jao, aisa bola)."

"From the above transcript, it is clear that the Respondent had no intention at any time to meet the said witness. He was thrown out physically from the office of Respondent. He was told not to meet the Respondent as they are not interested in any one."

Similarly in paragraph Z10 it is stated as follows:

"Z10.....The deponent has never tried or intended to influence this witness so as to interfere in the course of justice. On the other hand, deponent have rebuked and rebuffed him & told him not to ask for any money. Rather the witness was advised to speak the truth and not to falsely implicate the Nanda's. Respondent has gone to the extent of telling him to have fear from God since everyone is answerable for his acts to God....."

And again in paragraph 17 it is stated as follows:

"17.....The deponent had no intention to discuss the subject matter of the case with Sunil Kulkarni. The discussion was started by Sunil Kulkarni by alleging that;

Kul "kal kya mereko nikaal rahe ho kya...311 se."

Anand: Karoon...

Kulkarni nahi  
Kulkarni No, nahi nikalna

Kulkarni nahi, nahi, mat nikalna..withdraw karva lo na aap. Jab Main aapke saath ho jo marzi karne ke liya tyaar ho to yeh kay ke liye High Court main lagwa diya aapne...mere upar aapko itna bhi bharosa nahin hain kya..theek hain gussa ho jata hoon main....

Kulkarni lekin aana hain depose karma hain."

"The aforesaid transcript of Sunil Kulkarni would clearly indicate that he himself was suggesting that he is prepared to make any kind of statement. It is not that the deponent wanted him to make a statement in a particular manner. It is not that the deponent was trying to influence the witness. The witness had already taken a decision to make a statement in a particular manner not at the instance of the deponent."

Further in Paragraph 23 "23.....The below noted conversation would substantiate the stand of the deponent.

"Kul: kitna mango.  
Anand: chodo...baat samjha kar...aadmi ki zindagi  
main aur Bhi bade  
kaam aate hain. Aisa nahi karte"

"The whole conversation about reasonableness was in the form of an admonishment and advice so that no money is demanded. If the deponent wanted to deal with the witness or influence the witness or negotiate the terms of settlement, at that point of time, the deponent could have discussed since the demand of 2.5 crores was already allegedly made by the witness but categorically telling the witness to not to talk about the money and reminding of the relations would negate the discussion about the money part in the whole transcript. The reference to the utterances by Sunil Kulkarni.

Kul: "isme bachana hain usko sanjeev  
ko..

Anand: kabhi kisika bura mat kiya karo.

Anand: Kabhi kisi ka bura nahin kara karo..aisa  
bhala karne se hi Aadmi ko  
acha xx....kisii ko jhoota nahi phasana chahiya....nikal dena chahiye...

Anand: aage jake bhi bhagwan ko jawaab dena hota hain yaar ...aage bhi jawaab...kya fayda karne...xxx...

Anand: Bachane se phir bhi ache rehta hain...phasane me To bura kaam hota hain...main to kisi main interested hi nahin hoon."

First of all..."

Further in paragraph 24 "24. That during the course of conversation and in view of the past acquaintance Sunil Kulkarni had with the deponent, number of irrelevant statements were made by the witness. One such part was in relation to Amodh Kanth. The important conversation which came to light during the course of the talks was;

"Uska koi taluk nahin..phir bhi yeh amod kanth ke peeche kyon pada hua K.K.Paul."

91. He thus accepts the entire recordings in both the stings. For, it is absurd even to suggest that the sting recordings are true and correct if those are seen as supporting his explanations (which,

in any event, are quite un-statable!) but are otherwise false and fabricated.

92. In a rearguard action Mr. Altaf Ahmed took us one by one through all the paragraphs in different affidavits filed by RK Anand in which the sting recordings were described as false, fabricated, doctored, morphed and manipulated. But those allegations are simply not compatible with the other statements in his affidavits as noted above and his responses in regard to the sting operations at different times. The denials in the affidavits are nothing more than ornamental pleas.

93. We also see no substance in the anomalies and alleged inter correlation in the sting recordings as pointed out on behalf of RK Anand on the basis of the eight minute CD which he got prepared from the materials supplied to him by the Court. Along with the other materials we also viewed eight minute CD produced by RK Anand. In the CD an attempt is made to show that the frames in the sting recordings some times jumped out of the sequence number and such other technical flaws. The objections raised by RK Anand were fully explained by the affidavit filed by Dinesh Singh on behalf of NDTV. In the affidavit it was explained "80...the alleged discrepancies in the CDs produced before the Court and supplied to the appellants occurred primarily due to conversion of the recorded material from chips into CDs, via the intermediary medium of tapes. Shri Singh further explains the gap occurring at certain points of the recording as due to displacement of the ear-plus connector i.e. the device uses to attach the button lens and the microphone with the recording device."

94. Mr. Altaf Ahmed also made the grievance that the High Court failed to consider his defence. According to him NDTV had conceived the sting operation as pre-empted measure against Shri Anand, who was consulted in his professional capacity in connection with a matter in which NDTV in collusion with one Mrs. Sumana Sain and IRS officer was indulging in massive tax evasion. The materials in support of the allegations and in particular RK Anand's connection with the matter are so vague and tenuous that we don't consider it worthwhile to go into that question.

95. On a careful consideration of the materials on record we don't have the slightest doubt that the authenticity and integrity of the sting recordings was never disputed or doubted by RK Anand. As noted above he kept on changing his stand in regard to the sting recordings. In the facts and circumstances of the case, therefore, there was no requirement of any formal proof of the sting recordings. Further, so far as RK Anand is concerned there was no violation of the principles of natural justice inasmuch as he was given copies of all the sting recordings along with their transcripts. He was fully made aware of the charge against him. He was given fullest opportunity to defend himself and to explain his conduct as appearing from the sting recordings. The High Court viewed the microchips used in the spy camera and the programme telecast by TV channel in his presence and gave him further opportunity of hearing thereafter. The sting recordings were rightly made the basis of conviction and the irresistible conclusion is that the conviction of RK Anand for contempt of court is proper legal and valid calling for no interference. IU KHAN'S APPEAL

96. The sting on IU Khan was done on April 28, 2007 in one of the lawyers' chambers at the Patiala House court premises. The video CD begins by showing Poonam Agarwal fixing the recording device and the button camera on Kulkarni's person sitting inside the car. Then Kulkarni and Deepak Verma together enter the Patiala House. They move around in the court premises for a long time till just before the lunch recess they are able to find IU Khan sitting in someone else's chamber. The chamber seems to be quite crowded with people all the time coming and going away. The first exchange of greetings between IU Khan and Kulkarni as he, accompanied with Deepak Verma, enters into the chamber is not audible. But then IU

Khan is heard describing Kulkarni, in a general sort of introduction to those present there, as 'the prime witness in the BMW case', 'star witness' 'a very public spirited and devoted man' etc. Kulkarni starts chatting with him about the summons issued to him by the court in the BMW case. In the meanwhile someone else comes into the chamber. IU Khan greets him loudly and starts talking to him. After a while, on Kulkarni's request, both IU Khan and Kulkarni come out of the chamber and some conversation between the two takes place outside the chamber. After the meeting is over Kulkarni and Deepak Verma together return back. As the recording devices carried by them are still on the conversation that takes place between the two is naturally recorded. Kulkarni does not allow Deepak Verma to go directly to the TV Channel's vehicle parked outside the Court premises where Poonam Agarwal would be waiting for their return, saying that they are bound to be followed. Instead, they take an auto-rickshaw and go to Pargati Maidan at a short distance from the court. From there they contact Poonam Agarwal on mobile phone, who goes there and joins them and de-wires Kulkarni.

Only partial transcript of the sting recording submitted to Court:

97. The recording of this sting operation is more than an hour long. But the transcript of this sting recording submitted to the Court by NDTV is confined only to the exchange between IU Khan and Kulkarni. In the absence of the full transcript it becomes difficult and cumbersome to see what transpired between Kulkarni and Deepak Verma immediately before and after the meeting with their subject. In our view that part of the sting recording was also highly relevant and important for judging the true import of the exchange that took place between Kulkarni and IU Khan. We are surprised that the High Court did not notice this big omission in the transcript of the first sting and we record our disapproval of NDTV in withholding the full transcript of the sting recording. Full transcript/recording of IU Khan's interview by TV channel on May 31, 2007 not on record:

98. Further, it is noted above that in the morning of May 31, 2007 one Anusuya Roy, a reporter from NDTV had interviewed IU Khan at his residence for his response to the programme telecast the previous evening. The interview was telecast live from around 8 to 8.23 in the morning. But that was the only time the full interview was shown and later only one statement made by IU Khan in course of the interview was incorporated in the programmes telecast in the evening of May

31. What is more significant, however, is that NDTV did not present before the High Court either the full recording of the interview or its transcript and what we find on the High Court record is only the statement that was used in the programmes telecast on May 31, 2007 and that runs as follows;

"IU Khan: I am not denying anything at all, I am not denying it but the interpretation, meaning and inferences which were drawn are totally wrong, unfounded and totally inconsonance (sic) with the actual record that I am producing before you. Kulkarni also has used the word 'Bade Saheb' means the big officer, high officer of the police headquarter. In his deposition in the court also he had used the word Bade Saheb twice and when the explanation was sought, he explained that by bade saheb I mean senior officer of the police headquarter, it was unconnected to Mr. R.K. Anand as it has been wrongly, mischievously and calculatedly projected by you people."

Confusion in submitting copies of sting recording to High Court:

99. Yet again, there is serious confusion about the production of the recording of the first sting on the microchip of the spy camera carried by Kulkarni before the High Court. It is noted above that on June 1, 2007 three chips and five CDs were produced before the trial court. Those were returned back because in the meanwhile the proceeding was initiated by the High Court. On June 2, 2007 six CDs were submitted before the High Court. On that date Poonam Agarwal stated before the Registrar that one of the CDs (marked `1') was edited and the other five CDs (marked `2' to `6') were unedited. She also said that NDTV news channel did not have any other material in connection with the sting operation in question. On June 6, 2007 she submitted the transcripts of the recordings. In the statement made on that date she said that she had earlier submitted six CDs. Those CDs were duplicated from four spy camera chips which were recorded on different occasions. After copies of the CDs were given to the proceedees as directed in the order dated August 7, 2007 issuing show cause notices to them, a grievance was made before the Court that they were supplied only five CDs, though the number of CDs submitted before the High Court was six. It was then explained on behalf of NDTV that the contents of two CDs were copied onto a single one and thus the number of CDs was reduced from six to five. It was of course stated that a fresh set of six CDs each would again be supplied to all the three proceedees. The High Court apparently accepted the explanation given by NDTV (High Court order dated 24.9.2007). But the lapse was far more serious as would appear from the affidavit dated October 1, 2007 filed by Poonam Agarwal to explain the position. In her affidavit she stated that in the first sting (on IU Khan) two spy cameras were used, one carried by Kulkarni and the other by Deepak Verma. The recording of the first sting was thus on two microchips one in Kulkarni's camera and other in the bag camera of Deepak Verma. In the other three stings there was a single spy camera carried by Kulkarni, on each occasion having a fresh microchips. Thus for all the four stings a total number of five chips were used. The contents of the microchip in Kulkarni's spy camera used for the first sting (on IU Khan) were copied onto magnetic tape and then to a CD. That microchip was then reformatted for other uses. The other four microchips were available in their original and undisturbed condition. For preparation of the programme telecast on May 30 the contents of all the five chips, including the one that was reformatted, were used. However, the five unedited CDs (marked `2' to `6') that were submitted before the High Court on June 2, 2007 were copies from the four microchips that had remained in their original and undisturbed condition. The sixth CD (marked as `1') was the copy of the programme that was telecast. The recording on the microchip in Kulkarni's camera used for the first sting operation, though available on magnetic tape and CD was not submitted to the High Court because the microchip itself was reformatted. She further stated that while supplying CDs to the noticees in pursuance to the direction of the Court, "a mistake occurred in that, one of the CDs given to the noticees (sic) was not taken from the "four chips but the CD which is a copy of the formatted chip containing the recording done by Mr. Kulkarni". She further stated that a CD made from the mother tape of the formatted chip was being filed along with the affidavit before the High Court.

100. What follows from the affidavit may be summarised as follows; (I) the conduct of NDTV before the High Court in a vary serious proceeding was quite cavalier and causal. (II) At the time the High Court issued show cause notices to the three proceedees it did not have before it the recording on one of the five microchips used in the sting operations. (III) The materials given to the proceedees along with show cause notice were not exactly the same as submitted before the High Court. (IV) The explanation in the form of Poonam Agarwal's affidavit came on October 1, 2007 on the same day when IU Khan filed his reply affidavit in response to the show cause notice.

101. In those circumstances it was not wrong for IU Khan to state in paragraphs 14 and 15 of his memorandum of appeal as under:

"14.... This finding is again against the material on record as the original chip of the button camera carried by Mr. Kulkarni was formatted by the NDTV in violation of the direction issued by the Hon'ble Court. This part of the conversation is not available in the transcript of the bag camera."

"15. Because the CD of the button camera firstly cannot be relied upon as it was filed after the reply was filed by the appellant on 1.10.2007..."

Lapses have no effect on RK Anand's case or even on case of IU Khan:

102. We have recounted here some of the noticeable lapses committed by NDTV in the proceedings that were overlooked by the High Court. Having regard to seriousness of the proceeding we should have wished that it was free from such lapses. But it needs to be made absolutely clear that the irregularities pointed out above were in regard to the first sting concerning IU Khan. These in no way affect RK Anand or alter his position. The discussions and findings recorded above in respect of RK Anand thus remains completely unaffected by the mistakes pointed out here.

103. Further, having regard to the defence taken by IU Khan the aforementioned lapses do not have any material affect on his case either. But before proceeding to examine his defence and how the High Court dealt with it, it would be necessary to see what conversation is shown to have taken place in the sting recordings between Kulkarni and IU Khan.

#### THE EXCHANGE BETWEEN KULKARNI & IU KHAN:

Khan: Meet Kulkarni, he is the prime witness in the BMW case. He is our star witness and he is a very public spirited and devoted man and incidentally, he was in Delhi on the way/day when this unfortunate incident happened. He was going on foot to the Nizamuddin Railway Station. A BIT FOLLOWS THAT IS HARD TO UNDERSTAND Kulkarni: Mein barbad ho gaya, sir.

Khan: How?

Kulkarni: This particular thing is only you and myself are aware of. But I am not aware of anything, anything. I don't want to go again with that particular guy. I lost my mother, I don't know where my father is. I'm just roaming around for 8 years. Ab yeh mujhe kyun bulaya gaya hai?

Khan: Ab court ne (coughs) we dropped you....court ne (unclear) Kulkarni: No, no you....I think the state told you to drop, right, if I'm not wrong? Khan: These were the instructions I received from the Headquarters and that's why I got the SHO statement recorded that "on the instruction of the SHO and the ACP, such and such witness has been dropped". Then how can I make a statement? My clients are Delhi Police. Whatever instructions they will give, I will act upon it. I was very keen to examine you. Kulkarni: Ya, I know that because I still remember, still remember.

Khan: Inhone mera haath dabaya xxxbhi dabaya, khoob dabaya, maine kaha main kya karoo, agar individual client ho to samjha bhi lo, department hai.

Khan: Bade Sahab se mile? Nahi mile? Mulakat hi nahi hooyi?

Kulkarni: Ab yeh kya jhanjhat aur?

Khan: Nahi nahi kuch nahi hoga, ab High Court mein unhone petition file kar di hai ki

Kulkarni ki statement xxxxxxxx.

Kulkarni: To woh record karenge nahi na?

Khan: Nahi.

Kulkarni: Pakka?

Khan: Tum mauj karo...hum...humne drop kar diya, court ko kya...who is he is to say that it

should be recorded.

**Someone: Investigation to court kar sakta hai, pur mode of investigation to determine nahi kar sakta.**

Khan: Exactly, they cannot decide the mode of investigation

SOMEBODY ENTERS THE CHAMBER

**Kulkarni: Khan Sahab, ek minute, chale jata hoo, mein sham to ghar pe xxxxaa jaon ga.**

Khan: Ha, ha who to ana hi hai, ghar pe nahi xxx

Kulkarni: Who to abhi dilli mein aya hoo to aya hoo, ek second.

Khan: In Delhi, you're our guest.

Kulkarni: Inka nahi!

Khan: Na inke nahi.

Khan: Aapka aur hamara personal effort/rapport (not clear) hai

Kulkarni: Who to alag hi baat hai.

Khan: Aur, bhai yaar thanda peeke jana.

Kulkarni: Nahi thanda nahi, bus ek second khali, kyonki wahi xxxx

THEY COME OUT OF THE CHAMBER AND TALK

**Kulkarni: Summons Bombay challa gaya thaa, ab waha se reject ho ke ayaa hua hai. Ab loon ken na loon? Baad me mere ko raat ko ghar pe (Mr. Khan cuts in) Khan: Tum mere ko miloge kab, yeh batao?**

Kulkarni: Aap batao kyonki mere ko....SHO se meri baat hui hai. Aap usko...(Mr. Khan cuts in) Khan: Tum thehre kahan ho?

Kulkarni: Main to thehre hoo out of Delhi.

Khan: Out of Delhi?

Kulkarni: Out of Delhi, Haan.

Khan: Sham ko keh baje aaoge?

Kulkarni: Aaj nahi aaonga...mein kal zarror...shamko. Sunday aaram reheat hai aur....

Khan: Sunday ko kis waqt aaoge?

Kulkarni: Aap batao mere ko.

Khan: Aapko suit kaunsa time karta hai?

Kulkarni: Koi bhi.

Khan: Saat aur aath ke darmiyan?

Kulkarni: Hann, theek hai.

Khan: Kalxxx

Kulkarni: Lekin kisi ko bhi batao mat.

Khan: Nahi ji, sawal hi paida nahi hota yaar.

Kulkarni: Na, na.

Khan: Aur tumhare liye bahut badiya scotch rakhi hui haixxxx

Kulkarni: Scotch..laughs

Khan: Bahut badiya xxxx

Kulkarni: Acha baki sab khairyat sahib?

Khan: Sab khairyat xx.Khuda ka xxx

Kulkarni: Chalo, kal mulaqat hogi

Kulkarni: Ok, main... (Mr.Khan cuts in)

Khan: Saat aur aath ke darmiyan

Kulkarni: Main, vese meri K K Paul se baat hui hai, lekin maine abhi tak nahin bola hoo I have not received summons at all. Woh mere ko bata dena.

Khan: Kal tum aajao Kulkarni: Main...Huh? Woh hamare dono ki baat hogi, Khan: Theek hai.

104. After this Kulkarni and Deepak Verma return back. As walking along they naturally talk about the sting done by them together.

105. As we shall see presently much depends on what IU Khan meant when he asked Kulkarni whether he had met `Bade Saheb'.

106. As noted above IU Khan does not deny the conversation that is shown to have taken place between him and Kulkarni. In his first response, that is, in the interview given to NDTV on the morning following the telecast he said that he did not deny anything at all, he did not deny (the utterances) but the inferences sought to be drawn were totally unfounded and wrong. When he said `Bade Saheb' he meant some high officer in the police headquarter. He also said that was the way Kulkarni used to refer to superior officers in the police headquarter(s) and that is how he had referred to them in his deposition before the trial court. When the trial court asked Kulkarni to clarify he explained that Bade Saheb meant a superior officer of the police headquarter. The words Bade Saheb, according to IU Khan, did not in any way refer to RK Anand.

107. And this was broadly his defence before the High Court.

High Court dealing with IU Khan Defence:

108. The High Court did not accept his defence. The High Court held that there was great familiarity between IU Khan, Kulkarni and RK Anand. In this regard it observed as follows;

"We have noted above that there are several references to Mr. Khan in the conversations of Mr. Kulkarni with Mr. Anand. We cannot overlook these since they suggest a tacit arrangement or at least an understanding between Mr. Khan, Mr. Anand and Mr. Kulkarni".

109. In coming to this conclusion, as is evident from the above quoted observation the High Court relied a great deal upon the conversations between Kulkarni and RK Anand (vide paragraphs 196, 197 & 198 of the High Court Judgment).

110. The High Court further held that when IU Khan asked Kulkarni whether he had met `Bade Saheb' he only meant RK Anand. It rejected IU Khan's stand that what he meant by the expression was a senior police officer. The High Court observed that no material was produced on behalf of IU Khan in support of the statement that in course of his deposition before the trial court Kulkarni used the expression `Bade Saheb' to mean a senior police officer. It further observed that in the sting operation, just before the conclusion of the meeting, Kulkarni had said that he had met K.K. Paul (who was then the Police Commissioner). The passage referred to is as follows;

"Kulkarni: Main, vese meri K K Paul se baat hui hai, lekin maine abhi tak nahin bola hoo I have not received summons at all. Woh mere ko bata dena".

111. This, according to the High Court, clearly showed that Kulkarni referred to the Police Commissioner by his name and not by the expression `Bade Saheb'. High Court further observed that for Kulkarni there was no reason to meet the senior police officers particularly when he was dropped as prosecution witness. There was nothing to suggest that while in Delhi Kulkarni used to meet the senior police officers. On the other hand there was sufficient evidence to show that he was very familiar with both IU Khan and RK Anand, had easy

access to both of them and used to frequently meet them. The High Court then took up Kulkarni's affidavit that supported IU Khan's plea that by the expression he had meant some senior police officer and not RK Anand and rejected it on a number of grounds.

112. After giving the reasons for rejecting the stand of IU Khan the High Court held that Bade Saheb was none else then RK Anand observing as follows;

"190. On the other hand, when we watched the recording of the events of 28th April, 2007 from the button camera, we noted that towards the end of the recording, Mr. Deepak Verma asked Mr. Kulkarni about the identity of Bade Saheb and Mr. Kulkarni responded by saying that it is Mr. Anand. There is no suggestion that this part of the video recording is doctored or morphed.....".

(emphasis added)

113. The High Court further observed that as IU Khan was fully aware that Kulkarni, a prosecution witness was on highly familiar terms with a senior defence lawyer RK Anand, he was obliged to inform the prosecution about it and by not doing so he clearly failed in his duty as a prosecutor who was expected to be fair not only to his client but also to the Court. His conduct was, therefore, plainly unbecoming of a prosecutor. The High Court then proceeded to consider whether the conduct of IU Khan amounted to a criminal contempt of court. In this regard the Court refers to the conversation between IU Khan and Kulkarni taking place outside the chamber in which a second meeting was fixed up for the following evening with IU Khan giving Kulkarni the inducement of good scotch whisky. From the exchange between the two the court inferred that the extent of familiarity between the two was rather more than normal. IU Khan was aware that Kulkarni was on equally, if not more familiar, terms with RK Anand. Coupled with this his failure to inform the prosecution or the Court about the connection between Kulkarni and RK Anand had the potential and the tendency to interfere or obstruct the natural course of the BMW case and certainly the administration of justice, particularly when Mr. Khan himself described Mr. Kulkarni as the prime witness in the BMW case and the 'star witness of the prosecution'. Finally the court held "207. Under these circumstances, we are left with no option but to hold that Mr. Khan was quite familiar with Mr. Kulkarni; Mr. Khan was aware that Mr. Kulkarni was in touch with Mr. Anand; Mr. Khan was not unwilling to advise Mr. Kulkarni or at least discuss with him the issue of accepting the summons sent by the trial court to Mr. Kulkarni. We also have no option but to hold that Mr. Khan very seriously erred in not bringing important facts touching upon the BMW case to his client's notice, the prosecution. The error is so grave as to make it a deliberate omission that may have a very serious impact on the case of the prosecution in the Trial court. Consequently, we have no option but to hold Mr. Khan criminally liable, beyond a shadow of doubt, for actually interfering, if not tending to interfere with the due course of the judicial proceeding, that is the BMW case, and thereby actually interfering, if not tending to interfere with the administration of justice in any other manner".

Submissions on behalf of IU Khan:

114. Mr. P. P. Rao, learned Senior Advocate appearing for IU Khan mainly submitted that even if the sting recording is accepted as true, on the basis of the exchange that took place between his client and Kulkarni it cannot be said that he acted in a way or colluded in any action aimed at interfering or tending to interfere with the prosecution of the accused in the BMW case or interfering or tending to interfere with or obstructing or tending to obstruct the

administration of justice in any other manner. He further submitted that the findings of the High Court were based on assumptions that were not only completely unfounded but in respect of which the appellant was given no opportunity to defend himself. The High Court held the appellant guilty of committing criminal contempt of court referring to and relying upon certain alleged facts and circumstances that did not form part of the notice and in regard to which he was given no opportunity to defend himself. Mr. Rao submitted that along with the notice issued by the High Court the appellant was not given all the materials concerning his case and he was thus handicapped in submitting his show cause. He further submitted that the High Court erroneously placed the case of his client at par with RK Anand and convicted him because RK Anand was found guilty even though the two cases were completely different. Mr. Rao was also highly critical of the TV channel. He questioned the propriety of the sting operation and the telecast of the sting programme concerning a pending trial and involving a court witness without any information to, much less permission by the trial court or even the High Court or its Chief Justice. Mr. Rao submitted that when Kulkarni first approached Poonam Agarwal she thought it imperative to first obtain the approval of her superiors before embarking upon the project, but it did not occur to anyone, including her superiors in the TV channel to obtain the permission or to even inform at least the Chief Justice of the Delhi High Court before taking up the operation fraught with highly sinister implications. Mr. Rao also assailed the judgment coming under appeal on a number of other grounds.

#### SUBMISSIONS CONSIDERED:

115. We have carefully gone through all the materials concerning IU Khan. We have perused the transcript of the exchange between Kulkarni and IU Khan and have also viewed the full recording of the sting several times since the full transcript of the recording is not available on the record.

IU Khan's conduct quite improper:

116. We have not the slightest doubt that the exchange between Kulkarni and IU Khan far crosses the limits of proper professional conduct of a prosecutor (especially engaged to conduct a sensational trial) and a designated Senior Advocate of long standing. We are not prepared to accept for a moment that on seeing Kulkarni suddenly after several years in the company of a 'burly stranger' (Deepak Verma) IU Khan became apprehensive about his personal safety since in the past some violent incidents had taken place in the court premises and some lawyers had lost their lives and consequently he was simply play-acting and pampering Kulkarni in order to mollify him. The plea is not borne out from the transcript and much less from the video recording. In the video recording there is no trace of any fear or apprehension on his face or in his gestures. He appears perfectly normal and natural sitting among his colleagues (and may be one or two clients) and at no point the situation appears to be out of his control. As a matter of fact, we feel constrained to say that the plea is not quite worthy of a lawyer of IU Khan's standing and we should have much appreciated had he simply taken the plea of an error of discretion on his part.

117. Coming back to the exchange between IU Khan and Kulkarni, we accept that the transcript of the exchange does not present the accurate picture; listening to the live voices of the two (and others present in the chamber) on the CD gives a more realistic idea of the meeting. We grant everything that can be said in favour of IU Khan. The meeting took place without any prior appointment from him. Kulkarni was able to reach him, unlike RK Anand,

without his permission or consent. IU Khan did not seem to be overly enthused at the appearance of Kulkarni. Accosted by Kulkarni, he spoke to him out of civility and mostly responded only to his questions and comments. There were others present in the chamber with whom he was equally engaged in conversation. He also greeted someone else who came into the chamber far more cheerfully than Kulkarni. But the undeniable fact remains that he was talking to him all the time about the BMW trial and the related proceedings. Instead of simply telling him to receive the summons and appear before the court as directed, IU Khan gave reassurances to Kulkarni telling him about the revision filed in the High Court against the trial court's order. He advised him to relax saying that since he had dropped him (as a prosecution witness) the court was no one to ask for his statement. The part of the exchange that took place outside the chamber was worse. Inside the chamber, at one stage, IU Khan seemed even dismissive of Kulkarni but on coming out he appeared quite anxious to fix up another meeting with him at his residence giving promising good Scotch whisky as inducement. IU Khan would be the first person to deny any friendship or even a long acquaintanceship with Kulkarni. The only common factor between them was the BMW case in which one was the prosecutor and the other was a prosecution witness, later dropped from the list of witnesses. A lawyer, howsoever, affable and sociable by disposition, if he has the slightest respect for professional ethics, would not allow himself such degree of familiarity with the witness of a criminal trial that he might be prosecuting and would not indulge with him into the kind of exchange as admittedly took place between IU Khan and Kulkarni. We are also not prepared to believe that in his conversation with Kulkarni, IU Khan did not mean what he was saying and he was simply trying to somehow get rid of Kulkarni. The video of the sting recordings leaves no room for doubt that IU Khan was freely discussing the proceeding of BMW case with Kulkarni and was not at all averse to another meeting with him rather he was looking forward to it. We, therefore, fully endorse the High Court finding that the conduct of IU Khan was inappropriate for a lawyer in general and a prosecutor in particular. CRIMINAL CONTEMPT???

118. But there is a wide gap between professional misconduct and criminal contempt of court and we now proceed to examine whether on the basis of materials on record the charge of criminal contempt of court can be sustained against IU Khan.

119. The High Court held that there was an extraordinary degree of familiarity between IU Khan, Kulkarni and RK Anand and each of them knew that the other two were equally familiar with each other. So far as BMW trial is concerned Kulkarni was a link between IU Khan and RK Anand. IU Khan, by reason of his familiarity both with RK Anand and Kulkarni would also know about the game that was afoot for the subversion of the trial. He failed to inform the prosecution and the court about it and his omission to do so was likely to have a very serious impact on the trial. He was, therefore, guilty of actually interfering with due course of judicial proceeding, in the BMW case.

120. In the two sting recordings concerning RK Anand there are ample references to IU Khan to suggest a high degree of familiarity between the three. But in the sting on IU Khan the only words used by him that might connect him to RK Anand through Kulkarni are 'Bade Saheb'. If 'Bade Saheb' referred to RK Anand, the involvement of IU Khan needs no further proof. The question, however, is whether that finding can be safely arrived at.

121. Now, what are the materials that might suggest that while asking Kulkarni whether he had met Bade Saheb, IU Khan meant RK Anand. Apart from the piece of conversation between Deepak Verma and Kulkarni when they were returning after meeting with IU Khan,

relied upon by the High Court, there is another material, for whatever its worth, that doesn't find any mention in the High Court judgment. It is Kulkarni's statement in his interview recorded at the NDTV studio. He said as follows;

"He (IU Khan) directed me to Mr RK Anand is in that video you can find `Bade Saheb'. He meant that Mr. RK Anand."

122. We mention it only because it is one of the materials lying on the record. Not that we rely on it in the least. Having known the conduct of Kulkarni throughout this episode as discussed in detail in the earlier part of the judgment it is impossible to rely on this statement and we don't even fault the High Court for not taking any note of it.

123. The only other positive material in this regard is the one referred to by the High Court. The High Court observed that towards the end of the recording by the button camera, "Mr. Deepak Verma asked Mr. Kulkarni about the identity of Bade Saheb and Mr. Kulkarni responded by saying that it is Mr. Anand." But the reference by the High Court to that particular piece of conversation between Deepak Verma and Kulkarni is neither complete nor accurate. We have noted earlier that the transcript submitted to the High Court by NDTV was incomplete and it covered only the exchange between Kulkarni and IU Khan. If the High Court had before it the full transcript of the entire recording it might have taken a different view. We have viewed the CD labelled as "Button Spy cam Recording done by Sunil Kulkarni. IU Khan Sting Operation" a number of times and we find that on the way back after meeting IU Khan, Kulkarni was being quite voluble. He spoke to Deepak Verma and gave him some instructions. A part of their conversation, relevant for our purpose is as follows:

#### EXCHANGE BETWEEN KULKARNI & DEEPAK VERMA:

Kulkarni: Humming some tune

Kulkarni: Don't go to car directly. We'll take an auto

Deepak Verma: Take an auto?

Kulkarni: Haan. Thoda sa aage chalen ge

Kulkarni: Aap ne suna nahin? "Bade Saheb se mile ya nahin?"

Deepak Verma: Haan

Kulkarni: Ab dekho kal you will get [unclear..] you what you want

Deepak Verma: Kal aap Bade Saheb se milne ja rahe hain?

Kulkarni: Na, Haan unke ghar pe. No, you don't have to come. You just come and stay outside.

Theek hai na?

[unclear...] Haan ab to aap ke samne hua sab kuchh

Deepak Verma: Bade Saheb woh hai, Anand?

Kulkarni: Hmm.

Noise of some auto/heavy vehicle engine

Deepak Verma: [Unclear...] Ek baar iska Photograph lein...Iska photograph aaya ki nahin aaya? Kulkarni: Aaya. Aaya, aaya.

Kulkarni: Pukka trail hoga hamara. Hundred percent Tail hoga.

Deepak Verma: Police Waale ko kaise kah raha tha who? Gaadi Dilwao yaar..

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124. From the manner of speaking Kulkarni appeared to be giving the impression that everything went off according to the plan. He also tended to be slightly melodramatic. (He would not go to the car directly because they were bound to be followed!)

125. Now, while examining what Kulkarni understood or rather what he wanted Deepak Verma to believe what was meant by `Bade Saheb' it is necessary to bear in mind that the whole object of the sting was to uncover the alleged unholy alliance between the defence and the prosecution. It was based on the premise that the prosecution was colluding with the defence in the effort to save the accused in the BMW case. In that situation for Kulkarni, who for his own reasons was anxious to get NDTV's help for doing the sting, it was natural to find out and show to Deepak Verma some link between IU Khan and RK Anand irrespective of whether or not there was, in reality, any link between the two. There is no way to find out whether Kulkarni really believed that by `Bade Saheb' IU Khan meant RK Anand (Like everything else even on this issue he changed his stand from time to time!) or he just wanted Deepak Verma to believe so. But even if Kulkarni really understood Bade Saheb to mean RK Anand, that would not change the position much. For our purpose it is not important what Kulkarni or Deepak Verma or any one else understood (truthfully or otherwise!) by that expression. One may use an expression to mean a certain thing but to the listener it may mean something quite different. What is important here is to judge what IU Khan meant when he used that expression. In our view, on the basis of the exchange between Kulkarni and Deepak Verma, it will be highly unsafe to hold that when IU Khan asked Kulkarni whether he had met "Bade Saheb' he meant RK Anand.

126. The High Court rejected IU Khan's explanation that what he meant by `Bade Saheb' was some senior officer in the police headquarter. According to IU Khan, Kulkarni was in the habit of directly approaching the superior police officers and he would refer to them by that expression. In support of the plea in his reply affidavit (paragraph 12) IU Khan stated as follows:

"Even during the course of his deposition in court Mr. S. Kulkarni had used the expression "Bade Sahab" while referring to the higher police officers. The Ld. trial court also translated the same in English while recording the statement as "higher police officers". In the cross-examination Mr. S. Kulkarni has stated "I had voluntarily gone to the higher police officers of the police headquarter".

The High Court rejected the aforesaid plea observing as follows;

"It was further submitted that during the recording of Mr. Kulkarni's evidence on an earlier occasion, a reference to Bade Saheb was made more than once. "Bade Saheb" was then translated and recorded in the deposition to mean senior police officers. Learned counsel for Mr. Khan, however, did not produce any material to support the last submission".

(emphasis added)

127. Mr. P. P. Rao submitted that the approach of the High Court was quite unfair. The proceeding before the High Court was not in the nature of a suit or a criminal trial. In response to the notice issued by the Court the appellant had made a positive statement in his reply affidavit. The statement was not formally traversed by anyone. There was, therefore, no reason for the appellant to assume that he would be required to produce evidence in support of the statement. In case the High Court felt the need for some evidence in support of the averment it should have at least made it known to the appellant. But the High Court without giving any inkling to the appellant rejected the plea in the final judgment. The appellant was thus clearly denied a proper opportunity to defend himself. We find that the submission is not without substance. The proceeding before the High Court was under the [Contempt of Courts Act](#) and the High Court was not following any well known and well established format. In that situation it was only fair to give notice to the proceedees to substantiate the pleas taken in the reply affidavit by leading proper evidence. It must, therefore be held that the High Court rejected a material plea raised on behalf of the IU Khan without giving him any opportunity to substantiate it.

128. Further, as noticed above, the High Court, for arriving at the finding that there was a high degree of familiarity among IU Khan, Kulkarni and RK Anand has repeatedly used the transcripts of the meetings between Kulkarni and RK Anand. It is indeed true that in the exchanges between Kulkarni and RK Anand there are many references to IU Khan. That may give rise of a strong suspicion, of a common connection between the three. But having regard to the charge of criminal contempt any suspicion howsoever strong cannot take the place of proof and we don't feel it wholly prudent to rely upon the exchanges between Kulkarni and RK Anand to record a finding against IU Khan.

129. Further, according to the High Court, the essence of culpability of IU Khan was his omission to inform the prosecution and the Court "that one of its witnesses was more than an acquaintance of defence lawyer".

130. Mr. P. P. Rao submitted that the High Court convicted the appellant for something in regard to which he was never given an opportunity to defend himself. From the notice issued by the High Court it was impossible to discern that the charge of criminal contempt would be eventually fastened on him for his failure to inform the court and the prosecution about the way Kulkarni's was being manipulated by the defence. Mr. Rao further submitted that the reason assigned by the Court to hold the appellant guilty was based purely on assumption. The appellant was given no opportunity to show that, as a matter of fact, after Kulkarni met him at the Patiala House on April 28, 2007 he had informed the concerned authorities that after being summoned by the court Kulkarni was back to his old tricks. He further submitted that the appellant, given the opportunity, could also show that the decision to not examine him as one of the prosecution witnesses was taken by the concerned authorities in consultation with him. We find substance in Mr. Rao's submission.

131. In our considered view, on the basis of materials on record the charge of criminal contempt cannot be held to be satisfactorily established against IU Khan. In our opinion he is entitled to the benefit of doubt.

#### PROCEDURE FOLLOWED BY THE HIGH COURT:

132. A lot has been argued about the procedure followed by the High Court in dealing with the matter. On behalf of RK Anand it was strongly contended that by only asking for the copies of the original sting recordings and allowing the original microchips and the magnetic tapes to be retained in the custody of NDTV the High Court committed a serious and fatal lapse. Mr. Gopal Subramaniam also took the view that though the final judgment passed by the High Court was faultless, it was nevertheless an error on its part to leave the original sting recordings in the safe custody of the TV channel. On principle and as a matter of proper procedure, the Court, at the first instance, ought to have taken in its custody all the original electronic materials concerning the stings.

133. At first the direction of the High Court leaving the microchips containing the original sting recordings and the magnetic tapes with the TV channel indeed appears to be somewhat strange and uncommon but a moment's thought would show the rationale behind it. If the recordings on the microchips were fake from the start or if the microchips were morphed before notice was issued to the TV channel, those would come to the court in that condition and in that case the question whether the microchips were genuine or fake/morphed would be another issue. But once the High Court obtained their copies there was no possibility of any tampering with the microchips from that stage. Moreover, the High Court might have felt that the TV channel with its well equipped studio/laboratory would be a much better place for the handling and conservation of such electronic articles than the High Court Registry. On the facts of the case, therefore, there was no lapse on the part of the High Court in leaving the microchips in the safe custody of the TV channel and in any event it does not have any bearing on the final decision of the case.

134. However, what we find completely inexplicable is why, at least at the beginning of the proceeding, the High Court did not put NDTV, along with the two appellants, in the array of contemnors. Looking back at the matter (now that we have on the record before us the appellants' affidavits in reply to the notice issued by the High Court as well as their first response to the telecast in the form of their live interviews), we are in the position to say that since the contents of the sting recordings were admitted there was no need for the proof of integrity and correctness of the electronic materials. But at the time the High Court issued notices to the two appellants (and two others) the position was completely different. At that stage the issue of integrity, authenticity and reliability of the sting recordings was wide open. The appellants might have taken the stand that not only the sting recordings but their respective responses shown by the TV channel were fake and doctored. In such an event the TV channel would have been required to be subjected to the strictest proof of the electronic materials on which its programmes were based and, in case it failed to establish their genuineness and correctness, it would have been equally guilty, if not more, of serious contempt of court and other criminal offences. By all reckoning, at the time of initiation of the proceeding, the place of NDTV was along with the appellants facing the charge of contempt. Such a course would have put the proceeding on a more even keel and given it a more balanced appearance. Then perhaps there would have been no scope for the grievance that the High Court put the TV channel on the complainant's seat. And then perhaps the TV

Channel too would have conducted itself in a more careful manner and the lapses as indicated above in the case of IU Khan might not have occurred.

## THE PUNISHMENT: PROHIBITION AGAINST APPEARING IN COURTS

135. We were also addressed on the validity of the High Court's direction prohibiting the two appellants from appearing before the High Court and the courts subordinate to it for a period of four months. Though by the time the appeals were taken up for hearing the period of four months was over, Mr. Altaf Ahmed contended that the High Court's direction was beyond its competence and authority. In a proceeding of contempt punishment could only be awarded as provided under the [Contempt of Courts Act](#), though in a given case the High Court could debar the contemnor from appearing in court till he purged himself of the contempt. He further submitted that professional misconduct is a subject specifically dealt with under the [Advocates Act](#) and the authority to take action against a lawyer for any professional misconduct vests exclusively in the State Bar Council, where he may be enrolled, and the Bar Council of India. The Counsel further submitted that a High Court could frame rules under [section 34](#) of the Advocates Act laying down the conditions subject to which an advocate would be permitted to practise in the High Court and the courts subordinate to it and such rules may contain a provision that an advocate convicted of contempt of court would be barred from appearing before it or before the subordinate courts for a specified period. But so far the Delhi High Court has not framed any rules under [section 34](#) of the Act. According to him, therefore, the punishment awarded to the appellant by the High Court had no legal sanction.

136. Mr. Nageshwar Rao learned Senior Advocate assisting the Court as amicus shared the same view. Mr. Rao submitted that the direction given by the High Court was beyond its jurisdiction. In a proceeding of contempt the High Court could only impose a punishment as provided under [section 12](#) of the Contempt of Courts Act, 1971. The High Court was bound by the provisions of the [Contempt of Courts Act](#) and it was not open to it to innovate any new kind of punishment in exercise of its powers under [Article 215](#) of the Constitution or its inherent powers. Mr. Rao submitted that a person who is a law graduate becomes entitled to practise the profession of law on the basis of his enrolment with any of the State Bar Councils established under the [Advocates Act](#), 1961. Appearance in Court is the dominant, if not the sole content of a lawyer's practice. Since, the authority to grant licence to a law graduate to practise as an advocate vests exclusively in a State Bar Council, the power to revoke the licence or to suspend it for a specified term also vests in the same body. Further, the revocation or suspension of licence of an advocate has not only civil but also penal consequences; hence, the relevant statutory provisions in regard to imposition of punishment must be strictly followed. Punishment by way of suspension of the licence of an advocate can only be imposed by the Bar Council, the competent statutory body, after the charge is established against the advocate concerned in the manner prescribed by the Act and the Rules framed thereunder. The High Court can, of course, prohibit an advocate convicted of contempt from appearing before it or any court subordinate to it till the contemnor purged himself of the contempt. But it cannot assume the authority and the power statutorily vested in the Bar Council.

137. Mr. Gopal Subramaniam the other amicus, however, approached the issue in a slightly different manner and took the middle ground. Mr. Subramaniam submitted that the power to suspend the licence of a lawyer for a reason that may constitute contempt of court and at the same time may also amount to professional misconduct is a power to be exercised by the

disciplinary authority i.e. the Disciplinary Committee of the State Bar Council where the concerned advocate is registered or the Bar Council of India. The Supreme Court has held that even it, in exercise of its powers under [Article 142](#), cannot override statutory provisions and, assuming the position of the Disciplinary Committee, suspend the licence of a lawyer. Such a course cannot be followed even by taking recourse to the appellate powers of the Supreme Court under [section 38](#) of the Advocates Act while dealing with a case of contempt of court (and not an appeal relating to professional misconduct as such). But approaching the matter from a different angle Mr. Subramaniam submitted, it is, however, open to the High Court to make rules regulating the appearance of advocates in courts. He further submitted that although the Delhi High Court has not framed any specific rules regulating the appearance of advocates, it is settled law that power vested in an authority would not cease to exist merely because rules prescribing the manner of exercise of power have not been framed.

138. The contention that the direction debarring a lawyer from appearing before it or in courts subordinate to it is beyond the jurisdiction of the High Court is based on the premise that the bar is akin to revocation/suspension of the lawyer's licence which is a punishment for professional misconduct that can only be inflicted by the Bar Council after following the procedure prescribed under the [Advocates Act](#). The contention finds support from the Constitution Bench decision of this Court in Supreme Court [Bar Association vs. Union of India](#), (1998) 4 SSC 409. In paragraph 37 of the decision the Court observed and held as under:

"37. The nature and types of punishment which a court of record can impose in a case of established contempt under the common law have now been specifically incorporated in the [Contempt of Courts Act](#), 1971 insofar as the High Courts are concerned and therefore to the extent the [Contempt of Courts Act](#), 1971 identifies the nature or types of punishments which can be awarded in the case of established contempt, it does not impinge upon the inherent powers of the High Court under [Article 215](#) either. No new type of punishment can be created or assumed."

In paragraphs 39 & 40 it observed:

"39. Suspending the licence to practise of any professional like a lawyer, doctor, chartered accountant etc. when such a professional is found guilty of committing contempt of court, for any specified period, is not recognised or accepted punishment which a court of record either under the common law or under the statutory law can impose on a contemnor in addition to any of the other recognised punishments."

"40. The suspension of an advocate from practise and his removal from the State roll of advocates are both punishments specifically provided for under the [Advocates Act](#), 1961, for proven "professional misconduct" of an advocate. While exercising its contempt jurisdiction under [Article 129](#), the only cause or matter before this Court is regarding commission of contempt of court. There is no cause of professional misconduct, properly so called, pending before the Court. This Court, therefore, in exercise of its jurisdiction under [Article 129](#) cannot take over the jurisdiction of the Disciplinary Committee of the Bar Council of the State or the Bar Council of India to punish an advocate by suspending his licence, which punishment can only be imposed after a finding of "professional misconduct" is recorded in the manner prescribed under the [Advocates Act](#) and the Rules framed thereunder."

In Paragraph 57 it observed:

57. In a given case, an advocate found guilty of committing contempt of court may also be guilty of committing "professional misconduct", depending upon the gravity or nature of his contumacious conduct, but the two jurisdictions are separate and distinct and exercisable by different forums by following separate and distinct procedures. The power to punish an advocate by suspending his licence or by removal of his name from the roll of the State Bar Council for proven professional misconduct vests exclusively in the statutory authorities created under the [Advocates Act](#), 1961, while the jurisdiction to punish him for committing contempt of court vests exclusively in the courts."

Again in paragraph 80 it observed:

"80. In a given case it may be possible for this Court or the High Court, to prevent the contemnor advocate to appear before it till he purges himself of the contempt but that is much different from suspending or revoking his licence or debaring him to practise as an advocate. In a case of contemptuous, contumacious, unbecoming or blameworthy conduct of an Advocate-on-Record, this Court possesses jurisdiction, under the Supreme Court Rules, itself, to withdraw his privilege to practice as an Advocate-on- Record because that privilege is conferred by this Court and the power to grant the privilege includes the power to revoke or suspend it. The withdrawal of that privilege, however, does not amount to suspending or revoking his licence to practice as an advocate in other courts or tribunals."

139. The matter, however, did not stop at Supreme Court Bar Association. [In Pravin C Shah vs. K. A. Mohd. Ali and Another](#), (2001) 8 SCC 650, this Court considered the case of a lawyer who was found guilty of contempt of court and as a consequence was sought to be debarred from appearing in courts till he purged himself of contempt. Kerala High Court has framed Rules under [section 34](#) of the Advocates Act and rule 11 reads thus:

"No advocate who has been found guilty of contempt of court shall be permitted to appear, act or plead in any court unless he has purged himself of the contempt."

140. An Advocate, notwithstanding his conviction for contempt of Court by the Kerala High Court continued to freely appear before the courts. A complaint was made to the Kerala State Bar Council on which a disciplinary proceeding was initiated against the advocate concerned and finally the State Bar Council imposed a punishment on him debaring him from acting or pleading in any court till he got himself purged of the contempt of court by an order of the appropriate court. The concerned advocate challenged the order of the State Bar Council in appeal before the Bar Council of India. The Bar Council of India allowed the appeal and set aside the interdict imposed on the advocate. The matter was brought in appeal before this Court and a two judges' Bench hearing the appeal framed the question arising for consideration as follows:

"When an advocate was punished for contempt of court can he appear thereafter as a counsel in the courts, unless he purges himself of such contempt? If he cannot, then what is the way he can purge himself of such contempt?"

The Court answered the question in paragraphs 27, 28 and 31 of the judgment as follows:

"27. We cannot therefore approve the view that merely undergoing the penalty imposed on a contemnor is sufficient to complete the process of purging himself of the contempt, particularly in a case where the contemnor is convicted of criminal contempt. The danger in giving accord to the said view of the learned Single Judge in the aforesaid decision is that if a

contemnor is sentenced to a fine he can immediately pay it and continue to commit contempt in the same court, and then again pay the fine and persist with his contemptuous conduct. There must be something more to be done to get oneself purged of the contempt when it is a case of criminal contempt."

"28. The Disciplinary Committee of the Bar Council of India highlighted the absence of any mode of purging oneself of the guilt in any of the Rules as a reason for not following the interdict contained in Rule 11. Merely because the Rules did not prescribe the mode of purging oneself of the guilt it does not mean that one cannot purge the guilt at all. The first thing to be done in that direction when a contemnor is found guilty of a criminal contempt is to implant or infuse in his own mind real remorse about his conduct which the court found to have amounted to contempt of court. Next step is to seek pardon from the court concerned for what he did on the ground that he really and genuinely repented and that he has resolved not to commit any such act in future. It is not enough that he tenders an apology. The apology tendered should impress the court to be genuine and sincere. If the court, on being impressed of his genuineness, accepts the apology then it could be said the contemnor has purged himself of the guilt."

"31. Thus a mere statement made by a contemnor before court that he apologises is hardly enough to amount to purging himself of the contempt. The court must be satisfied of the genuineness of the apology. If the court is so satisfied and on its basis accepts the apology as genuine the court has to make an order holding that the contemnor has purged himself of the contempt. Till such an order is passed by the court the delinquent advocate would continue to be under the spell of the interdict contained in Rule 11 of the Rules."

141. More importantly, another Constitution Bench of this Court in Ex. Capt. [Harish Uppal vs. Union of India and Another](#), (2003) 2 SCC 45, examined the question whether lawyers have a right to strike and/or give a call for boycott of Court(s). In paragraph 34 of the decision the Court made highly illuminating observations in regard to lawyers' right to appear before the Court and sounded the note of caution for the lawyers. Para 34 of the decision need to be reproduced below:

"34. One last thing which must be mentioned is that the right of appearance in courts is still within the control and jurisdiction of courts. [Section 30](#) of the Advocates Act has not been brought into force and rightly so. Control of conduct in court can only be within the domain of courts. Thus [Article 145](#) of the Constitution of India gives to the Supreme Court and [Section 34](#) of the Advocates Act gives to the High Court power to frame rules including rules regarding condition on which a person (including an advocate) can practise in the Supreme Court and/or in the High Court and courts subordinate thereto. Many courts have framed rules in this behalf. Such a rule would be valid and binding on all. Let the Bar take note that unless self-restraint is exercised, courts may now have to consider framing specific rules debarring advocates, guilty of contempt and/or unprofessional or unbecoming conduct, from appearing before the courts. Such a rule if framed would not have anything to do with the disciplinary jurisdiction of the Bar Councils. It would be concerning the dignity and orderly functioning of the courts. The right of the advocate to practise envelopes a lot of acts to be performed by him in discharge of his professional duties. Apart from appearing in the courts he can be consulted by his clients, he can give his legal opinion whenever sought for, he can draft instruments, pleadings, affidavits or any other documents, he can participate in any conference involving legal discussions, he can work in any office or firm as a legal officer, he can appear for his clients before an arbitrator or arbitrators etc. Such a rule would have

nothing to do with all the acts done by an advocate during his practice. He may even file vakalat on behalf of a client even though his appearance inside the court is not permitted.

Conduct in court is a matter concerning the court and hence the Bar Council cannot claim that what should happen inside the court could also be regulated by them in exercise of their disciplinary powers. The right to practise, no doubt, is genus of which the right to appeal and conduct cases in the court may be a specie. But the right to appear and conduct cases in the court is a matter on which the court must and does have major supervisory and controlling power. Hence courts cannot be and are not divested of control or supervision of conduct in court merely because it may involve the right of an advocate. A rule can stipulate that a person who has committed contempt of court or has behaved unprofessionally and in an unbecoming manner will not have the right to continue to appear and plead and conduct cases in courts. The Bar Councils cannot overrule such a regulation concerning the orderly conduct of court proceedings. On the contrary, it will be their duty to see that such a rule is strictly abided by. Courts of law are structured in such a design as to evoke respect and reverence to the majesty of law and justice. The machinery for dispensation of justice according to law is operated by the court. Proceedings inside the courts are always expected to be held in dignified and orderly manner. The very sight of an advocate, who is guilty of contempt of court or of unbecoming or unprofessional conduct, standing in the court would erode the dignity of the court and even corrode its majesty besides impairing the confidence of the public in the efficacy of the institution of the courts. The power to frame such rules should not be confused with the right to practice law. While the Bar Council can exercise control over the latter, the courts are in control of the former. The distinction is clearly brought out by the difference in language in [Section 49](#) of the Advocates Act on the one hand and [Article 145](#) of the Constitution of India and [Section 34\(1\)](#) of the Advocates Act on the other. [Section 49](#) merely empower the Bar Council to frame rules laying down conditions subject to which an advocate shall have a right to practise i.e. do all the other acts set out above. However, [Article 145](#) of the Constitution of India empowers the Supreme Court to make rules for regulating this practice and procedure of the court including inter alia rules as to persons practising before this Court. Similarly [Section 34](#) of the Advocates Act empowers High Courts to frame rules, inter alia to lay down conditions on which an advocate shall be permitted to practice in courts. [Article 145](#) of the Constitution of India and [Section 34](#) of the Advocates Act clearly show that there is no absolute right to an advocate to appear in a court. An advocate appears in a Court to such conditions as are laid down by the Court. It must be remembered that [Section 30](#) has not been brought into force and this also shows that there is no absolute right to appear in a court. Even if [Section 30](#) were to be brought into force control of proceedings in a court will always remain with the court. Thus even then the right to appear in court will be subject to complying with conditions laid down by courts just as practice outside courts would be subject to conditions laid down by the Bar Council of India. There is thus no conflict or clash between other provisions of the [Advocates Act](#) on the one hand and [Section 34](#) or [Article 145](#) Constitution of Indian on the other."

(emphasis added)

142. In both *Pravin C. Shah and Ex. Capt. Harish Uppal* the earlier Constitution Bench decision was extensively considered. The decision in *Ex. Capt. Harish Uppal* was later followed in a three judge Bench decision in [Bar Council of India vs. The High Court of Kerala](#), (2004) 6 SCC

143. In Supreme Court Bar Association the direction prohibiting an advocate from appearing in court for a specified period was viewed as a total and complete denial of his right to practise law and the bar was considered as a punishment inflicted on him. 1 In Ex. Capt. Harish Uppal it was seen not as punishment for professional misconduct but as a measure necessary to regulate the court's proceedings and to maintain the dignity and orderly functioning of the courts. We may respectfully add that in a given case a direction disallowing an advocate who is convicted of criminal contempt from appearing in court may not only be a measure to maintain the dignity and Though in Paragraph 80 of the decision, as seen earlier there is an observation that in a given case it might be possible for this court or the High Court to prevent the contemnor advocate to appear before it till he purge himself of the contempt. orderly functioning of the courts but may become necessary for the self protection of the court and for preservation of the purity of court proceedings. Let us, for example, take the case where an advocate is shown to have accepted money in the name of a judge or on the pretext of influencing him; or where an advocate is found tampering with the court's record; or where an advocate is found actively taking part in faking court orders (fake bail orders are not unknown in several High Courts!); or where an advocate has made it into a practice to browbeat and abuse judges and on that basis has earned the reputation to get a case transferred from an 'inconvenient' court; or where an advocate is found to be in the habit of sending unfounded and unsubstantiated allegation petitions against judicial officers and judges to the superior courts. Unfortunately these examples are not from imagination. These things are happening more frequently than we care to acknowledge. We may also add that these illustrations are not exhaustive but there may be other ways in which a malefactor's conduct and actions may pose a real and imminent threat to the purity of court proceedings, cardinal to any court's functioning, apart from constituting a substantive offence and contempt of court and professional misconduct. In such a situation the court does not only have the right but it also has the obligation cast upon it to protect itself and save the purity of its proceedings from being polluted in any way and to that end bar the malefactor from appearing before the courts for an appropriate period of time. It is already explained in Ex. Captain Harish Uppal that a direction of this kind by the Court cannot be equated with punishment for professional misconduct. Further, the prohibition against appearance in courts does not affect the right of the concerned lawyer to carry on his legal practice in other ways as indicated in the decision.

144. We respectfully submit that the decision in Ex-Capt. [Harish Uppal vs. Union of India](#) places the issue in correct perspective and must be followed to answer the question at issue before us.

145. Lest we are misunderstood it needs to be made clear that the occasion to take recourse to the extreme step of debarring an advocate from appearing in court should arise very rarely and only as a measure of last resort in cases where the wrong doer advocate does not at all appear to be genuinely contrite and remorseful for his act/conduct, but on the contrary shows a tendency to repeat or perpetuate the wrong act(s).

146. Ideally every High Court should have rules framed under [section 34](#) of the Advocates Act in order to meet with such eventualities but even in the absence of the Rule the High Court cannot be held to be helpless against such threats. In a matter as fundamental and grave as preserving the purity of judicial proceedings, the High Court would be free to exercise the powers vested in it under [section 34](#) of the Advocates Act notwithstanding the fact that Rules prescribing the manner of exercise of power have not been framed. But in the absence of statutory Rules providing for such a course an advocate facing the charge of contempt would

normally think of only the punishments specified under [section 12](#) of the Contempt of Courts Act. He may not even imagine that at the end of the proceeding he might end up being debarred from appearing before the court. The rules of natural justice, therefore, demand that before passing an order debaring an advocate from appearing in courts he must be clearly told that his alleged conduct or actions are such that if found guilty he might be debarred from appearing in courts for a specific period. The warning may be given in the initial notice of contempt issued under [section 14](#) or [section 17](#) (as the case may be) of the [Contempt of Courts Act](#). Or such a notice may be given after the proceedee is held guilty of criminal contempt before dealing with the question of punishment.

147. In order to avoid any such controversies in future all the High Courts that have so far not framed rules under [section 34](#) of the Advocates Act are directed to frame the rules without any further delay. It is earnestly hoped that all the High Courts shall frame the rules within four months from today. The High Courts may also consider framing rules for having Advocates on Record on the pattern of the Supreme Court of India. Suborning a witness in a criminal trial is an act striking at the root of the judicial proceeding and it surely deserves the treatment meted out to the appellant. But the appellants were not given any notice by the High Court that if found guilty they might be prohibited from appearing in the High Court, and the courts subordinate to it, for a certain period. To that extent the direction given by the High Court was not in conformity with the principles of natural justice. But as to the consequence of that we shall deal with in due course.

#### THE QUESTION OF SENTENCE:

148. Having regard to the misdeeds of which RK Anand has been found guilty, the punishment given to him by the High Court can only be regarded as nominal. We feel that the leniency shown by the High Court in meting out the punishment was quite misplaced. And the view is greatly reinforced if one looks at the contemnor's conduct before the High Court. As we shall see presently, before the High Court the contemnor took a defiant stand and constantly tried to obstruct the proceedings.

#### THE DIVERSIONARY & INTIMIDATORY TACTICS IN THE PROCEEDING:

149. Even as contempt notices were issued by the High Court, or even before it, some diversionary and even intimidatory tactics were employed to stonewall the proceeding initiated by it.

#### Kulkarni's Affidavit:

150. The first in the series was an affidavit filed on August 6, 2007 by Kulkarni in regard to the stings done by him. The affidavit was not called for by the Court and it was filed quite gratuitously. It was a jumble of non-sense, half truths and lies. Kulkarni made all conceivable and even some inconceivable allegations against NDTV in general and Poonam Agarwal in particular. He stated that Poonam Agarwal had recorded his first interview on April 25, 2003 and thereafter on several other dates till the last one in the last week of May before the telecast. It is not clear on whose behalf Poonam Agarwal would take his earlier interviews because she had joined NDTV only two years prior to July 2007. He then alleged that Poonam Agarwal subjected him to "Gobel's technique" (sic. Goebbels's) to make him 'illicit' (sic. elicit) certain answers 'to' (sic. from) RK Anand and IU Khan in a particular manner. What is of significance in Kulkarni's affidavit, however, is that it anticipated what in the sting

recordings might prove fatal for RK Anand and IU Khan and tried to do the ground work for their defence. In regard to his meeting with IU Khan, Kulkarni said that he met and spoke to him in the manner directed by Poonam Agarwal. He further said on affidavit that when IU Khan asked him if he had met 'Bade Saheb' he implied some senior police official but it was Poonam Agarwal who forced him to say that IU Khan referred to RK Anand. Now, this is exactly what IU Khan said in his interview to the TV channel and what he would say later in his show cause to the High Court. He also said that as agreed between the two in the meeting of April 28, 2007, he again met IU Khan in the evening but the conversation that took place in that meeting exposed NDTV story and, therefore, that recording was withheld from being telecast.

151. Similarly, in regard to his meeting with RK Anand, Kulkarni said that he met him on being forced by Poonam Agarwal. He further said on affidavit that he had mentioned the sum of rupees two and half crores to RK Anand on the direction of Poonam Agarwal. He himself had neither any idea nor the intention to ask him for any money. He further said that on the mention of the sum of money RK Anand was shocked and he rebuked him by making the sarcastic remark that he should ask for five crores and not only two and half crores. He said that he got the message that no demand for money would be entertained. The similarity between what Kulkarni said in his affidavit and what RK Anand had to say about this matter and the manner in which he would say it is unmistakable. We are unable to believe that the manner in which Kulkarni's affidavit fore- shadows the proceedees defence was simply coincidental. It does not require much imagination to see that Kulkarni had once again switched over sides and he had joined hands with those whom he had earlier tried to trap in the stings.

152. In one of the paragraphs of the affidavit there is a ludicrous description of his meeting with Lovely. It is stated that despite persistent request by him for a meeting there was no positive response from RK Anand. Then, "suddenly a Sardar Ji came and started talking with me. In his pocket I saw some flash light beeping which alerted me that I was trapped. I was upset and wanted to convey all the facts to Hon'ble Court but Ms. Poonam Agarwal prevailed over me and dissuaded me to do the same". Even this apparently absurd story was not without purpose; its object was to provide for the existence of another recording, apart from his own sting, of his meeting with Lovely.

153. The recording, by Lovely, of their meeting was the second diversionary attempt in the proceeding before the High Court.

Another audio recording of the meeting between Kulkarni & Lovely:

154. The High Court registry received an audio cassette along with a letter from one Sunil Garg. In the letter it was stated that the cassette had the recording of some conversation between Lovely and Kulkarni. The cassette proved to be completely blank. Then on notice being issued to him Garg appeared in Court and made a statement on oath. He said that Kulbir Singh alias Lovely was his friend. Shortly before his death he had come to him and handed over to him two audio cassettes saying that those contained the recordings of his conversation with Kulkarni. He had earlier sent one of the two cassettes without playing it on the recorder. He later came to learn from the newspaper reports the cassette was blank. He then played the other cassette and found it had the recording of some conversation between his friend Lovely and someone else. He recognised the voice of his friend Lovely. He submitted the other cassette in the High Court.

155. We would have completely ignored Kulkarni's affidavit and Garg's audio cassettes as foolish and desperate attempts to create some defence, not worthy of any attention. But there is something more to come that is impossible to ignore.

"REQUEST" FOR RECUSAL:

156. Of all the obstructive measures adopted before the High Court the most unfortunate and undesirable came from RK Anand in the form of a petition 'requesting' Manmohan Sarin J., the presiding judge on the bench dealing with the matter, to recuse him from the proceeding. This petition, an ill concealed attempt at intimidation, was, as a matter of fact, RK Anand's first response to the notice issued to him by the Court. He stated in this petition that he had the feeling that he was not likely to get justice at the hands of Manmohan Sarin J. He further stated alluding to some past events, that he had tried his best to forget the past and bury the hatchet but the way and the manner in which the matter was being dealt with had caused the greatest damage to his reputation. He made the prayer that the recusal application should be heard in camera and the main matter be transferred to another bench of which Sarin J. was not a member. Along with the petition he filed a sealed cover containing a note and the materials giving rise to the belief that he was not likely to get justice at the hands of Sarin J.

157. The recusal petition was primarily based on the plea that he had reasonable apprehension of bias, for Sarin J. was personally hostile to him. The self perceived hostility between the applicant (RK Anand) and Sarin J. dated back to 1984 when he was still a lawyer. They had a quarrel then that had led to an exchange of verbal abuses. In 1988 Sarin J. (still a lawyer), in his position as the Vice President of the Delhi High Court Bar Association, had moved a resolution before the Association's executive committee opposing any proposal for the applicant's nomination for appointment as a judge of the Delhi High Court. Sarin J., as a lawyer, had among his clients, the magazine, 'India Today' (Living Media) and the owners of NDTV were closely associated with 'India Today'. Sarin J., as an advocate had done the cases of the applicant's brothers whom he had referred to him. It was stated that the judge, thus, might have been privy to some family gossip causing him to be prejudicially disposed towards the applicant. The applicant had earlier sent a complaint to the Prime Minister against the Law Minister, who was one of his (applicant's) political rival. In the complaint, apart from the Law Minister, allegations were also made against the then Chief Justice of the High Court. And in that connection it was alleged that the Chief Justice had around him a coterie of Judges that included Sarin J. On the arrest of a sitting judge of the Delhi High Court by the CBI the media had gone to Sarin J. for his comments and even this, it was stated, might lead him to harbour ill will against the applicant. In a civil case for damages arising from the BMW case the matter was settled between the parties (one of the victims of the accident on the one side and the family of the accused Sanjeev Nanda on the other). But Sarin J. who was a member of the bench before which the matter came up for recording the settlement, did not allow it to be said in the compromise petition that the accident was caused by a truck and not by any car. It showed, according to the applicant, that Sarin J. had some pre-conceived notion that the accident was caused by the car driven by Sanjeev Nanda. The bench had appointed as amicus curiae a lawyer personally hostile to the applicant. And lastly the applicant had moved the Chief Justice on the administrative side to assign the matter to some other bench.

158. In one glance, the grounds on which recusal was asked for appear fit to be rejected out of hands. But the court gave the matter far greater importance than it merited, apparently because it saw a personal angle in it. The petition was heard for three days before it was

rejected by the order dated October 4, 2007. It is a long order running into twenty seven pages authored by Sarin J. The order dealt with all the grounds advanced in support of the recusal petition and effectively showed that there was no truth or substance in any of those grounds. In regard to the 1988 resolution of the Bar Association allegedly passed against RK Anand at the instance of Mr. Sarin the Court called for the Association's Register of Resolutions for the years 1988 and 1989. From the Association's Register it transpired that at the relevant time Mr. Sarin was not an office bearer of the Association but was simply a member of its Executive Committee. Further, there was no resolution concerning RK Anand. A resolution of the nature stated in the recusal application was passed against someone from the Judicial Service. It is true that one Mr. Tufail, the Joint Secretary of the Association had wished to move a resolution against RK Anand too and was given the permission to do so by the Executive Committee. But he did not actually move any resolution and later said that he did not have necessary proof in support of the allegations and the matter was dropped. As regards the complaint to the Prime Minister in which Sarin J. was said to be a member of the alleged coterie around the Chief Justice, Sarin J. commented that until a copy of the complaint was filed with the recusal application he was not even aware of it. Having thus dealt with the rest of the allegations made in the recusal application, the order, towards its end, said something which alone was sufficient to reject the request for recusal. It was pointed out that the applicant had a flourishing practice; he had been frequently appearing in the court of Sarin J. ever since he was appointed as a judge and for the past twelve years was getting orders, both favourable and unfavourable, for his different clients. He never complained of any unfair treatment by Sarin J. but recalled his old 'hostility' with the judge only after the notice was issued to him.

In the order the concerned judge further observed:

"The path of recusal is very often a convenient and a soft option. This is especially so since a Judge really has no vested interest in doing a particular matter. However, the oath of office taken under [Article 219](#) of the Constitution of India enjoins the Judge to duly and faithfully and to the best of his knowledge and judgment, perform the duties of office without fear or favour affection or ill will while upholding the constitution and the laws. In a case, where unfounded and motivated allegations of bias are sought to be made with a view of forum hunting / Bench preference or brow-beating the Court, then, succumbing to such a pressure would tantamount to not fulfilling the oath of office."

159. The above passage, in our view, correctly sums up what should be the Court's response in the face of a request for recusal made with the intent to intimidate the court or to get better of an 'inconvenient' judge or to obfuscate the issues or to cause obstruction and delay the proceedings or in any other way frustrate or obstruct the course of justice. We are constrained to pause here for a moment and to express grave concern over the fact that lately such tendencies and practices are on the increase. We have come across instances where one would simply throw a stone on a judge (who is quite defenceless in such matters!) and later on cite the gratuitous attack as a ground to ask the judge to recuse himself from hearing a case in which he would be appearing. Such conduct is bound to cause deep hurt to the judge concerned but what is far greater importance is that it defies the very fundamentals of administration of justice. A motivated application for recusal, therefore, needs to be dealt with sternly and should be viewed ordinarily as interference in the due course of justice leading to penal consequences.

160. The other Judge on the bench, however, it seems was unable to bear the onslaught and he took the easy way out. He expressed his inability to concur with the order passed by

presiding judge observing that "the nature of the controversy before us pertains to my learned brother alone. It revolves around a number of factual assertions, which can only be known to my learned brother personally, and which must necessarily be examined in the light of the law on the subject. Therefore, I consider it inappropriate to express any opinion in the matter, one way or the other." Having passed the brief separate order he declined to take any further part in the proceeding.

161. This development provided RK Anand with another opportunity to carry on his offensive further. He unhesitatingly availed of the opportunity and filed an application (Crl. M. 11677/2007) for clarification/review of the order dated October 4, 2007 dismissing his recusal petition. Review was sought primarily on the ground that the order of Sarin J. was not the order by the bench since the other judge had declined to concur with him. After the other judge opted out of the bench, the Chief Justice put Lokur J. in his place. Consequently, the clarification/review application came before Sarin J., sitting with Lokur J., and the first thing this bench was told, and with some assertiveness too, was that it was not competent to hear the application and it could only be heard by the previous bench as it arose from an order passed by that bench.

162. The clarification/review application was rejected by a long order dated November 29, 2007 authored by Lokur J. As we shall see, henceforth all substantive orders in the proceeding were written, not by the presiding judge, but by Lokur J. and the significance of it is not lost on us. The application for recusal though rejected was not completely unsuccessful. It left a lasting shadow on the proceeding.

163. Here, it may be noted that apart from filing an application for its clarification/review before the High Court, the order rejecting the recusal application was also sought to be challenged before this Court by filing SLP (Crl) No. 7374 of 2007. The SLP was, however, withdrawn on December 14, 2007. Nevertheless, the challenge to the High Court order rejecting the recusal application is still not given up and paragraphs H & I of the Grounds in the present Memo of appeal expressly seek to assail that order.

164. Both Mr. Salve and Mr. Subramaniam strongly submitted that the appellant had plainly no respect for the court or the court proceedings. Mr. Salve submitted that the recusal application was a brazen attempt to browbeat the High Court and in that attempt the appellant succeeded to a large extent since the prohibition to appear before the courts for a period of only four months could only be considered as a token punishment having regard to the gravity of his conduct. Mr. Subramaniam also felt strongly about the recusal application but before taking up the issue he fairly tried to give another opportunity to the appellant stating that perhaps even now the appellant might wish to withdraw the grounds in the SLP challenging the order passed by the High Court on the recusal application. The appellant was given ample time to consider the suggestion but later on enquiry Mr. Altaf Ahmed stated that he had not pressed those grounds in course of his submissions exercising his discretion as the Counsel but he had no instructions to get those grounds deleted from the SLP.

165. The action of the appellant in trying to suborn the court witness in a criminal trial was reprehensible enough but his conduct before the High Court aggravates the matter manifold. He does not show any remorse for his gross misdemeanour and instead tries to take on the High Court by defying its authority. We are in agreement with Mr. Salve and Mr. Subramaniam that punishment given to him by the High Court was wholly inadequate and incommensurate to the seriousness of his actions and conduct. We, accordingly, propose to

issue a notice to him for enhancement of punishment. We also hold that by his actions and conduct the appellant has established himself as a person who needs to be kept away from the portals of the court for a longer time. The notice would therefore require him to show-cause why the punishment awarded to him should not be enhanced as provided under [section 12](#) of the Contempt of Courts Act. He would additionally show-cause why he should not be debarred from appearing in courts for a longer period. The second part of the notice would also cure the defect in the High Court order in debarring the appellant from appearing in courts without giving any specific notice in that regard as held in the earlier part of the judgment.

166. We have so far been considering the two appeals proper. We now proceed to examine some other important issues arising from the case.

#### THE ROLE OF NDTV:

167. NDTV came under heavy attack from practically all sides for carrying out the stings and airing the programme based on it. On behalf of RK Anand the sting programme was called malicious and motivated, aimed at defaming him personally. Mr. P P Rao appearing for IU Khan questioned the propriety of the stings and the repeated telecast of the sting programme concerning a pending trial and involving a court witness. Mr. Rao submitted that before taking up the sting operations, fraught with highly sinister implications, the TV channel should have informed the trial court and obtained its permission. If for any reason it was not possible to inform the trial judge then permission for the stings should have been taken from the Chief Justice of the Delhi High Court. Also, it was the duty of that TV channel to place the sting materials before the court before telecasting any programme on that basis.

168. Mr. Gopal Subramaniam submitted that this case raised the important issue regarding the nature and extent of the right of the media to deal with a pending trial. He submitted that a sting operation was, by its nature, based on deception and hence, overriding public interest alone might justify its publication/telecast. Further, since the operation was based on deception the onus would be heavy on the person behind the sting and publication/telecast of the sting materials to establish his/her bona fide, apart from the genuineness and truthfulness of the sting materials. In regard to sting operations bona fide could not be assumed. In this case, therefore, it was the duty of the High Court to inquire into and satisfy itself whether the sting operation was a genuine exercise by the TV channel to expose the attempted subversion of the trial. He further submitted that the affidavit of Poonam Agarwal was not sufficient to arrive at the conclusion that the action of the TV channel was genuine and bona fide and the matter required further enquiry. Mr. Subramaniam further submitted that the act of publication/telecast and the contents of publication/telecast, though interlinked, were still needed to be viewed separately and whether or not a publication or telecast was justified would, to a large extent, depend, as much on the contents of the publication/telecast, as the act of publication/telecast itself. He further submitted that, in the facts of the case, the sting operation was in public interest and there was nothing objectionable there. But the same cannot be said of the telecast. The date on which the programme was telecast (May 30, 2007-when Kulkarni's cross-examination was still pending), the "slant" given to the episode by the NDTV presenters, and the way opinions were solicited from eminent lawyers, left much to be explained by the TV channel. Learned Counsel submitted that a question may arise whether NDTV was justified in telecasting the programme based on the sting when they were not in a position to vouch for Kulkarni's character. He, however, submitted that the TV channel must

at least be given credit for transparency - it made a public disclosure, in the same telecast, that (a) Kulkarni had withdrawn his consent for the telecast;

(b) it did not know if any money had in fact changed hands, and (c) it could not vouch for Kulkarni's character. It also gave the contemnors a chance to state their version of the story. In conclusion Mr Subramaniam submitted that it would be difficult to conclude that NDTV was guilty of contempt or of conducting a media trial although the "slant in the telecast was regrettable overreach."

169. The other amicus Mr. N. Rao was more severe in his criticism of the telecast of the sting programme by NDTV. He maintained that NDTV was equally guilty of contempt of court, though under a different provision of law. Mr. Rao submitted that the programme was an instance of, what is commonly called, 'trial by media' and it was telecast while the criminal trial was going on. He submitted that in our system of law there was no place for trial by media in a sub-judice matter. Mr. Rao submitted that freedom of speech and expression, subject of course to reasonable restrictions, was indeed one of the most important rights guaranteed by the Constitution of India. But the press or the electronic media did not enjoy any right(s) superior to an individual citizen. Further, the right of free and fair trial was of far greater importance and in case of any conflict between free speech and fair trial the latter must always get precedence. Mr. Rao submitted that though the law normally did not permit any pre-censorship of a media report concerning an ongoing criminal trial or sub-judice matter, any person publishing the report in contravention of the provisions of law would certainly make himself liable to the proceeding of contempt. Mr. Rao further submitted that the immunity provided under [section 3](#) (3) of the [Contempt of Courts Act](#) was not available to the TV channel in terms of proviso (ii) Explanation (B) to sub-section (3) and thus the telecast of the sting programme by NDTV clearly fell in the prohibited zone under the Act. He further submitted that in such an event, a plea of 'larger public good' was not a legal defence. In support of his submission he cited several decisions of this court in (i) [Saibal Kumar Gupta and Others vs. B.K.Sen and Another.](#), 1961 3 SCR 460 (473) (ii) In Re: P.C.Sen, 1969 2 SCR 649 (651,653,654,658) (iii) [Reliance Petrochemicals Ltd. vs. Proprietors of Indian Express Newspapers, Bombay Pvt. Ltd.](#), (1988) 4 SCC 592 pr. 32,34,95,38 (iv) M. P. Lohia vs. State of W. B., (2005) 2 SCC 686 pr. 10.

170. Mr. Salve learned Senior Advocate appearing for NDTV, on the other hand, defended the telecast of the programme. Mr. Salve submitted that commenting on or exposing something foul concerning proceedings pending in courts would not constitute contempt if the court is satisfied that the report/comment is substantially accurate, it is bona fide and it is in public interest. He referred to the new [section 13](#) in the [Contempt of Courts Act](#) substituted with effect from March 17, 2006 which is as under:

"13. Notwithstanding anything contained in any law for the time being in force,-

(a) no court shall impose a sentence under this Act for a contempt of court unless it is satisfied that the contempt is of such a nature that it substantially interferes, or tends substantially to interfere with the due course of justice;

(b) the court may permit, in any proceeding for contempt of court, justification by truth as a valid defence if it is satisfied that it is in public interest and the request for invoking the said defence is bona fide."

(emphasis added)

171. Mr. Salve submitted that in a situation of this kind two competing public interests are likely to arise; one, purity of trial and the other public reporting of something concerning the conduct of a trial (that may even have the tendency to impinge on the proceedings) where the trial, for any reason, can be considered as a matter of public concern. With regard to the case in hand Mr. Salve submitted that in the sting programmes there was nothing to influence the outcome of the BMW trial. But even if the telecast had any potential to influence the trial proceedings that risk was far outweighed by the public good served by the programme. He further submitted that in a case where two important considerations arise, vying with each other, the court is the final arbiter to judge whether or not the publication or telecast is in larger public interest; how far, if at all, it interferes or tends to interfere with or obstructs or tends to obstruct the course of justice and on which side the balance tilts. In support of his submission he relied upon a decision of the House of Lords in *Re Lonrho plc and others*, [1989] 2 All ER 1100 paragraphs 7.2 and 7.3 at 1116.

172. We have already dealt with the allegations made on behalf of RK Anand while considering his appeal earlier in this judgment and we find no substance in those allegations. Reporting of pending trial:

173. We are also unable to agree with the submission made by Mr. P. P. Rao that the TV channel should have carried out the stings only after obtaining the permission of the trial court or the Chief Justice of the Delhi High Court and should have submitted the sting materials to the court before its telecast. Such a course would not be an exercise in journalism but in that case the media would be acting as some sort of special vigilance agency for the court. On little consideration the idea appears to be quite repugnant both from the points of view of the court and the media. It would be a sad day for the court to employ the media for setting its own house in order; and media too would certainly not relish the role of being the snoopers for the court. Moreover, to insist that a report concerning a pending trial may be published or a sting operation concerning a trial may be done only subject to the prior consent and permission of the court would tantamount to pre-censorship of reporting of court proceedings. And this would be plainly an infraction of the media's right of freedom of speech and expression guaranteed under [Article 19\(1\)](#) of the Constitution. This is, however, not to say that media is free to publish any kind of report concerning a sub-judice matter or to do a sting on some matter concerning a pending trial in any manner they please. The legal parameter within which a report or comment on a sub-judice matter can be made is well defined and any action in breach of the legal bounds would invite consequences. Compared to normal reporting, a sting operation is an incalculably more risky and dangerous thing to do. A sting is based on deception and, therefore, it would attract the legal restrictions with far greater stringency and any infraction would invite more severe punishment.

Sting programme whether trial by media??

174. The submissions of Mr. N. Rao are based on two premises: one, the sting programme telecast by NDTV was of the genre, 'trial by media' and two, the programme interfered or tended to interfere with or obstructed or tended to obstruct the proceedings of the BMW trial that was going on at the time of the telecast. If the two premises are correct then the rest of the submissions would logically follow. But are the two premises correct? What is trial by media? The expression 'trial by media' is defined to mean:

"the impact of television and newspaper coverage on a person's reputation by creating a widespread perception of guilt regardless of any verdict in a court of law. During high publicity court cases, the media are often accused of provoking an atmosphere of public hysteria akin to a lynch mob which not only makes a fair trial nearly impossible but means that, regardless of the result of the trial, in public perception the accused is already held guilty and would not be able to live the rest of their life without intense public scrutiny."

175. In light of the above it can hardly be said that the sting programme telecast by NDTV was a media trial. Leaving aside some stray remarks or comments by the anchors or the interviewees, the programme showed some people trying to subvert the BMW trial and the state of the criminal administration of justice in the country (as perceived by the TV channel and the interviewees). There was nothing in the programme to suggest that the accused in the BMW case were guilty or innocent. The programme was not about the accused but it was mainly about two lawyers representing the two sides and one of the witnesses in the case. It indeed made serious allegations against the two lawyers. The allegations, insofar as RK Anand is concerned, stand established after strict scrutiny by the High Court and this Court. Insofar as IU Khan is concerned, though this Court held that his conduct did not constitute criminal contempt of court, nonetheless allegations against him too are established to the extent that his conduct has been found to be inappropriate for a Special Prosecutor. In regard to the witness the comments and remarks made in the telecast were never subject to a judicial scrutiny but those too are broadly in conformity with the materials on the court's record. We are thus clearly of the view that the sting programme telecast by NDTV cannot be described as a piece of trial by media.

Stings & telecast of sting programmes not constituting criminal contempt:

176. Coming now to [section 3](#) of the Contempt of Courts Act we are unable to appreciate Mr. Rao's submission that NDTV did not have the immunity under sub-section (3) of [section 3](#) as the telecast was hit by proviso (ii) Explanation (B) to that sub section. [Section 3](#) of the Act insofar as relevant is as under:

"3. Innocent publication and distribution of matter not contempt.- (1) A person shall not be guilty of contempt of court on the ground that he has published (whether by words, spoken or written, or by signs, or by visible representations, or otherwise) any matter which interferes or tends to interfere with, or obstructs or tends to obstruct, the course of justice in connection with any civil or criminal proceeding pending at that time of publication, if at that time he had no reasonable grounds for believing that the proceeding was pending.

(2) xxx (3) A person shall not be guilty of contempt of court on the ground that he has distributed a publication containing any such matter as is mentioned in sub-section (1), if at the time of distribution he had no reasonable grounds for believing that it contained or was likely to contain any such matter as aforesaid:

Provided that this sub-section shall not apply in respect of the distribution of-

(i) any publication which is a book or paper printed or published otherwise than in conformity with the rules contained in [section 3](#) of the Press and [Registration of Books Act, 1867](#) (25 of 1867);

(ii) any publication which is a newspaper published otherwise than in conformity with the rules contained in [section 5](#) of the said Act.

Explanation.- For the purposes of this section, a judicial proceeding-

(a) is said to be pending-

(A) xxx (B) in the case of a criminal proceeding under [the Code](#) of Criminal Procedure, 1898 ( 5 of 1898), or any other law-

(i) where it relates to the commission of an offence, when the charge-sheet or challan is filed, or when the court issues summons or warrant, as the case may be, against the accused, and

(ii) in any other case, when the court takes cognizance of the matter to which the proceeding relates, and xxx

(b) xxxx"

177. [Section 5](#) provides that a fair criticism of a judicial act concerning any case which has been heard and finally decided would not constitute contempt.

178. Sub-section (1) of [section 3](#) provides immunity to a publisher of any matter which interferes or tends to interfere with, or obstructs or tends to obstruct the course of justice in any civil or criminal proceeding if he reasonably believed that there was no proceeding pending. A sub- section (3) deal with distribution of the publication as mentioned in sub-section (1) and provides immunity to the distributor if he reasonably believed that the publication did not contain any matter which interfered or tended to interfere with, or obstructed or tended to obstruct the course of justice in any civil or criminal proceeding. The immunity provided under sub-section (3) is subject to the exceptions as stated in the proviso and explanations to the sub-section. We fail to see any application of [section 3\(3\)](#) of the Contempt of Courts Act in the facts of this case. In this case there is no distribution of any publication made under sub-section (1). Hence, neither sub-section (3) nor its proviso or explanation is attracted. NDTV did the sting, prepared a programme on the basis of the sting materials and telecast it at a time when it fully knew that the BMW trial was going on. Hence, if the programme is held to be a matter which interfered or tended to interfere with, or obstructed or tended to obstruct the due course of the BMW case then the immunity under sub- section (1) will not be available to it and the telecast would clearly constitute criminal contempt within the meaning of [section 2](#) (c) (ii) & (iii) of the Act. But can the programme be accused of interfering or tending to interfere with, or obstructing or tending to obstruct the due course of the BMW case. Whichever way we look at the programme we are not able to come to that conclusion. The programme may have any other faults or weaknesses but it certainly did not interfere with or obstruct the due course of the BMW trial. The programme telecast by NDTV showed to the people (the courts not excluded) that a conspiracy was afoot to undermine the BMW trial. What was shown was proved to be substantially true and accurate. The programme was thus clearly intended to prevent the attempt to interfere with or obstruct the due course of the BMW trial. STINGS & TELECAST OF STING PROGRAMMES SERVED IMPORTANT PUBLIC CAUSE

179. Looking at the matter from a slightly different angle we ask the simple question, what would have been in greater public interest; to allow the attempt to suborn a witness, with the object to undermine a criminal trial, lie quietly behind the veil of secrecy or to bring out the mischief in full public gaze? To our mind the answer is obvious. The sting telecast by NDTV was indeed in larger public interest and it served an important public cause.

180. We have held that the sting programme telecast by NDTV in no way interfered with or obstructed the due course of any judicial proceeding, rather it was intended to prevent the attempt to interfere with or obstruct the due course of law in the BMW trial. We have also held that the sting programme telecast by NDTV served an important public cause. In view of the twin findings we need not go into the larger question canvassed by Mr Salve that even if the programme marginally tended to influence the proceedings in the BMW trial the larger public interest served by it was so important that the little risk should not be allowed to stand in its way. Excesses in the telecast:

181. We have unequivocally upheld the basic legitimacy of the stings and the sting programmes telecast by NDTV. But at the same time we must also point out the deficiencies (or rather the excesses) in the telecast. Mr. Subramaniam spoke about the 'slant' in the telecast as 'regrettable overreach'. But we find many instances in the programme that cannot be simply described as 'slants'. There are a number of statements and remarks which are actually incorrect and misleading. In the first sting programme telecast on May 30, 2007 at 8.00 pm the anchor made the opening remarks as under:

"Good Evening,.... an NDTV expose, on how the legal system may have been subverted in the high profile BMW case. In 1999 six people were run over allegedly by a BMW driven by Sanjeev Nanda a young, rich industrialist but 8 years later every witness except one has turned hostile. Tonight NDTV investigates did the prosecution, the defence and the only witness not turned hostile Sunil Kulkarni collude..."

182. The anchor's remarks were apparently from a prepared text since the same remarks were repeated word by word by another anchor as introduction to the second telecast on the same day at 9:00 pm.

183. Further, in the 9 o'clock telecast after some brief introductory remarks, clips from the sting recordings are shown for several minutes and a commentator from the background (probably Poonam Agarwal) introduces the main characters in the BMW case. Kulkarni is introduced by the commentator in the following words:

"Sunil Kulkarni, a passerby, who allegedly saw the accident but inexplicably dropped as witness by prosecution. They claim he had been bought by the Nandas. This despite the fact that he is the only witness who still says the accident was caused by a 'black car' with two men in it one of them called Sanjeev."

184. [This statement does not find place in the manuscript of the telecast furnished to the court and can be found only by carefully watching the CD of the telecast submitted before the court. We are again left with the feeling that NDTV did not submit full and complete materials before the court and we are surprised that the High Court did not find it amiss]

185. In the first statement Kulkarni is twice described as the only witness in the BMW case who after eight years had not turned hostile. The statement is fallacious and misleading. Kulkarni was not being examined in the court as prosecution witness and, therefore, there was no question of his being declared 'hostile' by the prosecution. He was being examined as a Court witnesses. Nevertheless, the prosecution was cross-examining him in detail in course of which he was trying to sabotage the prosecution case.

186. The second statement is equally, if not more, fallacious. In the second statement it is said that Kulkarni was 'inexplicably' dropped as a prosecution witness. We have seen earlier that Kulkarni was dropped as a prosecution witness for good reasons summed up in the Joint Commissioner's report to the trial court and there was nothing 'inexplicable' about it. In the second statement it is further suggested that the prosecution's claim that Kulkarni was bought over by the accused was untrue because he was the only witness who still said that the accident was caused by a black car with two men in it, one of them being called Sanjeev. It is true that in his deposition before the court Kulkarni said that the accident was caused by a black car but he resiled from his earlier statements made before the police and the magistrate in a more subtle and clever way than the other two prosecution witnesses, namely, Hari Shankar Yadav and Manoj Malik. Departing from his earlier statements he said in the court that he heard one of the two occupants of the car addressing the other as 'Sanch or sanz' (and not as Sanjeev). Further, though admitting that Sanjeev Nanda was one of the occupants of the car, he positively denied that he got down from the driving seat of the car and placed someone else on the driving seat of the car causing the accident. Thus the damage to the prosecution case that he tried to cause was far more serious than any other prosecution witness. It is not that NDTV did not know these facts. NDTV was covering the BMW trial very closely since its beginning and was aware of all the developments taking place in the case. Then why did it introduce the programme in this way, running down the prosecution and presenting Kulkarni as the only person standing upright while everyone else had fallen down? The answer is not far to seek. One can not start a highly sensational programme by saying that it was prepared with the active help of someone whose own credibility is extremely suspect. The opening remarks were thus designed to catch the viewer and to hold his/her attention, but truth, for the moment at least was relegated to the sidelines. It is indeed true that later on in the programme facts concerning Kulkarni were stated correctly and he was presented in a more balanced way and Mr. Subramaniam wanted to give NDTV credit points for that. But the impact and value of the opening remarks in a TV programme is quite different from what comes later on. The later corrections were for the sake of the record while the introductory remarks had their own value.

187. Further, on the basis of the sting recordings NDTV might have justifiably said that IU Khan, the Special Prosecutor appeared to be colluding with the defence (though this court found that there was no conclusive evidence to come to such a finding). But there was no material before NDTV to make such allegation against the prosecution as a whole and thus to run down the other agencies and people connected with the prosecution. There are other instances also of wrong and inappropriate choice of words and expressions but we need not go any further in the matter.

188. Another sad feature is its stridency. It is understandable that the programme should have started on a highly sensational note because what was about to be shown was really quite shocking. But the programme never regained poise and it became more and more shrill. All the interviewees, highly eminent people, expressed their shock and dismay over the state of the legal system in the country and the way the BMW trial was proceeding. But as the interview progressed, they somewhat tended to lose their self restraint and did not pause to ponder that they were speaking about a sub-judice matter and a trial in which the testimony of a court witness was not even over. We are left with the feeling that some of the speakers allowed their passions, roused by witnessing the shocking scenes on the TV screen, to get better of their judgment and made certain very general and broad remarks about the country's legal system that they might not have made if speaking in a more dispassionate and objective circumstances. Unfortunately, not a single constructive suggestion came from anyone as to

how to revamp the administration of criminal justice. The programme began on negative note and remained so till the very end.

#### Conduct of NDTV in proceeding before High Court:

189. In the earlier part of the judgment some of the glaring lapses committed by NDTV in the proceeding before the High Court are already recounted. Apart from those one or two other issues need to be mentioned here that failed to catch the attention of the High Court. It seems that at the time the sting operations were carried out people were actually apprehensive of something of that kind. Vikas Arora, Advocate had stated in his complaint (dated April 19, 2007) about receiving such a threat from Poonam Agarwal. NDTV in its reply dated April 26, 2007 had denied the allegations in the complaint, at the same time, declaring its resolve to make continuous efforts to unravel the truth. At the same time Poonam Agarwal was planning the stings in her meetings with Kulkarni. As a matter of fact, the first sting was carried out on IU Khan just two days after giving reply to Arora's complaint. Further, from the transcript of the first sting carried out on RK Anand on May 6, 2007 it appears that he too had expressed some apprehension of this kind to which Kulkarni responded by saying that he did not have money enough to eat how could he do any recording of anyone. (It is difficult to miss the irony that the exchange took place while RK Anand was actually being subjected to the sting). It thus appears that at that time, for some reason, the smell of sting was in the air. In those circumstances we find it strange that in the affidavits filed on behalf of NDTV there should be absolutely no reference to Vikas Arora's complaint. In the earlier part of the judgment we have examined the affidavits filed by Poonam Agarwal and found that she states about all the aspects of the sting operations in great detail. But surprisingly those affidavits do not even refer to, much less deal with the complaint of Vikas Arora despite the striking similarity between the threat that was allegedly given to him and his senior IU Khan and the way the sting operation was actually carried out on IU Khan.

190. There is another loose end in the whole matter. Kulkarni's sting meeting with IU Khan had ended with fixing up another meeting for the following Sunday at the latter's residence. (It was the setting up of this meeting that is primarily the basis for holding him guilty of misconduct as the Special Public Prosecutor). One should have thought that this meeting would surely take place because it provided a far better opportunity for the sting. With 'good Scotch whisky' flowing it was likely that the planners of the stings would get more substantial evidences of what they suspected. But we are not told anything about this meeting: whether it took place or not? If it took place what transpired in it and whether any sting recording was done? If it did not take place what was the reason for not keeping the appointment and giving up such a good opportunity. Here it may be noted that Kulkarni also in his affidavit filed before the High Court on August 6, 2007 stated that as arranged between them he again met IU Khan in the evening but the sting recording of that meeting was withheld by NDTV because that falsified their story. Kulkarni, as was his wont, might be telling lies but that was an additional reason for NDTV to clarify the issue regarding the second meeting between the two.

191. The next meeting between Kulkarni and IU Khan that was fixed up in the sting meeting on April 28, 2007 might or might not have taken place but there can be little doubt that they met again between April 28, 2007 and May 31, 2007 (the day following the first sting telecast) when Kulkarni gave IU Khan the 'certificate' that he had accepted the summons on his advice (which was submitted by IU Khan before the trial court when he withdrew from the case).

192. The affidavits filed on behalf of NDTV are completely silent on these aspects.

193. These omissions (and some similar others) on the part of NDTV leave one with the feeling that it was not sharing all the facts within its knowledge with the court. The disclosures before the Court do not appear to be completely open, full and frank. It would tell the court only so much as was necessary to secure the conviction of the proceedees-wrong doers. There were some things that it would rather hold back from the court. We would have appreciated the TV channel to make a fuller disclosure before the High Court of all the facts within its knowledge.

194. Having said all this we would say, in the end, that for all its faults the stings and the telecast of the sting programme by NDTV rendered valuable service to the important public cause to protect and salvage the purity of the course of justice. We appreciate the professional initiative and courage shown by the young reporter Poonam Agarwal and we are impressed by the painstaking investigation undertaken by NDTV to uncover the Shimla connection between Kulkarni and RK Anand.

195. We have recounted above the acts of omission and commission by NDTV before the High Court and in the telecast of the sting programme in the hope that the observations will help NDTV and other TV channels in their future operations and programmes. We are conscious that the privately run TV channels in this country are very young, no more than eighteen or twenty years old. We also find that like almost every other sphere of human activity in the country the electronic news media has a very broad spectrum ranging from very good to unspeakably bad.

196. The better news channels in the country (NDTV being one of them) are second to none in the world in matters of coverage of news, impartiality and objectivity in reporting, reach to the audience and capacity to influence public opinion and are actually better than many foreign TV channels. But that is not to say that they are totally free from biases and prejudices or they do not commit mistakes or gaffes or they some times do not tend to trivialise highly serious issues or that there is nothing wanting in their social content and orientation or that they maintain the same standards in all their programmes. In quest of excellence they have still a long way to go.

197. A private TV channel which is also a vast business venture has the inherent dilemma to reconcile its business interests with the higher standards of professionalism/demands of profession. The two may not always converge and then the TV channel would find its professional options getting limited as a result of conflict of priorities. The media trips mostly on TRPs (television rating points), when commercial considerations assume dominance over higher standards of professionalism.

198. It is not our intent here to lay down any reformist agenda for the media. Any attempt to control and regulate the media from outside is likely to cause more harm than good. The norms to regulate the media and to raise its professional standards must come from inside.

**ROLE OF THE LAWYER**

199. The other important issue thrown up by this case and that causes us both grave concern and dismay is the decline of ethical and professional standards among lawyers. The conduct of the two appellants (one convicted of committing criminal contempt of court and the other found guilty of misconduct as Special Prosecutor), both of them lawyers of long standing,

and designated Senior Advocates, should not be seen in isolation. The bitter truth is that the facts of the case are manifestation of the general erosion of the professional values among lawyers at all levels. We find today lawyers indulging in practices that would have appalled their predecessors in the profession barely two or three decades ago. Leaving aside the many kinds of unethical practices indulged in by a section of lawyers we find that even some highly successful lawyers seem to live by their own rules of conduct. We have viewed with disbelief Senior Advocates freely taking part in TV debates or giving interviews to a TV reporter/anchor of the show on issues that are directly the subject matter of cases pending before the court and in which they are appearing for one of the sides or taking up the brief of one of the sides soon after the TV show. Such conduct reminds us of the fictional barrister Rumpole, 'the Old Hack of Bailey', who self deprecatingly described himself as an 'old taxi plying for hire'. He at least was not bereft of professional values. When a young and enthusiastic journalist invited him to a drink of Dom Perignon, vastly superior and far more expensive than his usual 'plonk', 'Chbteau Fleet Street', he joined him with alacrity but when in the course of the drink the journalist offered him a large sum of money for giving him a story on the case; 'why he was defending the most hated woman in England', Rumpole ended the meeting simply saying "In the circumstance I think it is best if I pay for the Dom Perignon"

200. We express our concern on the falling professional norms among the lawyers with considerable pain because we strongly feel that unless the trend is immediately arrested and reversed, it will have very deleterious consequences for administration of justice in the country. No judicial system in a democratic society can work satisfactorily unless it is supported by a bar that enjoys the unqualified trust and confidence of the people, that share the aspirations, hopes and the ideals of the people and whose members are monetarily accessible and affordable to the people.

201. We are glad to note that Mr. Gopal Subramaniam, the amicus fully shared our concern and realised the gravity of the issue. In course of his submissions he eloquently addressed us on the elevated position enjoyed by a lawyer in our system of justice and the responsibilities cast upon him in consequence. His Written Submissions begin with this issue and he quotes extensively from the address of Shri M C Setalvad at the Diamond Jubilee Celebrations of the Bangalore Bar Association, 1961, and from the decisions of this Court in [Pritam Pal vs. High court of Madhya Pradesh](#), 1993 Supp (1) SCC 529 (observations of Ratnavel Pandian J.) and [Sanjeev Datta, In Re](#), (1995) 3 SCC 619 (observations of Sawant J. at pp 634-635, para 20).

202. We respectfully endorse the views and sentiments expressed by Mr. M.C. Setalvad, Pandian J. and Sawant J.

203. Here we must also observe that the Bar Council of India and the Bar Councils of the different states cannot escape their responsibility in this regard. Indeed the Bar council(s) have very positively taken up a number of important issues concerning the administration of justice in the country. It has consistently fought to safeguard the interests of lawyers and it has done a lot of good work for their welfare. But on the issue of maintaining high professional standards and enforcing discipline among lawyers its performance hardly matches its achievements in other areas. It has not shown much concern even to see that lawyers should observe the statutory norms prescribed by the Council itself. We hope and trust that the Council will at least now sit up and pay proper attention to the restoration of the high professional standards among lawyers worthy of their position in the judicial system and in the society.

This takes us to the last leg of this matter.

#### THE LARGER ISSUE: BMW TRIAL GETTING OUT OF HAND:

204. Before laying down the records of the case we must also advert to another issue of great importance that causes grave concern to this Court. At the root of this odious affair is the way the BMW trial was allowed to be constantly interfered with till it almost became directionless. We have noted Kulkarni's conduct in course of investigation and at the commencement of the trial; the fight that broke out in the court premises between some policemen and a section of lawyers over his control and custody; the manner in which Hari Shankar Yadav, a key prosecution witness turned hostile in court; the curious way in which Manoj Malik, another key witness for the prosecution appeared before the court and overriding the prosecution's protest, was allowed to depose only to resile from his earlier statement. All this and several other similar developments calculated to derail the trial would not have escaped the notice of the Chief Justice or the judges of the Court. But there is nothing to show that the High Court, as an institution, as a body took any step to thwart the nefarious activities aimed at undermining the trial and to ensure that it proceeded on the proper course. As a result, everyone seemed to feel free to try to subvert the trial in any way they pleased.

205. We must add here that this indifferent and passive attitude is not confined to the BMW trial or to the Delhi High Court alone. It is shared in greater or lesser degrees by many other High Courts. From experience in Bihar, the author of these lines can say that every now and then one would come across reports of investigation deliberately botched up or of the trial being hijacked by some powerful and influential accused, either by buying over or intimidating witnesses or by creating insurmountable impediments for the trial court and not allowing the trial to proceed. But unfortunately the reports would seldom, if ever, be taken note of by the collective consciousness of the Court. The High Court would continue to carry on its business as if everything under it was proceeding normally and smoothly. The trial would fail because it was not protected from external interferences. Every trial that fails due to external interference is a tragedy for the victim(s) of the crime. More importantly, every frustrated trial defies and mocks the society based on the rule of law. Every subverted trial leaves a scar on the criminal justice system. Repeated scars make the system unrecognisable and it then loses the trust and confidence of the people. Every failed trial is also, in a manner of speaking, a negative comment on the State's High Court that is entrusted with the responsibility of superintendence, supervision and control of the lower courts. It is, therefore, high time for the High Courts to assume a more pro-active role in such matters. A step in time by the High Court can save a criminal case from going astray. An enquiry from the High Court Registry to the concerned quarters would send the message that the High Court is watching; it means business and it will not tolerate any nonsense. Even this much would help a great deal in insulating a criminal case from outside interferences. In very few cases where more positive intervention is called for, if the matter is at the stage of investigation the High Court may call for status report and progress reports from police headquarter or the concerned Superintendent of Police. That alone would provide sufficient stimulation and pressure for a fair investigation of the case. In rare cases if the High Court is not satisfied by the status/progress reports it may even consider taking up the matter on the judicial side. Once the case reaches the stage of trial the High Court obviously has far wider powers. It can assign the trial to some judicial officer who has made a reputation for independence and integrity. It may fix the venue of the trial at a proper place where the scope for any external interference may be eliminated or minimized. It can give effective directions for protection of

witnesses and victims and their families. It can ensure a speedy conclusion of the trial by directing the trial court to take up the matter on a day-to-day basis. The High Court has got ample powers for all this both on the judicial and administrative sides. [Article 227](#) of the Constitution of India that gives the High Court the authority of superintendence over the subordinate courts has great dynamism and now is the time to add to it another dimension for monitoring and protection of criminal trials. Similarly [Article 235](#) of the Constitution that vests the High Court with the power of control over sub-ordinate courts should also include a positive element. It should not be confined only to posting, transfer and promotion of the officers of the subordinate judiciary. The power of control should also be exercised to protect them from external interference that may sometime appear overpowering to them and to support them to discharge their duties fearlessly.

206. In light of the discussions made above we pass the following orders and directions.

1. The appeal filed by IU Khan is allowed and his conviction for criminal contempt is set aside. The period of four month's prohibition from appearing in Delhi High Court and the courts sub-ordinate to it is already over. The punishment of fine given to him by the High Court is set aside. The Full Court of the Delhi High Court may still consider whether or not to continue the honour of Senior Advocate conferred on him in light of the findings recorded in this judgment.
2. The appeal of RK Anand is dismissed subject to the notice of enhancement of punishment issued to him as indicated in paragraph 165 of the judgment. He is allowed eight weeks time from the date of service of notice for filing his show-cause.
3. Those of the High Courts which have so far not framed any rules under [section 34](#) of the Advocates Act, shall frame appropriate rules without any further delay as directed in paragraph 147 of the judgment.
4. Put up the appeal of RK Anand after the show-cause is filed.

.....J.

[B.N. AGRAWAL] .....J.

[G.S. SINGHVI] .....J.

[AFTAB ALAM] New Delhi, July 29, 2009.

Punjab-Haryana High Court

Rao Harnarain Singh Sheoji Singh ... vs The State on 12 August, 1957

Equivalent citations: AIR 1958 P H 123, 1958 CriLJ 563

Author: T Chand

Bench: T Chand

ORDER Tek Chand, J.

1. This is an application under Section 498, [Criminal Procedure Code](#), for release of the petitioners on bail pending their trial for offence said to have committed under [Sections 302](#), 376, 109 and 201, [Indian Penal Code](#). The applicants are (1) Rao Harnarain Singh, an Advocate and an Additional Public Prosecutor at Gurgaon, (2) Ch. Mauji Ram Deputy Superintendent Jail, Gurgaon, (3) Balbir Singh and (4) Sanwat Singh. The salient facts of the case are that Kalu Ram accused, husband of Mst. Surti, used to live in one of the rooms in the house of accused Rao Harnarain Singh.

Mst. Surti is said to be an attractive girl of 19 years. On the evening of 18th of April 1957 Rao Harnarain Singh was entertaining Ch. Mauji Ram, Deputy Superintendent Jail, Gurgaon, on the eve of his transfer. Rao Harnarain Singh is said to have required Kalu Hum to send Mst. Surti for the carnal pleasures of himself and his guests. Kalu Ram, who had a very humble station in life, after initial protasts, was induced to provide his wife to satisfy the carnal lust of Rao Harnarain Singh and his guests.

It is said that the girl protested vehemently against this outrageous demand, but under pressure of her husband, she was induced to surrender her chastity. It is alleged that three accused persons Rao Harnarain Singb, Ch. Mauji Ram and Balbir Singh ravished her during the night & she died almost immediately. It is also alleged that her shrieks were heard by some Advocates living in the neighbourhood. It is then stated that at the instance of Rao Harnarain Singh, Dr. Ram Parshad, Assistant Surgeon, was sent for in order to ascertain whether the girl had merely swooned or died.

Another physician Dr. Gulati, was also summoned and both of thorn were of the view, that she was dead but they could not assign the cause of her death. In the early hours of the morning of 19th April 1957 she was cremated. The prosecution contention is that the cremation was unduly hurried, without the performance of the usual funeral rites and with a view to destroy proof of violence done to her. The prosecution then alleges that soon after the hurried cremation of the dead body of Mst. Surti Rao Harnarain Singh left Gurgaon on 19th of April 1957 and was not to be seen there for several days.

Ch. Mauji Ram also left Gurgaon in the early hours of the morning of 19th of April 1957. It is also alleged that before her cremation, clothes worn by Mst. Surti at the time had been removed and they have been found by an expert to be smeared with stains of seminal fluid and human blood. Kalu Ram, the husband of Mst. Surti, made a confession giving full details as to the manner in which pressure was put on him for production of his wife for the satisfaction of the carnal pleasures of Rao Harnarain Singh and his guests.

This confession had been retracted after a lapse of a month and a half of its recording. The prosecution contends that Kalu Ram was made to resile from the confession under influence and coercion emanating from accused Rao Harnarain Singh and Mauji Ram, The prosecution also submitted that Babu Ram, who served Rao Harnarain Singh and his guests at the dinner,

was a witness to the earlier part of the entertainment and saw Rao Harnarain Singh, Mauji Ram and Balbir Singh going inside a room with the girl and he also heard their talk when they came out after she had expired.

Out of the applicants Balbir Singh was proclaimed as an absconder and was apprehended after his property had been attached under the provisions [of Criminal Procedure Code](#). Bail Application was rejected by the Committing Magistrate and the Additional Sessions Judge also declined to release the accused on bail. This Court has therefore been moved under [Section 498, Criminal Procedure Code](#), praying that the petitioners be released on bail pending the decision of the case.

2. On behalf of the accused it is stated that a report was made by the local station house Officer to the Superintendent of Police of Gurgaon on 26th of April, 1957 that no tfrime had been committed. It is then stated that about three weeks after the cremation of the girl a rumour went round in Gurgaon that Mst. Surti had died an unnatural death and this rumour was featured by a local newspaper. A formal report was then lodged by the Superintendent of Police on 11th of May, 1957.

In that report he stated that on 26th of April. 1957 station House Officer Sadar Gurgaon brought to his notice an incident wherein a woman was reported to have died on the night of 18th/19th of April 1957 and that her body was cremated in haste early in the morning without performance of customary obsequial rites. The report then stated that although no formal or informal complaint or report had been lodged with the police and since the matter was likely to attract public attention he ordered Shri Ram Partap Deputy Superintendent of Police to Institute immediate inquiries into the Incident.

The report then mentioned that while the matter was still under inquiry with the Deputy Superintendent of Police, the Superintendent of Police found a large number of different rumours in circulation as to the sinister and suspicious manner in which the girl met her death. The Superintendent of Police ordered that a case under [Section 302, Indian Penal Code](#), should be registered and investigated by the Inspector of Police, C. I. A, Gurgaon, under his direct supervision, and that the inquiry entrusted to Shri Ram Partap, Deputy Superintendent of Police, should be discontinued forthwith and all the papers transferred to his file. On 13th of May 1957 the Deputy Superintendent of Police, C. I. D. started investigation. On 18th of May, 1957 Rao Harnarain Singh was taken into custody and Mauji Ram was arrested on 28th of May, 1957. Balbir Singh accused was arrested on 26th of June, 1957. In this case 30th of July 1957 was the date fixed for recording the evidence of prosecution witnesses and on that day a transfer application was moved on behalf of the accused in this Court which has not yet been disposed of except that the High Court declined to stay proceedings in the trial Court. I am informed that 12th of August 1957 is the next date of hearing in this case before the trial Court.

3. Mr. Bhagat Singh Chawla has pressed for enlargement of the accused on bail on several grounds. He said that his clients deserved to be released on bail, as there did not appear any reasonable ground for holding that they had been guilty of an offence punishable with death or with imprisonment for life.

In the absence of Corpus delict he said it was not possible on the allegations in this case to hold any one of the accused to be guilty of murder, especially when there is no eye-witness to testify to the murder and no proof being available that the body of the girl which was

cremated in the early hours shortly after the occurrence bore any marks of violence, suggestive of commission of offences of which they have been accused.

4. He also contended that on the allegations made in this case commission of offence of rape on the girl could not be established. According to him the girl was produced for the satisfaction of the carnal desires of Rao Harnarain Singh and his guests, with the consent of the girl's husband Kalu Ram. He further urged that the girl was also a consenting party and she surrendered her body to the three persons willingly and with the approval and at the bidding of her husband.

5. Mr. Bhagat Singh, also suggested that she was a grown up girl of 19 years, and a married woman, and death could not result in consequence of sexual intercourse with her by three persons. Her death, he thought, was fortuitous and probably due to sudden failure of the heart. In his words, Rao Harnarain Singh and his guests were having "a good time" and had gathered there for a little bit of "gaiety and enjoyment".

He also said that his two clients were "respectable persons", one being an Advocate and the other a Deputy Superintendent of Jail, and for this reason also deserved to be set at large. He lastly urged that the gathering of three accused in the evening and their act in ravishing Mst. Surti, young wife of Kalu Ram, might be morally reprehensible but it was not such an act which should stand in the way of the accused, from being released on bail.

6. From such material as was referred to during the course of arguments of the counsel, I cannot accept the suggestion of S. Bhagat Singh Chawla that Kalu Ram, the husband of the girl, was a pander who had willingly agreed to minister to the baser passions of his clients. I cannot even persuade myself to the view that his wife was a dissolute young woman who willingly lent her body to her ravishers to gratify her own lustful propensities;

The confession of Kalu Ram which was read out and which was later retracted after a month and a half, does not suggest consent on the part of either Kalu Ram or Mst Surti his wife. Kalu Ram appears to have protested as vehemently as he could dare, having regard to his humble station in life, to the suggestion made by accused Rao Harnarain Singh, that he should send his wife for carnal connection with himself and with his guests.

After such verbal resistance as Kalu Ram could offer had been overcome, his wife indignantly refused to submit to the indecent proposal conveyed to her through her husband. It is said that under the husband's pressure, she after vehement protestations resigned herself to the disgrace that awaited her. There is also material with the prosecution that her shrieks pierced through the walls of the room and were heard by some Advocates living in the neighbourhood just before her voice was finally and fatally silenced. Such a submission on her part cannot be called by any stretch of language, consent.

7. A mere act of helpless resignation in the face of inevitable compulsion, quiescence, non-resistance, or passive giving in, when volitional faculty is either clouded by fear or vitiated by duress, cannot be deemed to be "consent" as understood in law. Consent, on the part of a woman as a defence to an allegation of rape, requires voluntary participation, not only after the exercise of intelligence, based on the knowledge, of the significance and moral quality of the act, but after having freely exercised a choice between resistance and assent.

Submission of her body under the influence of fear or terror is no consent. There is a difference between consent and submission. Every consent involves a submission but the converse does not follow and a mere act of submission does not involve consent. Consent of the girl in order to relieve an act, of a criminal character, like rape, must be an act of reason, accompanied with deliberation, after the mind has weighed as in a balance, the good and evil on each side, with the existing capacity and power to withdraw the assent according to one's will or pleasure.

A woman is said to consent, only when she freely agrees to submit herself, while in free and unconstrained possession of her physical and moral power to act in a manner she wanted. Consent implies the exercise of a free and untrammelled right to forbid or withhold what is being consented to; it always is a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former. On the material placed before me it cannot reasonably be argued that Mst. Surti was an assenting victim to the outrage perpetrated on her, on the fatal night. It is also not possible for me to accept the contention of the counsel for the accused petitioners, that Kalu Rani, the husband of the girl had freely and voluntarily accepted the importunate overtures, said to have been made to him, by Rao Haranarain Singh with full awareness of and willing concurrence in the proposed acts to which his wife was to be subjected by the accused persons.

8. Mr. Bhagat Singh Chawla also submitted commiseratingly that his clients were respectable and well connected persons, belonging to a higher strata of society and had assembled to spend a pleasant evening with no intention to endanger the life of the girl. The orgy of lust and debauchery to which the accused are said to have abandoned themselves was an act of unmitigated reprobates rather than of the so called "respectable persons".

9. I am not unmindful of the proposition that the bad character of a man does not disentitle him from being bailed out if the law allows it. It is also well established that the object of detention pending criminal proceedings, is not punishment, and the law favours allowance of bail, which is the rule, and refusal is the exception. On the other hand, the social position or status of an accused person should not be taken into consideration while granting or rejecting an application for bail.

The Courts do not grant bail merely because an accused is a respectable man and is able to afford reasonable security (vide [Emperor v. Abhairaj Kunwar](#) AIR 1940 Oudh 8 (A) and [Shaikh Karim v. Emperor](#) AIR 1926 Nag 279 (B)). I may profitably quote the observations of Courtney-Terrell, C. J., in [Hikayat Singh v. Emperor](#), AIR 1932 Pat 209, at p. 211 (C).

"We must point out in the most emphatic way for the future guidance of Magistrates and Sessions Judges that save in exceptional cases, persons accused of crimes punishable with long terms of imprisonment should not be released by them on bail. The richer the accused and the more easy it is for him to find bail, the less it is desirable that he should be released ....."

10. It will be proper at this place to consider the principles which should guide the Courts in granting bail in a case like the present. There cannot be inflexible rules governing a subject which rests principally with the Courts' discretion in the matter of allowance or refusal of bail. The probability or improbability of the prosecution terminating in conviction is not a conclusive consideration for the grant or refusal of bail, particularly in a case like this, in

which evidence has not so far been led. For their guidance the Courts also look to other circumstances which may be determinative, as for example the Courts consider:

(a) the enormity of the charge,

(b) the nature of the accusation,

(c) the severity of the punishment which the conviction will entail, (d) the nature of the evidence in support of the accusation,

(e) the danger of the applicant's absconding if he is released on bail,

(f) the danger of witnesses being tampered with,

(g) the protracted nature of the trial, (h) opportunity to the applicant for preparation of his defence and access to his counsel and

(i) the health, age and sex of the accused. There are also other considerations and the above is by no means an exhaustive catalogue of the factors which should weigh with the Courts.

11. The applicants in this case are accused of having committed the offences of murder, rape and also for causing disappearance of evidence of these offences. The first is a capital offence entailing death sentence, the second involves imprisonment for life and the last makes the offence punishable with imprisonment which may extend to seven years.

[Section 497\(1\)](#) of the Code of Criminal Procedure, while conferring wide discretionary powers on Courts to grant or refuse bail, where an accused person is suspected of the commission of a non-bailable offence, imposes important limitations, in cases where there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life. The words "death or imprisonment for life," should be read disjunctively, so as to mean offence punishable with death or punishable with imprisonment for life vide *Emperor v. Nga San Htwa*, AIR 1927 Rang 205 (FB) (D).

12. In this case an application for bail has been made at the initial stages of the case before the framing of charges against the accused and it is not possible at this juncture to scan the evidence in order to see whether it establishes the guilt of the accused beyond reasonable doubt. On an application for bail it is not the certainty or the improbability of a capital sentence or imprisonment for life being imposed, which is to be seen but simply whether, the offence is one for which such a sentence may be awarded.

In considering an application for bail a Court is not required to conduct a preliminary trial of the case and consider the probability of the accused being found guilty or innocent. The Courts while deciding such applications, will be traversing beyond their proper ambit and would be exceeding the limits of their function if they engage themselves in discovering the guilt or innocence of the accused applicant, which can only be determined at the trial stage.

Courts may, however, incidentally turn to the evidence with a view to examining the question of allowance or refusal of bail with reference to the principles governing release or detention pending the proceedings vide [Public Prosecutor v. M. Sanyasayya Naidu](#) AIR 1925 Mad 1224 (E).

13. The applicants in this case have been accused of having committed grave offences punishable with long terms of imprisonment and this is a consideration against their being released on bail. The question of severity of punishment must be looked at not from the point of view of what sentence on the facts of a particular case the Court should award, but only to see the maximum punishment which the Court may award.

14. Shri Chctan Das Diwan, learned counsel appearing for the State, has argued that the State entertains grave apprehension that there is a danger of the applicants absconding. It is stated in the affidavit of S. Surjan Singh, Deputy Superintendent of Police, C.I.D., that Balbir Singh accused was proclaimed as an absconder and he could not be apprehended until his property was attached under the provisions [of the Criminal Procedure Code](#).

He has also argued that two accused, Rao Harnarain Singh and Mauji Ram, are men of importance in their respective walks of life, possessing considerable wealth and wielding great influence, and the witnesses who are to be produced by the prosecution, comparatively, occupy a very humble station in life; one of such witnesses served meals to the party at the dinner and another was a sweepress in the house of Rao Harnarain Singh. In this case, the apprehension that the accused on being released on bail will in all likelihood avail themselves of the opportunities to corrupt the prosecution witnesses by tampering with their testimony cannot be dismissed as chimerical.

15. In this case there is no risk of any unreasonable delay in consequence of the laches of the prosecution. An unreasonably long detention in Jail before the commencement of the trial is ordinarily a hardship, which weighs greatly with the Courts, in favour of the accused, while considering the desirability of allowing bail applications. But in this case there is no such risk as 12th of August, 1957, is the next date fixed before the trial Court. It is expected that the trial will proceed with reasonable speed.

16. There is no suggestion, that the trial is going to be protracted or their detention in jail has in any way deprived them of an opportunity to prepare their defence or has in any way interfered with their right to instruct their counsel. Lastly, bail in this case has not been asked on grounds relating to health or age of the accused.

17. After having thoroughly examined the arguments of the learned counsel, and after taking into careful consideration the principles governing release on bail, I am of the view, that this application and Criminal Miscellaneous No. 397 of 1957 cannot succeed, and are, there-tore, dismissed. I must however, warn the trial Court against drawing any inferences as to the guilt or innocence of the accused from any observations made in this order. The guilt or innocence of the accused is a matter which has to be determined by the trial Court and no remarks made by me should be treated as prejudging the case. Such comments as have been made in this order exclusively bear on considerations for refusing or allowing release on bail.

**U.S. Supreme Court**

**Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)**

**Richmond Newspapers, Inc. v. Virginia**

**No. 79-243**

**Argued February 19, 1980**

**Decided July 2, 1980**

**448 U.S. 555**

*APPEAL FROM THE SUPREME COURT OF VIRGINIA*

*Syllabus*

At the commencement of a fourth trial on a murder charge (the defendant's conviction after the first trial having been reversed on appeal, and two subsequent retrials having ended in mistrials), the Virginia trial court granted defense counsel's motion that the trial be closed to the public without any objections having been made by the prosecutor or by appellants, a newspaper and two of its reporters who were present in the courtroom, defense counsel having stated that he did not "want any information being shuffled back and forth when we have a recess as to . . . who testified to what." Later that same day, however, the trial judge granted appellants' request for a hearing on a motion to vacate the closure order, and appellants' counsel contended that constitutional considerations mandated that, before ordering closure, the court should first decide that the defendant's rights could be protected in no other way. But the trial judge denied the motion, saying that, if he felt that the defendant's rights were infringed in any way and others' rights were not overridden, he was inclined to order closure, and ordered the trial to continue "with the press and public excluded." The next day, the court granted defendant's motion to strike the prosecution's evidence, excused the jury, and found the defendant not guilty. Thereafter, the court granted appellants' motion to intervene *nunc pro tunc* in the case, and the Virginia Supreme Court dismissed their mandamus and prohibition petitions and, finding no reversible error, denied their petition for appeal from the closure order.

*Held:* The judgment is reversed. Pp. 448 U. S. 563-581; 448 U. S. 584-598; 448 U. S. 598-601; 448 U. S. 601-604.

*Reversed.*

MR. CHIEF JUSTICE BURGER, joined by MR JUSTICE WHITE and MR. JUSTICE STEVENS, concluded that the right of the public and press to attend criminal trials is guaranteed under the First and Fourteenth Amendments. Absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public. *Gannett Co. v. DePasquale*, 443 U. S. 368, distinguished. Pp. 448 U. S. 563-581.

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(a) The historical evidence of the evolution of the criminal trial in Anglo-American justice demonstrates conclusively that, at the time this Nation's organic laws were adopted, criminal trials both here and in England had long been presumptively open, thus giving assurance that the proceedings were conducted fairly to all concerned and discouraging perjury, the misconduct of participants, or decisions based on secret bias or partiality. In addition, the significant community therapeutic value of public trials was recognized: when a shocking crime occurs, a community reaction of outrage and public protest often follows, and thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. To work effectively, it is important that society's criminal process "satisfy the appearance of justice," *Offutt v. United States*, 348 U. S. 11, 348 U. S. 14, which can best be provided by allowing people to observe such process. From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, it must be concluded that a presumption of openness inheres in the very nature of a criminal trial under this Nation's system of justice. *Cf., e.g., Levine v. United States*, 362 U. S. 610. Pp. 448 U. S. 563-575.

(b) The freedoms of speech, press, and assembly, expressly guaranteed by the First Amendment, share a common core purpose of assuring freedom of communication on matters relating to the functioning of government. In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees; the First Amendment right to receive information and ideas means, in the context of trials, that the guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time the First Amendment was adopted. Moreover, the right of assembly is also relevant, having been regarded not only as an independent right, but also as a catalyst to augment the free exercise of the other First Amendment rights with which it was deliberately linked by the draftsmen. A trial courtroom is a public place where the people generally -- and representatives of the media -- have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place. Pp. 448 U. S. 575-578.

(c) Even though the Constitution contains no provision which, by its terms, guarantees to the public the right to attend criminal trials, various fundamental rights, not expressly guaranteed, have been recognized as indispensable to the enjoyment of enumerated rights. The right to attend criminal trials is implicit in the guarantees of the First Amendment;

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without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and of the press could be eviscerated. Pp. 448 U. S. 579-580.

(d) With respect to the closure order in this case, despite the fact that this was the accused's fourth trial, the trial judge made no findings to support closure; no inquiry was made as to whether alternative solutions would have met the need to ensure fairness; there was no recognition of any right under the Constitution for the public or press to attend the trial; and there was no suggestion that any problems with witnesses could not have been dealt with by exclusion from the courtroom or sequestration during the trial, or that sequestration of the jurors would not have guarded against their being subjected to any improper information. Pp. 448 U. S. 580-581.

MR. JUSTICE BRENNAN, joined by MR. JUSTICE MARSHALL, concluded that the First Amendment -- of itself and as applied to the States through the Fourteenth Amendment -- secures the public a right of access to trial proceedings, and that, without more, agreement of the trial judge and the parties cannot constitutionally close a trial to the public. Historically and functionally, open trials have been closely associated with the development of the fundamental procedure of trial by jury, and trial access assumes structural importance in this Nation's government of laws by assuring the public that procedural rights are respected and that justice is afforded equally, by serving as an effective restraint on possible abuse of judicial power, and by aiding the accuracy of the trial factfinding process. It was further concluded that it was not necessary to consider in this case what countervailing interests might be sufficiently compelling to reverse the presumption of openness of trials, since the Virginia statute involved -- authorizing trial closures at the unfettered discretion of the judge and parties -- violated the First and Fourteenth Amendments. Pp.448 U. S. 584-598.

MR. JUSTICE STEWART concluded that the First and Fourteenth Amendments clearly give the press and the public a right of access to trials, civil as well as criminal; that such right is not absolute, since various considerations may sometimes justify limitations upon the unrestricted presence of spectators in the courtroom; but that, in the present case, the trial judge

apparently gave no recognition to the right of representatives of the press and members of the public to be present at the trial. Pp. [448 U. S. 598-601](#).

MR. JUSTICE BLACKMUN, while being of the view that *Gannett Co. v. DePasquale*, *supra*, was in error, both in its interpretation of the Sixth Amendment generally and in its application to the suppression hearing

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involved there, and that the right to a public trial is to be found in the Sixth Amendment, concluded, as a secondary position, that the First Amendment must provide some measure of protection for public access to the trial, and that here, by closing the trial, the trial judge abridged these First Amendment interests of the public. Pp. [448 U. S. 601-604](#).

BURGER, C J., announced the Court's judgment and delivered an opinion, in which WHITE and STEVENS, JJ., joined. WHITE, J., *post*, p. [448 U. S. 581](#), and STEVENS, J., *post*, p. [448 U. S. 582](#), filed concurring opinions. BRENNAN, J., filed an opinion concurring in the judgment, in which MARSHALL, J., joined, *post*, p. [448 U. S. 584](#). STEWART, J., *post*, p. [448 U. S. 598](#), and BLACKMUN, J., *post*, p. [448 U. S. 601](#), filed opinions concurring in the judgment. REHNQUIST, J., filed a dissenting opinion, *post*, p. [448 U. S. 604](#). POWELL, J., took no part in the consideration or decision of the case.

MR. CHIEF JUSTICE BURGER announced the judgment of the Court and delivered an opinion, in which MR. JUSTICE WHITE and MR. JUSTICE STEVENS joined.

The narrow question presented in this case is whether the right of the public and press to attend criminal trials is guaranteed under the United States Constitution.

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## I

In March, 1976, one Stevenson was indicted for the murder of a hotel manager who had been found stabbed to death on December 2, 1975. Tried promptly in July, 1976, Stevenson was convicted of second-degree murder in the Circuit Court of Hanover County, Va. The Virginia Supreme Court reversed the conviction in October, 1977, holding that a bloodstained shirt purportedly belonging to Stevenson had been improperly admitted into evidence. *Stevenson v. Commonwealth*, 218 Va. 462, 237 S.E.2d 779.

Stevenson was retried in the same court. This second trial ended in a mistrial on May 30, 1978, when a juror asked to be excused after trial had begun and no alternate was available. [\[Footnote 1\]](#)

A third trial, which began in the same court on June 6, 1978, also ended in a mistrial. It appears that the mistrial may have been declared because a prospective juror had read about Stevenson's previous trials in a newspaper and had told other prospective jurors about the case before the retrial began. *See* App. 35a-36a.

Stevenson was tried in the same court for a fourth time beginning on September 11, 1978. Present in the courtroom when the case was called were appellants Wheeler and McCarthy, reporters for appellant Richmond Newspapers, Inc. Before the trial began, counsel for the defendant moved that it be closed to the public:

"[T]here was this woman that was with the family of the deceased when we were here before. She had sat in the Courtroom. I would like to ask that everybody be excluded from the Courtroom because I don't want any information being shuffled back and forth when we have

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a recess as to what -- who testified to what."

Tr. of Sept. 11, 1978 Hearing on Defendant's Motion to Close Trial to the Public 2-3.

The trial judge, who had presided over two of the three previous trials, asked if the prosecution had any objection to clearing the courtroom. The prosecutor stated he had no objection, and would leave it to the discretion of the court. *Id.* at 4. Presumably referring to Va.Code § 19.2-266 (Supp. 1980), the trial judge then announced: "[T]he statute gives me that power specifically, and the defendant has made the motion." He then ordered "that the Courtroom be kept clear of all parties except the witnesses when they testify." Tr., *supra*, at 4-5. [\[Footnote 2\]](#) The record does not show that any objections to the closure order were made by anyone present at the time, including appellants Wheeler and McCarthy.

Later that same day, however, appellants sought a hearing on a motion to vacate the closure order. The trial judge granted the request and scheduled a hearing to follow the close of the day's proceedings. When the hearing began, the court ruled that the hearing was to be treated as part of the trial; accordingly, he again ordered the reporters to leave the courtroom, and they complied.

At the closed hearing, counsel for appellants observed that no evidentiary findings had been made by the court prior to the entry of its closure order, and pointed out that the court had failed to consider any other less drastic measures within its power to ensure a fair trial. Tr. of Sept. 11, 1978, Hearing on Motion to Vacate 11-12. Counsel for appellants argued that constitutional considerations mandated that, before ordering closure, the court should first decide that the rights of the defendant could be protected in no other way.

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Counsel for defendant Stevenson pointed out that this was the fourth time he was standing trial. He also referred to "difficulty with information between the Jurors," and stated that he "didn't want information to leak out," be published by the media, perhaps inaccurately, and then be seen by the jurors. Defense counsel argued that these things, plus the fact that "this is a small community," made this a proper case for closure.*Id.* at 118.

The trial judge noted that counsel for the defendant had made similar statements at the morning hearing. The court also stated:

"[O]ne of the other points that we take into consideration in this particular Courtroom is layout of the Courtroom. I think that having people in the Courtroom is distracting to the jury. Now, we have to have certain people in here, and maybe that's not a very good reason. When we get into our new Court Building, people can sit in the audience so the jury can't see them. The rule of the Court may be different under those circumstances. . . ."

*Id.* at 19. The prosecutor again declined comment, and the court summed up by saying:

"I'm inclined to agree with [defense counsel] that, if I feel that the rights of the defendant are infringed in any way, [when] he makes the motion to do something and it doesn't completely override all rights of everyone else, then I'm inclined to go along with the defendant's motion."

*Id.* at 20. The court denied the motion to vacate, and ordered the trial to continue the following morning "with the press and public excluded." *Id.* at 27; App. 21a.

What transpired when the closed trial resumed the next day was disclosed in the following manner by an order of the court entered September 12, 1978:

"[I]n the absence of the jury, the defendant, by counsel,

made a Motion that a mistrial be declared, which motion was taken under advisement."

"At the conclusion of the Commonwealth's evidence, the attorney for the defendant moved the Court to strike the Commonwealth's evidence on grounds stated to the record, which Motion was sustained by the Court."

"And the jury having been excused, the Court doth find the accused NOT GUILTY of Murder, as charged in the Indictment, and he was allowed to depart."

*Id.* at 22a. [Footnote 3]

On September 27, 1978, the trial court granted appellants' motion to intervene *nunc pro tunc* in the Stevenson case. Appellants then petitioned the Virginia Supreme Court for writs of mandamus and prohibition, and filed an appeal from the trial court's closure order. On July 9, 1979, the Virginia Supreme Court dismissed the mandamus and prohibition petitions and, finding no reversible error, denied the petition for appeal. *Id.* at 23a-28a.

Appellants then sought review in this Court, invoking both our appellate, 28 U.S.C. § 1257(2), and certiorari jurisdiction. § 1257(3). We postponed further consideration of the question of our jurisdiction to the hearing of the case on the merits. 444 U.S. 896 (1979). We conclude that jurisdiction by appeal does not lie; [Footnote 4] however, treating the filed

papers as a petition for a writ of certiorari pursuant to 28 U.S.C. § 2103, we grant the petition.

\*ig:jurisdiction\*justiciability\*

The criminal trial which appellants sought to attend has long since ended, and there is thus some suggestion that the case is moot. This Court has frequently recognized, however, that its jurisdiction is not necessarily defeated by the practical termination of a contest which is short-lived by nature. *See, e.g., Gannett Co. v. DePasquale*, 443 U. S. 368, 443 U. S. 377-378 (1979); *Nebraska Press Assn. v. Stuart*, 427 U. S. 539, 427 U. S. 546-547 (1976). If the underlying dispute is "capable of repetition, yet evading review," *Southern Pacific Terminal Co. v. ICC*, 219 U. S. 498, 219 U. S. 515 (1911), it is not moot.

Since the Virginia Supreme Court declined plenary review, it is reasonably foreseeable that other trials may be closed by other judges without any more showing of need than is presented on this record. More often than not, criminal trials will be of sufficiently short duration that a closure order "will evade review, or at least considered plenary review in this Court." *Nebraska Press*, *supra*, at 427 U. S. 547. Accordingly, we turn to the merits.

## II

We begin consideration of this case by noting that the precise issue presented here has not previously been before this

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Court for decision. In *Gannett Co. v. DePasquale*, *supra*, the Court was not required to decide whether a right of access to *trials*, as distinguished from hearings on pretrial motions, was constitutionally guaranteed. The Court held that the Sixth Amendment's guarantee to the accused of a public trial gave neither the public nor the press an enforceable right of access to a pretrial suppression hearing. One concurring opinion specifically emphasized that "a hearing on a motion before trial to suppress evidence is not a trial. . . ." 443 U.S. at 443 U. S. 394 (BURGER, C.J., concurring). Moreover, the Court did not decide whether the First and Fourteenth Amendments guarantee a right of the public to attend trials, *id.* at 443 U. S. 392, and n. 24; nor did the dissenting opinion reach this issue. *Id.* at 443 U. S. 447 (opinion of BLACKMUN, J.).

In prior cases, the Court has treated questions involving conflicts between publicity and a defendant's right to a fair trial; as we observed in *Nebraska Press Assn. v. Stuart*, *supra* at 427 U. S. 547, "[t]he problems presented by this [conflict] are almost as old as the Republic." *See also e.g., Gannett, supra; Murphy v. Florida*, 421 U. S. 794 (1975); *Sheppard v. Maxwell*, 384 U. S. 333 (1966); *Estes v. Texas*, 381 U. S. 532 (1965). But here, for the first time, the Court is asked to decide whether a criminal trial itself may be closed to the public upon the unopposed request of a defendant, without any demonstration that closure is required to protect the defendant's superior right to a fair trial, or that some other overriding consideration requires closure.

## A

The origins of the proceeding which has become the modern criminal trial in Anglo-American justice can be traced back beyond reliable historical records. We need not here review all details of its development, but a summary of that history is instructive. What is significant for present purposes is that, throughout its evolution, the trial has been open to all who cared to observe.

In the days before the Norman conquest, cases in England were generally brought before moots, such as the local court of the hundred or the county court, which were attended by the freemen of the community. Pollock, *English Law Before the Norman Conquest*, in 1 *Select Essays in Anglo-American Legal History* 88, 89 (1907). Somewhat like modern jury duty, attendance at these early meetings was compulsory on the part of the freemen, who were called upon to render judgment. *Id.* at 89-90; *see also* 1 W. Holdsworth, *A History of English Law* 10, 12 (1927). [Footnote 5]

With the gradual evolution of the jury system in the years after the Norman Conquest, *see, e.g., id.* at 316, the duty of all freemen to attend trials to render judgment was relaxed, but there is no indication that criminal trials did not remain public. When certain groups were excused from compelled attendance, *see* the Statute of Marlborough, 52 Hen. 3, ch. 10 (1267); 1 Holdsworth, *supra*, at 79, and n. 4, the statutory exemption did not prevent them from attending; Lord Coke observed that those excused "are not compellable to come, but left to their own liberty." 2 E. Coke, *Institutes of the Laws of England* 121 (6th ed. 1681). [Footnote 6]

Although there appear to be few contemporary statements

on the subject, reports of the Eyre of Kent, a general court held in 1313-1314, evince a recognition of the importance of public attendance apart from the "jury duty" aspect. It was explained that

"the King's will was that all evil doers should be punished after their deserts, and that justice should be ministered indifferently to rich as to poor; *and for the better accomplishing of this*, he prayed the community of the county *by their attendance* there to lend him their aid in the establishing of a happy and certain peace that should be both for the honour of the realm and for their own welfare."

1 Holdsworth, *supra* at 268, quoting from the S.S. edition of the Eyre of Kent, vol. i., p. 2 (emphasis added) .

From these early times, although great changes in courts and procedure took place, one thing remained constant: the public character of the trial at which guilt or innocence was decided. Sir Thomas Smith, writing in 1565 about "the definitive proceedinges in causes criminall," explained that, while the indictment was put in writing as in civil law countries:

"All the rest is doone openlie in the presence of the Judges, the Justices, the enquest, the prisoner, *and so manie as will or can come so neare as to heare it*, and all depositions and witnesses given aloude, *that all men may heare from the mouth of the depositors and witnesses what is saide.*"

T. Smith, *De Republica Anglorum* 101 (Alston ed.1972) (emphasis added). Three centuries later, Sir Frederick Pollock was able to state of the "rule of publicity" that, "[h]ere we have one tradition, at any rate, which has persisted through all changes." F. Pollock, *The Expansion of the Common Law* 31-32 (1904). *See also* E. Jenks, *The Book of English Law* 73-74 (6th ed.1967):

"[O]ne of the most conspicuous features of English justice, that all judicial trials are held in open court, to which the

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public have free access, . . . appears to have been the rule in England from time immemorial."

We have found nothing to suggest that the presumptive openness of the trial which English courts were later to call "one of the essential qualities of a court of justice," *Dabney v. Cooper*, 10 B. & C. 237, 240, 109 Eng.Rep. 438, 440 (K.B. 1829), was not also an attribute of the judicial systems of colonial America. In Virginia, for example, such records as there are of early criminal trials indicate that they were open, and nothing to the contrary has been cited. *See* A. Scott, *Criminal Law in Colonial Virginia* 128-129 (1930); Reinsch, *The English Common Law in the Early American Colonies*, in 1 *Select Essays in Anglo-American Legal History* 367, 405 (1907). Indeed, when in the mid-1600's the Virginia Assembly felt that the respect due the courts was

"by the clamorous unmannerlynes of the people lost, and order, gravity and decoram which should manifest the authority of a court in the court it selfe neglected,"

the response was not to restrict the openness of the trials to the public, but, instead, to prescribe rules for the conduct of those attending them. *See* Scott, *supra* at 132.

In some instances, the openness of trials was explicitly recognized as part of the fundamental law of the Colony. The 1677 Concessions and Agreements of West New Jersey, for example, provided:

"That in all publick courts of justice for tryals of causes, civil or criminal, any person or persons, inhabitants of the said Province may freely come into, and

attend the said courts, and hear and be present, at all or any such tryals as shall be there had or passed, that justice may not be done in a corner nor in any covert manner."

Reprinted in *Sources of Our Liberties* 188 (R. Perry ed.1959). *See also* 1 B. Schwartz, *The Bill of Rights: A Documentary History* 129 (1971).

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The Pennsylvania Frame of Government of 1682 also provided "[t]hat all courts shall be open . . .," *Sources of Our Liberties, supra* at 217; 1 Schwartz, *supra* at 140, and this declaration was reaffirmed in § 26 of the Constitution adopted by Pennsylvania in 1776. *See* 1 Schwartz, *supra* at 271. *See also* §§ 12 and 76 of the Massachusetts Body of Liberties, 1641, reprinted in 1 Schwartz, *supra* at 73, 80.

Other contemporary writings confirm the recognition that part of the very nature of a criminal trial was its openness to those who wished to attend. Perhaps the best indication of this is found in an address to the inhabitants of Quebec which was drafted by a committee consisting of Thomas Cushing, Richard Henry Lee, and John Dickinson and approved by the First Continental Congress on October 26, 1774. 1 *Journals of the Continental Congress, 1774-1789*, pp. 101, 105 (1904) (*Journals*). This address, written to explain the position of the Colonies and to gain the support of the people of Quebec, is an "exposition of the fundamental rights of the colonists, as they were understood by a representative assembly chosen from all the colonies." 1 Schwartz, *supra* at 221. Because it was intended for the inhabitants of Quebec, who had been "educated under another form of government" and had only recently become English subjects, it was thought desirable for the Continental Congress to explain "the inestimable advantages of a free English constitution of government, which it is the privilege of all English subjects to enjoy." 1 *Journals* 106.

"[One] great right is that of trial by jury. This provides that neither life, liberty nor property can be taken from the possessor until twelve of his unexceptionable countrymen and peers of his vicinage, who from that neighbourhood may reasonably be supposed to be acquainted with his character and the characters of the witnesses, upon a fair trial, and full enquiry, face to face, *in open Court, before as many of the people as chuse to*

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*attend*, shall pass their sentence upon oath against him. . . ."

*Id.* at 107 (emphasis added).

## B

As we have shown, and as was shown in both the Court's opinion and the dissent in *Gannett*, 443 U.S. at 443 U. S. 384, 443 U. S. 386, n. 15, 443 U. S. 418-425, the historical evidence demonstrate conclusively that, at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open. This is no quirk of history; rather, it has long been recognized as an indispensable attribute of an Anglo-American trial. Both Hale in the 17th century and Blackstone in the 18th saw the importance of openness to the proper functioning of a trial; it gave assurance that the proceedings were conducted fairly to all concerned, and it discouraged perjury, the misconduct of participants, and decisions based on secret bias or partiality. *See, e.g.*, M. Hale, *The History of the Common Law of England* 343-345 (6th ed. 1820); 3 W. Blackstone, *Commentaries* \*372-\*373. Jeremy Bentham not only recognized the therapeutic value of open justice but regarded it as the keystone:

"Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks, would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance."

1 J. Bentham *Rationale of Judicial Evidence* 524 (1827). [[Footnote 7](#)]

Panegyrics on the values of openness were by no means confined to self-praise by the English. Foreign observers of English criminal procedure in the 18th and early 19th centuries

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came away impressed by the very fact that they had been freely admitted to the courts, as many were not in their own homelands. *See* L. Radzinowicz, *A History of English Criminal Law* 715, and n. 96 (1948). They marveled that "the whole juridical procedure passes in public," 2 P. Grosley, *A Tour to London; or New Observations on England* 142 (Nugent trans. 1772), quoted in Radzinowicz, *supra* at 717, and one commentator declared:

"The main excellence of the English judicature consists in publicity, in the free trial by jury, and in the extraordinary despatch with which business is transacted. The publicity of their proceedings is indeed astonishing. *Free access to the courts is universally granted.*"

C. Goede, *A Foreigner's Opinion of England* 214 (Horne trans. 1822) (emphasis added.) The nexus between openness, fairness, and the perception of fairness was not lost on them:

"[T]he judge, the counsel, and the jury, are constantly exposed to public animadversion, and this greatly tends to augment the extraordinary confidence which the English repose in the administration of justice."

*Id.* at 215.

This observation raises the important point that "[t]he publicity of a judicial proceeding is a requirement of much broader bearing than its mere effect upon the quality of testimony." 6 J. Wigmore, *Evidence* § 1834, p. 435 (J. Chadbourn rev.1976). [Footnote 8] The early history of open trials in part reflects the widespread acknowledgment, long before there were behavioral scientists, that public trials had significant community therapeutic value. Even without such experts to frame

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the concept in words, people sensed from experience and observation that, especially in the administration of criminal justice, the means used to achieve justice must have the support derived from public acceptance of both the process and its results.

When a shocking crime occurs, a community reaction of outrage and public protest often follows. *See* H. Weihofen, *The Urge to Punish* 130-131 (1956). Thereafter the open processes of justice serve an important prophylactic purpose, providing an outlet for community concern, hostility, and emotion. Without an awareness that society's responses to criminal conduct are underway, natural human reactions of outrage and protest are frustrated, and may manifest themselves in some form of vengeful "self-help," as indeed they did regularly in the activities of vigilante "committees" on our frontiers.

"The accusation and conviction or acquittal, as much perhaps as the execution of punishment, operat[e] to restore the imbalance which was created by the offense or public charge, to reaffirm the temporarily lost feeling of security and, perhaps, to satisfy that latent 'urge to punish.'"

Mueller, *Problems Posed by Publicity to Crime and Criminal Proceedings*, 110 *U.Pa.L.Rev.* 1, 6 (1961).

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." *Supra* at 448 U. S. 567. 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

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process "satisfy the appearance of justice," *Offutt v. United States*, 348 U. S. 11, 348 U. S. 14 (1954), and the appearance of justice can best be provided by allowing people to observe it.

Looking back, we see that, when the ancient "town meeting" form of trial became too cumbersome, 12 members of the community were delegated to act as its surrogates, but the community did not surrender its right to observe the conduct of trials. The people retained a "right of visitation" which enabled them to satisfy themselves that justice was, in fact, being done.

People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing. When a criminal trial is conducted in the open, there is at least an opportunity both for understanding the system in general and its workings in a particular case:

"The educative effect of public attendance is a material advantage. Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy."

6 Wigmore, *supra*, at 438. *See also* 1 J. Bentham, *Rationale of Judicial Evidence*, at 525.

In earlier times, both in England and America, attendance at court was a common mode of "passing the time." *See, e.g.*, 6 Wigmore, *supra*, at 436; Mueller, *supra*, at 6. With the press, cinema, and electronic media now supplying the representations or reality of the real life drama once available only in the courtroom, attendance at court is no longer a widespread pastime. Yet

"[i]t is not unrealistic, even in this day, to believe that public inclusion affords citizens a form of legal education, and hopefully promotes confidence in the fair administration of justice."

*State v. Schmit*, 273 Minn. 78, 87-88, 139 N.W.2d 800, 807 (1966). Instead of acquiring information about trials by firsthand observation or by word

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of mouth from those who attended, people now acquire it chiefly through the print and electronic media. In a sense, this validates the media claim of functioning as surrogates for the public. While media representatives enjoy the same right of access as the public, they often are provided special seating and priority of entry so that they may report what people in attendance have seen and heard. This

"contribute[s] to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system. . . ."

*Nebraska Press Assn. v. Stuart*, 427 U.S. at 427 U. S. 587 (BRENNAN, J., concurring in judgment).

C

From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice. This conclusion is hardly novel; without a direct holding on the issue, the Court has voiced its recognition of it in a variety of contexts over the years. [Footnote 9] Even while holding, in *Levine v.*

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*United States*, 362 U. S. 610 (1960), that a criminal contempt proceeding was not a "criminal prosecution" within the meaning of the Sixth Amendment, the Court was careful to note that more than the Sixth Amendment was involved:

"[W]hile the right to a 'public trial' is explicitly guaranteed by the Sixth Amendment only for 'criminal prosecutions,' that provision is a reflection of the notion, deeply rooted in the common law, that 'justice must satisfy the appearance of justice.' . . . [D]ue process demands appropriate regard for the requirements of a public proceeding in cases of criminal contempt . . . as it does for all adjudications through the exercise of the judicial power, barring narrowly limited categories of exceptions. . . ."

*Id.* at 362 U. S. 616. [Footnote 10] And recently, in *Gannett Co. v. DePasquale*, 443 U. S. 368 (1979), both the majority, *id.* at 443 U. S. 384, 386, n. 15, and dissenting opinion, *id.* at 443 U. S. 423, agreed that open trials were part of the common law tradition.

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Despite the history of criminal trials being presumptively open since long before the Constitution, the State presses its contention that neither the Constitution nor the Bill of Rights contains any provision which, by its terms, guarantees to the public the right to attend criminal trials. Standing alone, this is correct, but there remains the question whether, absent an explicit provision, the Constitution affords protection against exclusion of the public from criminal trials.

### III

A

The First Amendment, in conjunction with the Fourteenth, prohibits governments from

"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."

These expressly guaranteed freedoms share a common core purpose of assuring freedom of communication on matters relating to the functioning of government. Plainly it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted; as we have shown, recognition of this pervades the centuries-old history of open trials and the opinions of this Court. *Supra* at 448 U. S. 564-575, and n. 9.

The Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open. Public access to trials was then regarded as an important aspect of the process itself; the conduct of trials "before as many of the people as chuse to attend" was regarded as one of "the inestimable advantages of a free English constitution of government." 1 Journals 106, 107. In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees.

"[T]he First Amendment goes beyond protection of the press and the self-expression

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of individuals to prohibit government from limiting the stock of information from which members of the public may draw."

*First National Bank of Boston v. Bellotti*, 435 U. S. 765, 435 U. S. 783 (1978). Free speech carries with it some freedom to listen. "In a variety of contexts, this Court has referred to a First Amendment right to *receive information and ideas*." *Kleindienst v. Mandel*, 408 U. S. 753, 408 U. S. 762 (1972). *What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted.*

"For the First Amendment does not speak equivocally. . . . It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow."

*Bridges v. California*, 314 U. S. 252, 314 U. S. 263 (1941) (footnote omitted). It is not crucial whether we describe this right to attend criminal trials to hear, see, and communicate observations concerning them as a "right of access," *cf. Gannett, supra* at 443 U. S. 397 (POWELL, J., concurring); *Saxbe v. Washington Post Co.*, 417 U. S. 843 (1974); *Pell v. Procunier*, 417 U. S. 817 (1974), [Footnote 11] or a "right to gather information," for we have recognized that, "without some protection for seeking out the news, freedom of the press could be eviscerated." *Branzburg v. Hayes*, 408 U. S. 665, 408 U. S. 681 (1972). The explicit, guaranteed rights to speak and to publish concerning what takes place at a

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trial would lose much meaning if access to observe the trial could, as it was here, be foreclosed arbitrarily. [Footnote 12]

*B*

The right of access to places traditionally open to the public, as criminal trials have long been, may be seen as assured by the amalgam of the First Amendment guarantees of speech and press; and their affinity to the right of assembly is not without relevance. From the outset, the right of assembly was regarded not only as an independent right, but also as a catalyst to augment the

free exercise of the other First Amendment rights with which it was deliberately linked by the draftsmen. [Footnote 13]

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"The right of peaceable assembly is a right cognate to those of free speech and free press, and is equally fundamental." *De Jonge v. Oregon*, 299 U. S. 353, 299 U. S. 364 (1937). People assemble in public places not only to speak or to take action, but also to listen, observe, and learn; indeed, they may "assembl[e] for any lawful purpose," *Hague v. CIO*, 307 U. S. 496, 307 U. S. 519 (1939) (opinion of Stone, J.). Subject to the traditional time, place, and manner restrictions, *see, e.g., Cox v. New Hampshire*, 312 U. S. 569 (1941); *see also Cox v. Louisiana*, 379 U. S. 559, 379 U. S. 560-564 (1965), streets, sidewalks, and parks are places traditionally open, where First Amendment rights may be exercised, *see Hague v. CIO, supra*, at 307 U. S. 515 (opinion of Roberts, J.); a trial courtroom also is a public place where the people generally -- and representatives of the media -- have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place. [Footnote 14]

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C

The State argues that the Constitution nowhere spells out a guarantee for the right of the public to attend trials, and that, accordingly, no such right is protected. The possibility that such a contention could be made did not escape the notice of the Constitution's draftsmen; they were concerned that some important rights might be thought disparaged because not specifically guaranteed. It was even argued that, because of this danger, no Bill of Rights should be adopted. *See, e.g., The Federalist No. 84* (A. Hamilton). In a letter to Thomas Jefferson in October, 1788, James Madison explained why he, although "in favor of a bill of rights," had "not viewed it in an important light" up to that time: "I conceive that, in a certain degree . . . , the rights in question are reserved by the manner in which the federal powers are granted." He went on to state that "there is great reason to fear that a positive declaration of some of the most essential rights could not be obtained in the requisite latitude." 5 Writings of James Madison 271 (G. Hunt ed.1904). [Footnote 15]

But arguments such as the State makes have not precluded recognition of important rights not enumerated. Notwithstanding the appropriate caution against reading into the Constitution rights not explicitly defined, the Court has acknowledged that certain unarticulated rights are implicit in enumerated guarantees. For example, the rights of association and of privacy, the right to be

presumed innocent, and the right to be judged by a standard of proof beyond a reasonable

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doubt in a criminal trial, as well as the right to travel, appear nowhere in the Constitution or Bill of Rights. Yet these important but unarticulated rights have nonetheless been found to share constitutional protection in common with explicit guarantees. [Footnote 16] The concerns expressed by Madison and others have thus been resolved; fundamental rights, even though not expressly guaranteed, have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined.

We hold that the right to attend criminal trials [Footnote 17] is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and "of the press could be eviscerated." *Branzburg*, 408 U.S. at 408 U. S. 681.

*D*

Having concluded there was a guaranteed right of the public under the First and Fourteenth Amendments to attend the trial of Stevenson's case, we return to the closure order challenged by appellants. The Court in *Gannett* made clear that, although the Sixth Amendment guarantees the accused a right to a public trial, it does not give a right to a private trial. 443 U.S. at 443 U. S. 382. Despite the fact that this was the fourth trial of the accused, the trial judge made no findings to support closure; no inquiry was made as to whether alternative

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solutions would have met the need to ensure fairness; there was no recognition of any right under the Constitution for the public or press to attend the trial. In contrast to the pretrial proceeding dealt with in *Gannett*, there exist in the context of the trial itself various tested alternatives to satisfy the constitutional demands of fairness. *See, e.g., Nebraska Press Assn. v. Stuart*, 427 U.S. at 427 U. S. 563-565; *Sheppard v. Maxwell*, 384 U.S. at 384 U. S. 357-362. There was no suggestion that any problems with witnesses could not have been dealt with by their exclusion from the courtroom or their sequestration during the trial. *See id.* at 384 U. S. 359. Nor is there anything to indicate that sequestration of the jurors would not have guarded against their being subjected to any improper information. All of the alternatives admittedly present difficulties for trial courts, but none of the factors relied on here was beyond the realm of the manageable. Absent an overriding interest articulated in findings, the trial of a

criminal case must be open to the public. [Footnote 18] Accordingly, the judgment under review is

*Reversed.*

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

[Footnote 1]

A newspaper account published the next day reported the mistrial and went on to note that

"[a] key piece of evidence in Stevenson's original conviction was a bloodstained shirt obtained from Stevenson's wife soon after the killing. The Virginia Supreme Court, however, ruled that the shirt was entered into evidence improperly."

App. 34a.

[Footnote 2]

Virginia Code § 19.2-266 (Supp. 1980) provides in part:

"In the trial of all criminal cases, whether the same be felony or misdemeanor cases, the court may, in its discretion, exclude from the trial any persons whose presence would impair the conduct of a fair trial, provided that the right of the accused to a public trial shall not be violated."

[Footnote 3]

At oral argument, it was represented to the Court that tapes of the trial were available to the public as soon as the trial terminated. Tr. of Oral Arg. 36.

[Footnote 4]

In our view, the validity of Va.Code § 19.2-266 (Supp. 1980) was not sufficiently drawn in question by appellants before the Virginia courts to invoke our appellate jurisdiction.

"It is essential to our jurisdiction on appeal . . . that there be an explicit and timely insistence in the state courts that a state statute, as applied, is repugnant to the federal Constitution, treaties or laws."

*Charleston Federal Savings & Loan Assn. v. Alderson*, 324 U. S. 182, 324 U. S. 185 (1945). Appellants never explicitly challenged the statute's validity. In both the trial court and the State Supreme Court, appellants argued that constitutional rights of the public and the press prevented the court from closing a trial without first giving notice and an opportunity for a hearing to the public and the press and exhausting every alternative means of protecting the defendant's right to a fair trial. Given appellants' failure explicitly to challenge the statute, we view these arguments as constituting claims of rights under the Constitution, which rights are said to limit the exercise of the discretion conferred by the statute on the trial court. *Cf. Phillips v. United States*, 312 U. S. 246, 312 U. S. 252 (1941) ("[A]n attack on lawless exercise of authority in a particular case is not an attack upon the constitutionality of a statute conferring the authority . . ."). Such claims are properly brought before this Court by way of our certiorari, rather than appellate, jurisdiction. *See, e.g., Kulko v. California Superior Court*, 436 U. S. 84, 436 U. S. 90, n. 4 (1978); *Hanson v. Denckla*, 357 U. S. 235, 357 U. S. 244, and n. 4 (1958). We shall, however, continue to refer to the parties as appellants and appellee. *See Kulko, supra*.

[Footnote 5]

That there is little in the way of a contemporary record from this period is not surprising. It has been noted by historians, *see* E. Jenks, *A Short History of English Law* 3-4 (2d ed.1922), that the early Anglo-Saxon laws

"deal rather with the novel and uncertain than with the normal and undoubted rules of law. . . . Why trouble to record that which every village elder knows? Only when a disputed point has long caused bloodshed and disturbance, or when a successful invader . . . insists on a change, is it necessary to draw up a code."

*Ibid.*

[Footnote 6]

Coke interpreted certain language of an earlier chapter of the same statute as specifically indicating that court proceedings were to be public in nature:

"These words [*In curia Domini Regis*] are of great importance, for all Causes ought to be heard, ordered, and determined before the Judges of the King's Courts openly in the King's Courts, *whither all persons may resort*. . . ."

2 E. Coke, *Institutes of the Laws of England* 103 (6th ed. 1681) (emphasis added).

[Footnote 7]

Bentham also emphasized that open proceedings enhanced the performance of all involved, protected the judge from imputations of dishonesty, and served to educate the public. *Rationale of Judicial Evidence* at 522-525.

[Footnote 8]

A collateral aspect seen by Wigmore was the possibility that someone in attendance at the trial or who learns of the proceedings through publicity may be able to furnish evidence in chief or contradict "falsifiers." 6 Wigmore at 436. Wigmore gives examples of such occurrences. *Id.* at 436, and n. 2.

[Footnote 9]

"Of course, trials must be public, and the public have a deep interest in trials." *Pennekamp v. Florida*, 328 U. S. 331, 328 U. S. 361 (1946) (Frankfurter, J, concurring).

"A trial is a public event. What transpires in the court room is public property."

*Craig v. Harney*, 331 U. S. 367, 331 U. S. 374 (1947) (Douglas, J.).

"[W]e have been unable to find a single instance of a criminal trial conducted *in camera* in any federal, state, or municipal court during the history of this country. Nor have we found any record of even one such secret criminal trial in England since abolition of the Court of Star Chamber in 1641, and whether that court ever convicted people secretly is in dispute. . ."

"This nation's accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage. The exact date of its origin is obscure, but it likely evolved long before the settlement of our land as an accompaniment of the ancient institution of jury trial."

*In re Oliver*, 333 U. S. 257, 333 U. S. 266 (1948) (Black, J.) (footnotes omitted).

"One of the demands of a democratic society is that the public should know what goes on in courts by being told by the press what happens there, to the end that the public may judge whether our system of criminal justice is fair and right."

*Maryland v. Baltimore Radio Show, Inc.*, 338 U. S. 912, 338 U. S. 920 (1950) (Frankfurter, J., dissenting from denial of certiorari) .

"It is true that the public has the right to be informed as to what occurs in its courts, . . . reporters of all media, including television, are always present if they wish to be, and are plainly free to report whatever occurs in open court. . . ."

*Estes v. Texas*, 381 U. S. 532, 381 U. S. 541-542 (1965) (Clark, J.); *see also id.* at 381 U. S. 583-584 (Warren, C.J., concurring). (The Court ruled, however, that the televising of the criminal trial over the defendant's objections violated his due process right to a fair trial.)

"The principle that justice cannot survive behind walls of silence has long been reflected in the 'Anglo-American distrust for secret trials.'"

*Sheppard v. Maxwell*, 384 U. S. 333, 384 U. S. 349 (1966) (Clark, J.).

[Footnote 10]

The Court went on to hold that, "on the particular circumstances of the case," 362 U.S. at 362 U. S. 616, the accused could not complain on appeal of the "so-called *secrecy*' of the proceedings," *id.* at 362 U. S. 617, because, with counsel present, he had failed to object or to request the judge to open the courtroom at the time.

[Footnote 11]

*Procunier* and *Saxbe* are distinguishable in the sense that they were concerned with penal institutions which, by definition, are not "open" or public places. Penal institutions do not share the long tradition of openness, although traditionally there have been visiting committees of citizens, and there is no doubt that legislative committees could exercise plenary oversight and "visitation rights." *Saxbe*, 417 U.S. at 417 U. S. 849, noted that

"limitation on visitations is justified by what the Court of Appeals acknowledged as 'the truism that prisons are institutions where public access is generally limited.' 161 U.S.App.D.C. at 80, 494 F.2d at 999. *See Adderley v. Florida*, 385 U. S. 39, 385 U. S. 41 (1966) [jails]."

*See also Greer v. Spock*, 424 U. S. 828 (1966) (military bases).

[Footnote 12]

That the right to attend may be exercised by people less frequently today, when information as to trials generally reaches them by way of print and electronic media, in no way alters the basic right. Instead of relying on personal observation or reports from neighbors as in the past, most people receive

information concerning trials through the media whose representatives "are entitled to the same rights [to attend trials] as the general public." *Estes v. Texas*, 381 U.S. at 381 U. S. 540.

[Footnote 13]

When the First Congress was debating the Bill of Rights, it was contended that there was no need separately to assert the right of assembly, because it was subsumed in freedom of speech. Mr. Sedgwick of Massachusetts argued that inclusion of "assembly" among the enumerated rights would tend to make the Congress

"appear trifling in the eyes of their constituents. . . . If people freely converse together, they must assemble for that purpose; it is a self-evident, unalienable right which the people possess; it is certainly a thing that never would be called in question. . . ."

1 Annals of Cong. 731 (1789). Since the right existed independent of any written guarantee, Sedgwick went on to argue that, if it were the drafting committee's purpose to protect all inherent rights of the people by listing them, "they might have gone into a very lengthy enumeration of rights," but this was unnecessary, he said, "in a Government where none of them were intended to be infringed." *Id.* at 732.

Mr. Page of Virginia responded, however, that, at times "such rights have been opposed," and that "people have . . . been prevented from assembling together on their lawful occasions":

"[T]herefore it is well to guard against such stretches of authority by inserting the privilege in the declaration of rights. If the people could be deprived of the power of assembling under any pretext whatsoever, they might be deprived of every other privilege contained in the clause."

*Ibid.* The motion to strike "assembly" was defeated. *Id.* at 733.

[Footnote 14]

It is, of course, true that the right of assembly in our Bill of Rights was, in large part, drafted in reaction to restrictions on such rights in England. *See, e.g.*, 1 Geo. 1, stat. 2, ch. 5 (1714); *cf.* 36 Geo. 3, ch. 8 (1795). As we have shown, the right of Englishmen to attend trials was not similarly limited; but it would be ironic indeed if the very historic openness of the trial could militate against protection of the right to attend it. The Constitution guarantees more than simply freedom from those abuses which led the Framers to single out particular

rights. The very purpose of the First Amendment is to guarantee all facets of each right described; its draftsmen sought both to protect the "rights of Englishmen" and to enlarge their scope. *See Bridges v. California*, 314 U. S. 252, 314 U. S. 263-265 (1941).

"There are no contrary implications in any part of the history of the period in which the First Amendment was framed and adopted. No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed."

*Id.* at 314 U. S. 265.

[Footnote 15]

Madison's comments in Congress also reveal the perceived need for some sort of constitutional "saving clause," which, among other things, would serve to foreclose application to the Bill of Rights of the maxim that the affirmation of particular rights implies a negation of those not expressly defined. *See* 1 Annals of Cong. 438-440 (1789). *See also, e.g.*, 2 J. Story, Commentaries on the Constitution of the United States 651 (5th ed. 1891). Madison's efforts, culminating in the Ninth Amendment, served to allay the fears of those who were concerned that expressing certain guarantees could be read as excluding others.

[Footnote 16]

*See, e.g.*, *NAACP v. Alabama*, 357 U. S. 449 (1958) (right of association); *Griswold v. Connecticut*, 381 U. S. 479 (1965), and *Stanley v. Georgia*, 394 U. S. 557 (1969) (right to privacy); *Estelle v. Williams*, 425 U. S. 501, 425 U. S. 503 (1976), and *Taylor v. Kentucky*, 436 U. S. 478, 436 U. S. 483-486 (1978) (presumption of innocence); *In re Winship*, 397 U. S. 358 (1970) (standard of proof beyond a reasonable doubt); *United States v. Guest*, 383 U. S. 745, 383 U. S. 757-759 (1966), and *Shapiro v. Thompson*, 394 U. S. 618, 394 U. S. 630 (1969) (right to interstate travel).

[Footnote 17]

Whether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal trials have been presumptively open.

[Footnote 18]

We have no occasion here to define the circumstances in which all or parts of a criminal trial may be closed to the public, *cf.*, *e.g.*, 6 J. Wigmore, Evidence § 1835 (J. Chadbourn rev.1976), but our holding today does not mean that the First Amendment rights of the public and representatives of the press are absolute. Just as a government may impose reasonable time, place, and manner restrictions upon the use of its streets in the interest of such objectives as the free flow of traffic, *see, e.g., Cox v. New Hampshire*, 312 U. S. 569 (1941), so may a trial judge, in the interest of the fair administration of justice, impose reasonable limitations on access to a trial.

"[T]he question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge . . . the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places."

*Id.* at 312 U. S. 574. It is far more important that trials be conducted in a quiet and orderly setting than it is to preserve that atmosphere on city streets. *Compare, e.g., Kovacs v. Cooper*, 336 U. S. 77 (1949), with *Illinois v. Allen*, 397 U. S. 337 (1970), and *Estes v. Texas*, 381 U. S. 532 (1965). Moreover, since courtrooms have limited capacity, there may be occasions when not every person who wishes to attend can be accommodated. In such situations, reasonable restrictions on general access are traditionally imposed, including preferential seating for media representatives. *Cf. Gannett*, 443 U.S. at 443 U. S. 397-398 (POWELL, J., concurring); *Houchins v. KQED, Inc.*, 438 U. S. 1, 438 U. S. 17 (1978) (STEWART, J., concurring in judgment); *id.* at 438 U. S. 32 (STEVENS, J., dissenting).

MR. JUSTICE WHITE, concurring.

This case would have been unnecessary had *Gannett Co. v. DePasquale*, 443 U. S. 368 (1979), construed the Sixth

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Amendment to forbid excluding the public from criminal proceedings except in narrowly defined circumstances. But the Court there rejected the submission of four of us to this effect, thus requiring that the First Amendment issue involved here be addressed. On this issue, I concur in the opinion of THE CHIEF JUSTICE.

MR. JUSTICE STEVENS, concurring.

This is a watershed case. Until today, the Court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it

squarely held that the acquisition of newsworthy matter is entitled to any constitutional protection whatsoever. An additional word of emphasis is therefore appropriate.

Twice before, the Court has implied that any governmental restriction on access to information, no matter how severe and no matter how unjustified, would be constitutionally acceptable so long as it did not single out the press for special disabilities not applicable to the public at large. In a dissent joined by MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL in *Saxbe v. Washington Post Co.*, 417 U. S. 843, 417 U. S. 850, MR. JUSTICE POWELL unequivocally rejected the conclusion that

"any governmental restriction on press access to information,

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so long as it is nondiscriminatory, falls outside the purview of First Amendment concern."

*Id.* at 417 U. S. 857 (emphasis in original). And in *Houchins v. KQED, Inc.*, 438 U. S. 1, 438 U. S. 19-40, I explained at length why MR. JUSTICE BRENNAN, MR. JUSTICE POWELL, and I were convinced that

"[a]n official prison policy of concealing . . . knowledge from the public by arbitrarily cutting off the flow of information at its source abridges the freedom of speech and of the press protected by the First and Fourteenth Amendments to the Constitution."

*Id.* at 438 U. S. 38. Since MR. JUSTICE MARSHALL and MR. JUSTICE BLACKMUN were unable to participate in that case, a majority of the Court neither accepted nor rejected that conclusion or the contrary conclusion expressed in the prevailing opinions. [Footnote 2/1] Today, however, for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment.

It is somewhat ironic that the Court should find more reason to recognize a right of access today than it did in *Houchins*. For *Houchins* involved the plight of a segment of society least able to protect itself, an attack on a longstanding policy of concealment, and an absence of any legitimate justification for abridging public access to information about how government operates. In this case, we are protecting the interests of the most powerful voices in the community, we are concerned with an almost unique exception to an established tradition of openness in the conduct of criminal

trials, and it is likely that the closure order was motivated by the judge's desire to protect the individual defendant from the burden of a fourth criminal trial.  
[Footnote 2/2]

In any event, for the reasons stated in Part II of my *Houchins* opinion, 438 U.S. at 438 U. S. 338, as well as those stated by THE CHIEF JUSTICE today, I agree that the First Amendment protects the public and the press from abridgment of their rights of access to information about the operation of their government, including the Judicial Branch; given the total absence of any record justification for the closure order entered in this case, that order violated the First Amendment.

[Footnote 2/1]

"Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to government information or sources of information within the government's control."

438 U.S. at 438 U. S. 15 (opinion of BURGER, C.J.) .

"The First and Fourteenth Amendments do not guarantee the public a right of access to information generated or controlled by government. . . . The Constitution does no more than assure the public and the press equal access once government has opened its doors."

*Id.* at 438 U. S. 16 (STEWART, J., concurring in judgment).

[Footnote 2/2]

Neither that likely motivation nor facts showing the risk that a fifth trial would have been necessary without closure of the fourth are disclosed in this record, however. The absence of any articulated reason for the closure order is a sufficient basis for distinguishing this case from *Gannett Co. v. DePasquale*, 443 U. S. 368. The decision today is in no way inconsistent with the perfectly unambiguous holding in *Gannett* that the rights guaranteed by the Sixth Amendment are rights that may be asserted by the accused, rather than members of the general public. In my opinion, the Framers quite properly identified the party who has the greatest interest in the right to a public trial. The language of the Sixth Amendment is worth emphasizing:

"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."

(Emphasis added.)

MR. JUSTICE BRENNAN, with whom MR. JUSTICE MARSHALL joins, concurring in the judgment.

*Gannett Co. v. DePasquale*, 443 U. S. 368 (1979), held that the Sixth Amendment right to a public trial was personal to the accused, conferring no right of access to pretrial proceedings that is separately enforceable by the public or the press. The instant case raises the question whether the First Amendment, of its own force and as applied to the States through

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the Fourteenth Amendment, secures the public an independent right of access to trial proceedings. Because I believe that the First Amendment -- of itself and as applied to the States through the Fourteenth Amendment -- secures such a public right of access, I agree with those of my Brethren who hold that, without more, agreement of the trial judge and the parties cannot constitutionally close a trial to the public. [Footnote 3/1]

I

While freedom of expression is made inviolate by the First Amendment, and, with only rare and stringent exceptions, may not be suppressed, *see, e.g., Brown v. Glines*, 444 U. S. 348, 444 U. S. 364 (1980) (BRENNAN, J., dissenting); *Nebraska Press Assn. v. Stuart*, 427 U. S. 539, 427 U. S. 558-559 (1976); *id.* at 427 U. S. 590 (BRENNAN, J., concurring in judgment); *New York Times Co. v. United States*, 403 U. S. 713, 403 U. S. 714 (1971) (per curiam opinion); *Near v. Minnesota ex rel. Olson*, 283 U. S. 697, 283 U. S. 715-716 (1931), the First Amendment has not been viewed by the Court in all settings as providing an equally categorical assurance of the correlative freedom of access to information, *see, e.g., Saxbe v. Washington Post Co.*, 417 U. S. 843, 417 U. S. 849

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(1974), *Zemel v. Rusk*, 381 U. S. 1, 381 U. S. 16-17 (1965); *see also Houchins v. KQED, Inc.*, 438 U. S. 1, 438 U. S. 8-9 (1978) (opinion of BURGER,

C.J.); *id.* at 438 U. S. 16 (STEWART J., concurring in judgment); *Gannett Co. v. DePasquale*, 433 U.S. at 433 U. S. 401-405 (REHNQUIST, J., concurring). *But cf. id.* at 433 U. S. 397-398 (POWELL, J., concurring); *Houchins*, *supra* at 438 U. S. 27-38 (STEVENS, J., dissenting); *Saxbe*, *supra* at 417 U. S. 856-864 (POWELL, J., dissenting); *Pell v. Procunier*, 417 U. S. 817, 417 U. S. 839-842 (1974) (Douglas, J., dissenting). [Footnote 3/2] Yet the Court has not ruled out a public access component to the First Amendment in every circumstance. Read with care and in context, our decisions must therefore be understood as holding only that any privilege of access to governmental information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality. *See Houchins*, *supra* at 438 U. S. 8-9 (opinion of BURGER, C.J.) (access to prisons); *Saxbe*, *supra* at 417 U. S. 849 (same); *Pell*, *supra* at 417 U. S. 831-832 (same); *Estes v. Texas*, 381 U. S. 532, 381 U. S. 541-542 (1965) (television in courtroom); *Zemel v. Rusk*, *supra* at 381 U. S. 16-17 (validation of passport to unfriendly country). These cases neither comprehensively nor absolutely deny that public access to information may, at times, be implied by the First Amendment and the principles which animate it.

The Court's approach in right-of-access cases simply reflects the special nature of a claim of First Amendment right to gather information. Customarily, First Amendment guarantees are interposed to protect communication between speaker

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and listener. When so employed against prior restraints, free speech protections are almost insurmountable. *See Nebraska Press Assn. v. Stuart*, *supra* at 427 U. S. 558-559; *New York Times Co. v. United States*, *supra* at 403 U. S. 714 (per curiam opinion). *See generally* Brennan Address, 32 Rutgers L.Rev. 173 176 (1979). But the First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a structural role to play in securing and fostering our republican system of self-government. *See United States v. Carolene Products Co.*, 304 U. S. 144, 304 U. S. 152-153, n. 4 (1938); *Grosjean v. American Press Co.*, 297 U. S. 233, 297 U. S. 249-250 (1936); *Stromberg v. California*, 283 U. S. 359, 283 U. S. 369 (1931); Brennan, *supra* at 176-177; J. Ely Democracy and Distrust 93-94 (1980); T. Emerson, The System of Freedom of Expression 7 (1970); A. Meiklejohn, Free Speech and Its Relation to Self-Government (1948); Bork, Neutral Principles and Some First Amendment Problems, 47 Ind.L.J. 1, 23 (1971). Implicit in this structural role is not only "the principle that debate on public issues should be uninhibited, robust, and wide-open," *New York Times Co. v. Sullivan*, 376 U. S. 254, 376 U. S. 270 (1964), but also the antecedent

assumption that valuable public debate -- as well as other civic behavior -- must be informed. [Footnote 3/3] The structural

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model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication. [Footnote 3/4]

However, because "the stretch of this protection is theoretically endless," Brennan, *supra* at 448 U. S. 177, it must be invoked with discrimination and temperance. For, so far as the participating citizen's need for information is concerned, "[t]here are few restrictions on action which could not be clothed by ingenious argument in the garb of decreased data flow." *Zemel v. Rusk*, *supra* at 381 U. S. 16-17. An assertion of the prerogative to gather information must accordingly be assayed by considering the information sought and the opposing interests invaded. [Footnote 3/5]

This judicial task is as much a matter of sensitivity to practical necessities as it is of abstract reasoning. But at least

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two helpful principles may be sketched. First, the case for a right of access has special force when drawn from an enduring and vital tradition of public entree to particular proceedings or information. *Cf. In re Winship*, 397 U. S. 358, 397 U. S. 361-362 (1970). Such a tradition commands respect, in part, because the Constitution carries the gloss of history. More importantly, a tradition of accessibility implies the favorable judgment of experience. Second, the value of access must be measured in specifics. Analysis is not advanced by rhetorical statements that all information bears upon public issues; what is crucial in individual cases is whether access to a particular government process is important in terms of that very process.

To resolve the case before us, therefore, we must consult historical and current practice with respect to open trials, and weigh the importance of public access to the trial process itself.

## II

"This nation's accepted practice of guaranteeing a public trial to an accused has its roots in our English common law heritage." *In re Oliver*, 333 U. S. 257, 333 U. S. 266 (1948); *see Gannett Co. v. DePasquale*, 443 U.S. at 443 U. S. 419-

420 (BLACKMUN, J., concurring and dissenting). Indeed, historically and functionally, open trials have been closely associated with the development of the fundamental procedure of trial by jury. *In re Oliver, supra* at 333 U. S. 266; Radin, *The Right to a Public Trial*, 6 *Temp.L.Q.* 381, 388 (1932). [Footnote 3/6] Preeminent English legal observers and commentators have unreservedly acknowledged and applauded the public character of the common law

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trial process. *See* T. Smith, *De Republica Anglorum* 77, 81-82 (1970); [Footnote 3/7] 2 E. Coke, *Institutes of the Laws of England* 103 (6th ed. 1681); 3 W. Blackstone, *Commentaries* \*372-\*373; [Footnote 3/8] M. Hale *The History of the Common Law of England* 342-344 (6th ed. 1820); [Footnote 3/9] 1 J. Bentham, *Rationale of Judicial Evidence* 584-585 (1827). And it appears that "there is little record, if any, of secret proceedings, criminal or civil, having occurred at any time in known English history." *Gannett, supra* at 443 U. S. 420 (BLACKMUN, J., concurring and dissenting); *see also In re Oliver, supra* at 333 U. S. 269, n. 22; Radin, *supra*, at 386-387.

This legacy of open justice was inherited by the English settlers in America. The earliest charters of colonial government expressly perpetuated the accepted practice of public trials. *See* *Concessions and Agreements of West New Jersey*, 1677, ch. XXIII; [Footnote 3/10] *Pennsylvania Frame of Government* 1682, *Laws Agreed Upon in England*, V. [Footnote 3/11] "There is no evidence that any colonial court conducted criminal trials behind closed doors. . . ." *Gannett Co. v. DePasquale, supra* at 443 U. S. 425 (BLACKMUN, J., concurring and dissenting). Subsequently framed state constitutions also prescribed open trial proceedings. *See, e.g.,* *Pennsylvania Declaration of Rights*, 1776, IX; [Footnote 3/12] *North Carolina Declaration of Rights*, 1776, IX; [Footnote 3/13] *Vermont Declaration of Rights*, X (1777); [Footnote 3/14] *see also In re Oliver*, 333 U.S. at 333 U. S. 267.

"Following the ratification in 1791 of the Federal Constitution's Sixth Amendment, . . most of the original states and those subsequently admitted to

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the Union adopted similar constitutional provisions."

*Ibid.* [Footnote 3/15] Today, the overwhelming majority of States secure the right to public trials. *Gannett, supra*, at 443 U. S. 414-415, n. 3 (BLACKMUN, J., concurring and dissenting); *see also In re Oliver, supra* at 333 U. S. 267-268, 333 U. S. 271, and nn. 17-20.

This Court too has persistently defended the public character of the trial process. *In re Oliver* established that the Due Process Clause of the Fourteenth Amendment forbids closed criminal trials. Noting the "universal rule against secret trials," 333 U.S. at 333 U. S. 266, the Court held that

"[i]n view of this nation's historic distrust of secret proceedings, their inherent dangers to freedom, and the universal requirement of our federal and state governments that criminal trials be public, the Fourteenth Amendment's guarantee that no one shall be deprived of his liberty without due process of law means, at least, that an accused cannot be thus sentenced to prison."

*Id.* at 333 U. S. 273. [Footnote 3/16]

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Even more significantly for our present purpose, *Oliver* recognized that open trials are bulwarks of our free and democratic government: public access to court proceedings is one of the numerous "checks and balances" of our system, because "contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power," *id.* at 333 U. S. 270. *See Sheppard v. Maxwell*, 384 U. S. 333, 384 U. S. 350 (1966). Indeed, the Court focused with particularity upon the public trial guarantee "as a safeguard against any attempt to employ our courts as instruments of persecution," or "for the suppression of political and religious heresies." *Oliver, supra* at 333 U. S. 270. Thus, *Oliver* acknowledged that open trials are indispensable to First Amendment political and religious freedoms.

By the same token, a special solicitude for the public character of judicial proceedings is evident in the Court's rulings upholding the right to report about the administration of justice. While these decisions are impelled by the classic protections afforded by the First Amendment to pure communication, they are also bottomed upon a keen appreciation of the structural interest served in opening the judicial system to public inspection. [Footnote 3/17] So, in upholding a privilege for reporting truthful information about judicial misconduct proceedings, *Landmark Communications, Inc. v. Virginia*, 435 U. S. 829 (1978), emphasized that public scrutiny of the operation of a judicial disciplinary body implicates a major purpose of the First Amendment -- "discussion of governmental affairs," *id.* at 435 U. S. 839. Again, *Nebraska Press Assn. v. Stuart*, 427 U.S. at 427 U. S. 559, noted that the traditional guarantee against prior restraint "should have particular force as applied to reporting of criminal proceedings. . . ." And *Cox Broadcasting Corp. v. Cohn*, 420 U. S. 469, 420 U. S. 492 (1975), instructed that,

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"[w]ith respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice."

*See Time, Inc. v. Firestone*, 424 U. S. 448, 424 U. S. 473-474, 424 U. S. 476-478 (1976) (BRENNAN, J., dissenting) (open judicial process is essential to fulfill "the First Amendment guarantees to the people of this Nation that they shall retain the necessary means of control over their institutions . . .").

Tradition, contemporaneous state practice, and this Court's own decisions, manifest a common understanding that "[a] trial is a public event. What transpires in the court room is public property." *Craig v. Harney*, 331 U. S. 367, 331 U. S. 374 (1947). As a matter of law and virtually immemorial custom, public trials have been the essentially unwavering rule in ancestral England and in our own Nation. *See In re Oliver*, 333 U.S. at 333 U. S. 266-268; *Gannett Co. v. DePasquale*, 443 U.S. at 443 U. S. 386, n. 15; *id.* at 443 U. S. 418-432, and n. 11 (BLACKMUN, J., concurring and dissenting). [Footnote 3/18] Such abiding adherence to the principle of open trials "reflect[s] a profound judgment about the way in which law should be enforced and justice administered." *Duncan v. Louisiana*, 391 U. S. 145, 391 U. S. 155 (1968).

### III

Publicity serves to advance several of the particular purposes of the trial (and, indeed, the judicial) process. Open trials play a fundamental role in furthering the efforts of our judicial system to assure the criminal defendant a fair and accurate adjudication of guilt or innocence. *See, e.g., Estes v. Texas*, 381 U.S. at 381 U. S. 538-539. But, as a feature of our

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governing system of justice, the trial process serves other, broadly political, interests, and public access advances these objectives as well. To that extent, trial access possesses specific structural significance. [Footnote 3/19]

The trial is a means of meeting "the notion, deeply rooted in the common law, that *justice must satisfy the appearance of justice.*" *Levine v. United States*, 362 U. S. 610, 362 U. S. 616 (1960), quoting *Offutt v. United States*, 348 U. S. 11, 348 U. S. 14 (1954); accord, *Gannett Co. v. DePasquale*, *supra*, at 443 U. S. 429 (BLACKMUN, J., concurring and dissenting); see *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884) (Holmes, J.). *For a civilization founded upon principles of ordered liberty to survive and flourish, its members must share the conviction that they are governed equitably. That necessity underlies constitutional provisions as diverse as the rule against takings without just*

compensation, see *PruneYard Shopping Center v. Robins*, 447 U. S. 74, 447 U. S. 82-83, and n. 7 (1980), and the Equal Protection Clause. It also mandates a system of justice that demonstrates the fairness of the law to our citizens. One

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major function of the trial, hedged with procedural protections and conducted with conspicuous respect for the rule of law, is to make that demonstration. See *In re Oliver*, supra, at 333 U. S. 270, n. 24.

Secrecy is profoundly inimical to this demonstrative purpose of the trial process. Open trials assure the public that procedural rights are respected, and that justice is afforded equally. Closed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law. Public access is essential, therefore, if trial adjudication is to achieve the objective of maintaining public confidence in the administration of justice. See *Gannett*, supra at 443 U. S. 428-429 (BLACKMUN, J., concurring and dissenting).

But the trial is more than a demonstrably just method of adjudicating disputes and protecting rights. It plays a pivotal role in the entire judicial process, and, by extension, in our form of government. Under our system, judges are not mere umpires, but, in their own sphere, lawmakers -- a coordinate branch of government.[Footnote 3/20] While individual cases turn upon the controversies between parties, or involve particular prosecutions, court rulings impose official and practical consequences upon members of society at large. Moreover, judges bear responsibility for the vitally important task of construing and securing constitutional rights. Thus, so far as the

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trial is the mechanism for judicial factfinding, as well as the initial forum for legal decisionmaking, it is a genuine governmental proceeding.

It follows that the conduct of the trial is preeminently a matter of public interest. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 420 U. S. 491-492; *Maryland v. Baltimore Radio Show, Inc.*, 338 U. S. 912, 338 U. S. 920(1950) (opinion of Frankfurter, J., respecting denial of certiorari). More importantly, public access to trials acts as an important check, akin in purpose to the other checks and balances that infuse our system of government.

"The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power,"

*In re Oliver*, 333 U.S. at 333 U. S. 270 -- an abuse that, in many cases, would have ramifications beyond the impact upon the parties before the court. Indeed, "[w]ithout publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account." *Id.* at 333 U. S. 271, quoting 1 J. Bentham, *Rationale of Judicial Evidence* 524 (1827); see 3 W. Blackstone, *Commentaries* \*372; M. Hale, *History of the Common Law of England* 344 (6th ed. 1820); 1 J. Bryce, *The American Commonwealth* 514 (rev.1931).

Finally, with some limitations, a trial aims at true and accurate factfinding. Of course, proper factfinding is to the benefit of criminal defendants and of the parties in civil proceedings. But other, comparably urgent, interests are also often at stake. A miscarriage of justice that imprisons an innocent accused also leaves a guilty party at large, a continuing threat to society. Also, mistakes of fact in civil litigation may inflict costs upon others than the plaintiff and defendant. Facilitation of the trial factfinding process, therefore, is of concern to the public as well as to the parties. [Footnote 3/21]

Publicizing trial proceedings aids accurate factfinding. "Public trials come to the attention of key witnesses unknown

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to the parties." *In re Oliver*, *supra* at 333 U. S. 270, n. 24; see *Tanksley v. United States*, 145 F.2d 58, 59 (CA9 1944); 6 J. Wigmore, *Evidence* § 1834 (J. Chadbourn rev.197). Shrewd legal observers have averred that

"open examination of witnesses *viva voce*, in the presence of all mankind, is much more conducive to the clearing up of truth than the private and secret examination . . . where a witness may frequently depose that in private which he will be ashamed to testify in a public and solemn tribunal."

3 Blackstone, *supra*, at \*373. See *Tanksley v. United States*, *supra* at 59-60; Hale, *supra* at 345; 1 Bentham, *supra* at 522-523. And experience has borne out these assertions about the truthfinding role of publicity. See Hearings on S. 290 before the Subcommittee on Constitutional Rights and the Subcommittee on Improvements in Judicial Machinery of the Senate Judiciary Committee, 89th Cong., 1st Sess., pt. 2, pp. 433-434, 437-438 (1966).

Popular attendance at trials, in sum, substantially furthers the particular public purposes of that critical judicial proceeding. [Footnote 3/22] In that sense, public access is an indispensable element of the trial process itself. Trial access, therefore, assumes structural importance in our "government of laws," *Marbury v. Madison*, 1 Cranch 137, 5 U. S. 163 (1803).

## IV

As previously noted, resolution of First Amendment public access claims in individual cases must be strongly influenced

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by the weight of historical practice and by an assessment of the specific structural value of public access in the circumstances. With regard to the case at hand, our ingrained tradition of public trials and the importance of public access to the broader purposes of the trial process, tip the balance strongly toward the rule that trials be open. [Footnote 3/23] What countervailing interests might be sufficiently compelling to reverse this presumption of openness need not concern us now, [Footnote 3/24] for the statute at stake here authorizes trial closures at the unfettered discretion of the judge and parties. [Footnote 3/25] Accordingly, Va.Code § 19.2-266 (Supp. 1980) violates the First and Fourteenth Amendments, and the decision of the Virginia Supreme Court to the contrary should be reversed.

[Footnote 3/1]

Of course, the Sixth Amendment remains the source of the accused's own right to insist upon public judicial proceedings. *Gannett Co. v. DePasquale*, 443 U. S. 368 (1979).

That the Sixth Amendment explicitly establishes a public trial right does not impliedly foreclose the derivation of such a right from other provisions of the Constitution. The Constitution was not framed as a work of carpentry, in which all joints must fit snugly without overlapping. Of necessity, a document that designs a form of government will address central political concerns from a variety of perspectives. Significantly, this Court has recognized the open trial right both as a matter of the Sixth Amendment and as an ingredient in Fifth Amendment due process. *See Levine v. United States*, 362 U. S. 610, 362 U. S. 614, 362 U. S. 616 (1960); *cf. In re Oliver*, 333 U. S. 257 (1948) (Fourteenth Amendment due process). Analogously, racial segregation has been found independently offensive to the Equal Protection and Fifth Amendment Due Process Clauses. *Compare Brown v. Board of Education*, 347 U. S. 483, 347 U. S. 495 (1954), *with Bolling v. Sharpe*, 347 U. S. 497, 347 U. S. 499-500 (1954).

[Footnote 3/2]

A conceptually separate, yet related, question is whether the media should enjoy greater access rights than the general public. *See, e.g., Saxbe v. Washington Post Co.*, 417 U.S. at 417 U. S. 850; *Pell v. Procunier*, 417 U.S. at 417 U. S. 834-

835. But no such contention is at stake here. Since the media's right of access is at least equal to that of the general public, *see ibid.*, this case is resolved by a decision that the state statute unconstitutionally restricts public access to trials. As a practical matter, however, the institutional press is the likely, and fitting, chief beneficiary of a right of access because it serves as the "agent" of interested citizens, and funnels information about trials to a large number of individuals.

[Footnote 3/3]

This idea has been foreshadowed in MR. JUSTICE POWELL's dissent in *Saxbe v. Washington Post Co.*, *supra* at 417 U. S. 862-863:

"What is at stake here is the societal function of the First Amendment in preserving free public discussion of governmental affairs. No aspect of that constitutional guarantee is more rightly treasured than its protection of the ability of our people through free and open debate to consider and resolve their own destiny. . . . '[The] First Amendment is one of the vital bulwarks of our national commitment to intelligent self-government.' . . . It embodies our Nation's commitment to popular self-determination and our abiding faith that the surest course for developing sound national policy lies in a free exchange of views on public issues. And public debate must not only be unfettered; it must also be informed. For that reason, this Court has repeatedly stated that First Amendment concerns encompass the receipt of information and ideas as well as the right of free expression."

(Footnote omitted.)

[Footnote 3/4]

The technique of deriving specific rights from the structure of our constitutional government, or from other explicit rights, is not novel. The right of suffrage has been inferred from the nature of "a free and democratic society," and from its importance as a "preservative of other basic civil and political rights. . . ." *Reynolds v. Sims*, 377 U. S. 533, 377 U. S. 561-562 (1964), *San Antonio Independent School Dist. v. Rodriguez*, 411 U. S. 1, 411 U. S. 34, n. 74 (1973). So, too, the explicit freedoms of speech, petition, and assembly have yielded a correlative guarantee of certain associational activities. *NAACP v. Button*, 371 U. S. 415, 371 U. S. 430 (1963). *See also Rodriguez*, *supra* at 411 U. S. 33-34 (indicating that rights may be implicitly embedded in the Constitution); 411 U.S. at 411 U. S. 62-63 (BRENNAN, J., dissenting); *id.* at 411 U. S. 112-115 (MARSHALL, J., dissenting); *Lamont v. Postmaster General*, 381 U. S. 301, 381 U. S. 308 (1965) (BRENNAN, J., concurring).

[Footnote 3/5]

Analogously, we have been somewhat cautious in applying First Amendment protections to communication by way of nonverbal and nonpictorial conduct. Some behavior is so intimately connected with expression that, for practical purposes, it partakes of the same transcendental constitutional value as pure speech. *See, e.g., Tinker v. Des Moines School District*, 393 U. S. 503, 393 U. S. 505-506 (1969). Yet where the connection between expression and action is perceived as more tenuous, communicative interests may be overridden by competing social values. *See, e.g., Hughes v. Superior Court*, 339 U. S. 460, 339 U. S. 464-465 (1950).

[Footnote 3/6]

"[The public trial] seems almost a necessary incident of jury trials, since the presence of a jury . . . already insured the presence of a large part of the public. We need scarcely be reminded that the jury was the *patria*, the 'country,' and that it was in that capacity, and not as judges, that it was summoned."

Radin, *The Right to a Public Trial*, 6 *Temp.L.Q.* 381, 388 (1932); *see* 3 W. Blackstone, *Commentaries* \*349 ("trial *by jury*, called also the trial *per pais*, or *by the country*"); T. Smith, *De Republica Anglorum* 79 (1970).

[Footnote 3/7]

First published in 1583.

[Footnote 3/8]

First published in 1765.

[Footnote 3/9]

First edition published in 1713.

[Footnote 3/10]

Quoted in 1 B. Schwartz, *The Bill of Rights: A Documentary History* 129 (1971).

[Footnote 3/11]

*Id.* at 140.

[Footnote 3/12]

*Id.* at 265.

[Footnote 3/13]

*Id.* at 287.

[Footnote 3/14]

*Id.* at 323

[Footnote 3/15]

To be sure, some of these constitutions, such as the Pennsylvania Declaration of Rights, couched their public trial guarantees in the language of the accused's rights. But although the Court has read the Federal Constitution's explicit public trial provision, U.S.Const., Amdt. 6, as benefiting the defendant alone, it does not follow that comparably worded state guarantees must be so construed. *See Gannett Co. v. DePasquale*, 443 U.S. at 443 U. S. 425, and n. 9 (BLACKMUN, J., concurring and dissenting); *cf. also Mallott v. State*, 608 P.2d 737, 745, n. 12 (Alaska 1980). And even if the specific state public trial protections must be invoked by defendants, those state constitutional clauses still provide evidence of the importance attached to open trials by the founders of our state governments. Indeed, it may have been thought that linking public trials to the accused's privileges was the most effective way of assuring a vigorous representative for the popular interest.

[Footnote 3/16]

Notably, *Oliver* did not rest upon the simple incorporation of the Sixth Amendment into the Fourteenth, but upon notions intrinsic to due process, because the criminal contempt proceedings at issue in the case were "not within *all criminal prosecutions' to which [the Sixth] . . . Amendment applies.*" *Levine v. United States*, 362 U. S. 610, 362 U. S. 616 (1960); *see also n. 1, supra.*

[Footnote 3/17]

As Mr. Justice Holmes pointed out in his opinion for the Massachusetts Supreme Judicial Court in *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884), "the privilege [to publish reports of judicial proceedings] and the access of the public to the courts stand in reason upon common ground." *See Lewis v. Levy*, El., Bl., & El. 537, 120 Eng.Rep. 610 (K.B. 1858).

[Footnote 3/18]

The dictum in *Branzburg v. Hayes*, 408 U. S. 665, 408 U. S. 684-685 (1972), that "[n]ewsmen . . . may be prohibited from attending or publishing information about trials if such restrictions are necessary to assure a defendant fair trial . . ." is not to the contrary; it simply notes that rights of access may be curtailed where there are sufficiently powerful countervailing considerations. *See supra* at 448 U. S. 588.

[Footnote 3/19]

By way of analogy, we have fashioned rules of criminal procedure to serve interests implicated in the trial process beside those of the defendant. For example, the exclusionary rule is prompted not only by the accused's interest in vindicating his own rights, but also, in part, by the independent "*imperative of judicial integrity.*" *See, e.g., Terry v. Ohio*, 392 U. S. 1, 392 U. S. 12-13 (1968), quoting *Elkins v. United States*, 364 U. S. 206, 222 (1960); *United States v. Calandra*, 414 U. S. 338, 414 U. S. 357-359 (1974) (BRENNAN, J., dissenting); *Olmstead v. United States*, 277 U. S. 438, 277 U. S. 484-485 (1928) (Brandeis, J., dissenting); *id.* at 277 U. S. 470 (Holmes, J., dissenting). And several Members of this Court have insisted that criminal entrapment cannot be "countenanced," because the "obligation" to avoid

"enforcement of the law by lawless means . . . goes beyond the conviction of the particular defendant before the court. Public confidence in the fair and honorable administration of justice . . . is the transcending value at stake."

*Sherman v. United States*, 356 U. S. 369, 356 U. S. 380 (1958) (Frankfurter, J., concurring in result); *see United States v. Russell*, 411 U. S. 423, 411 U. S. 436-439 (1973) (Douglas, J., dissenting); *id.* at 411 U. S. 442-443 (STEWART, J., dissenting); *Sorrells v. United States*, 287 U. S. 435, 287 U. S. 455 (1932) (opinion of Roberts, J.); *Casey v. United States*, 276 U. S. 413, 276 U. S. 423, 276 U. S. 425 (1928) (Brandeis, J., dissenting) .

[Footnote 3/20]

The interpretation and application of constitutional and statutory law, while not legislation, is lawmaking, albeit of a kind that is subject to special constraints and informed by unique considerations. Guided and confined by the Constitution and pertinent statutes, judges are obliged to be discerning, to exercise judgment, and to prescribe rules. Indeed, at times, judges wield considerable authority to formulate legal policy in designated areas. *See, e.g., Moragne v. States Marine Lines*, 398 U. S. 375 (1971); *Banco Nacional de Cuba v. Sabbatino*, 376 U. S. 398 (1964); *Textile Workers v. Lincoln Mills*, 353 U. S. 448, 353 U. S. 456-457 (1957); P. Areeda, *Antitrust Analysis* 45-46 (2d ed.1974) ("Sherman Act [is] . . . a general authority to do what common law

courts usually do: to use certain customary techniques of judicial reasoning . . . and to develop, refine, and innovate in the dynamic common law tradition").

[Footnote 3/21]

Further, the interest in insuring that the innocent are not punished may be shared by the general public, in addition to the accused himself.

[Footnote 3/22]

In advancing these purposes, the availability of a trial transcript is no substitute for a public presence at the trial itself. As any experienced appellate judge can attest, the "cold" record is a very imperfect reproduction of events that transpire in the courtroom. Indeed, to the extent that publicity serves as a check upon trial officials, "[r]ecordation . . . would be found to operate rather as cloa[k] than chec[k]; as cloa[k] in reality, as chec[k] only in appearance." *In re Oliver*, 333 U.S. at 333 U. S. 271, quoting 1 J. Bentham, *Rationale of Judicial Evidence* 524 (1827); *see id.* at 577-578.

[Footnote 3/23]

The presumption of public trials is, of course, not at all incompatible with reasonable restrictions imposed upon courtroom behavior in the interests of decorum. *Cf. Illinois v. Allen*, 397 U. S. 337 (1970). Thus, when engaging in interchanges at the bench, the trial judge is not required to allow public or press intrusion upon the huddle. Nor does this opinion intimate that judges are restricted in their ability to conduct conferences in chambers, inasmuch as such conferences are distinct from trial proceedings.

[Footnote 3/24]

For example, national security concerns about confidentiality may sometimes warrant closures during sensitive portions of trial proceedings, such as testimony about state secrets. *Cf. United States v. Nixon*, 418 U. S. 683, 418 U. S. 714-716 (1974).

[Footnote 3/25]

Significantly, closing a trial lacks even the justification for barring the door to pretrial hearings: the necessity of preventing dissemination of suppressible prejudicial evidence to the public before the jury pool has become, in a practical sense, finite and subject to sequestration.

MR. JUSTICE STEWART, concurring in the judgment.

In *Gannett Co. v. DePasquale*, 443 U. S. 368, the Court held that the Sixth Amendment, which guarantees "the accused" the right to a public trial, does not confer upon representatives of the press or members of the general public any right of access to a trial. [Footnote 4/1] But the Court explicitly left

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open the question whether such a right of access may be guaranteed by other provisions of the Constitution, *id.* at 443 U. S. 391-393. MR. JUSTICE POWELL expressed the view that the First and Fourteenth Amendments do extend at least a limited right of access even to pretrial suppression hearings in criminal cases, *id.* at 443 U. S. 397-403 (concurring opinion). MR. JUSTICE REHNQUIST expressed a contrary view, *id.* at 443 U. S. 403-406 (concurring opinion). The remaining Members of the Court were silent on the question.

Whatever the ultimate answer to that question may be with respect to pretrial suppression hearings in criminal cases, the First and Fourteenth Amendments clearly give the press and the public a right of access to trials themselves, civil as well as criminal. [Footnote 4/2] As has been abundantly demonstrated in Part II of the opinion of THE CHIEF JUSTICE, in MR. JUSTICE BRENNAN's opinion concurring in the judgment, and in MR. JUSTICE BLACKMUN's opinion dissenting in part last Term in the *Gannett case*, *supra* at 448 U. S. 406, it has for centuries been a basic presupposition of the Anglo-American legal system that trials shall be public trials. The opinions referred to also convincingly explain the many good reasons why this is so. With us, a trial is, by very definition, a proceeding open to the press and to the public.

In conspicuous contrast to a military base, *Greer v. Spock*, 424 U. S. 828; a jail, *Adderley v. Florida*, 385 U. S. 39; or a prison, *Pell v. Procunier*, 417 U. S. 817, a trial courtroom is a public place. Even more than city streets, sidewalks, and

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parks as areas of traditional First Amendment activity, *e.g.*, *Shuttlesworth v. Birmingham*, 394 U. S. 147, a trial courtroom is a place where representatives of the press and of the public are not only free to be, but where their presence serves to assure the integrity of what goes on.

But this does not mean that the First Amendment right of members of the public and representatives of the press to attend civil and criminal trials is absolute. Just as a legislature may impose reasonable time, place, and manner restrictions upon the exercise of First Amendment freedoms, so may a trial judge impose reasonable limitations upon the unrestricted occupation of a courtroom by

representatives of the press and members of the public. *Cf. Sheppard v. Maxwell*, 384 U. S. 333. Much more than a city street, a trial courtroom must be a quiet and orderly place. *Compare Kovacs v. Cooper*, 336 U. S. 77, with *Illinois v. Allen*, 397 U. S. 337, and *Estes v. Texas*, 381 U. S. 532. Moreover, every courtroom has a finite physical capacity, and there may be occasions when not all who wish to attend a trial may do so. [Footnote 4/3] And while there exist many alternative ways to satisfy the constitutional demands of a fair trial, [Footnote 4/4] those demands may also sometimes justify limitations upon the unrestricted presence of spectators in the courtroom. [Footnote 4/5]

Since, in the present case, the trial judge appears to have

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given no recognition to the right of representatives of the press and members of the public to be present at the Virginia murder trial over which he was presiding, the judgment under review must be reversed.

It is upon the basis of these principles that I concur in the judgment.

[Footnote 4/1]

The Court also made clear that the Sixth Amendment does not give the accused the right to a private trial. 443 U.S. at 443 U. S. 382. *Cf. Singer v. United States*, 380 U. S. 24 (Sixth Amendment right of trial by jury does not include right to be tried without a jury).

[Footnote 4/2]

It has long been established that the protections of the First Amendment are guaranteed by the Fourteenth Amendment against invasion by the States. *E.g., Gitlow v. New York*, 268 U. S. 652. The First Amendment provisions relevant to this case are those protecting free speech and a free press. The right to speak implies a freedom to listen, *Kleindienst v. Mandel*, 408 U. S. 753. The right to publish implies a freedom to gather information, *Branzburg v. Hayes*, 408 U. S. 665, 408 U. S. 681. *See* opinion of MR JUSTICE BRENNAN concurring in the judgment, *ante* p. 448 U. S. 584, *passim*.

[Footnote 4/3]

In such situations, representatives of the press must be assured access. *Houchins v. KQED, Inc.*, 438 U. S. 1, 438 U. S. 16 (opinion concurring in judgment).

[Footnote 4/4]

Such alternatives include sequestration of juries, continuances, and changes of venue.

[Footnote 4/5]

This is not to say that only constitutional considerations can justify such restrictions. The preservation of trade secrets, for example, might justify the exclusion of the public from at least some segments of a civil trial. And the sensibilities of a youthful prosecution witness, for example, might justify similar exclusion in a criminal trial for rape, so long as the defendant's Sixth Amendment right to a public trial were not impaired. *See, e.g., Stamicarbon, N.V. v. American Cyanamid Co.*, 56 F.2d 532, 539-542 (CA2 1974).

MR. JUSTICE BLACKMUN, concurring in the judgment.

My opinion and vote in partial dissent last Term in *Gannett Co. v. DePasquale*, 443 U. S. 368, 443 U. S. 406 (1979), compels my vote to reverse the judgment of the Supreme Court of Virginia.

I

The decision in this case is gratifying for me for two reasons:

It is gratifying, first, to see the Court now looking to and relying upon legal history in determining the fundamental public character of the criminal trial. *Ante* at 448 U. S. 564-569, 448 U. S. 572-574, and n. 9. The partial dissent in *Gannett*, 443 U.S. at 443 U. S. 419-433, took great pains in assembling -- I believe adequately -- the historical material, and in stressing its importance to this area of the law. *See also* MR. JUSTICE BRENNAN's helpful review set forth as Part II of his opinion in the present case. *Ante* at 448 U. S. 589-593. Although the Court in *Gannett* gave a modicum of lip service to legal history, 443 U.S. at 443 U. S. 386, n. 15, it denied its obvious application when the defense and the prosecution, with no resistance by the trial judge, agreed that the proceeding should be closed.

The Court's return to history is a welcome change in direction.

It is gratifying, second, to see the Court wash away at least some of the graffiti that marred the prevailing opinions in *Gannett*. No fewer than 12 times in the primary opinion in that case, the Court (albeit in what seems now to have become

clear dicta) observed that its Sixth Amendment closure ruling applied to the trial itself. The author of the first concurring opinion was fully aware of this, and would have restricted the Court's observations and ruling to the suppression hearing. *Id.* at 443 U. S. 394. Nonetheless, he joined the Court's opinion, *ibid.*, with its multiple references to the trial itself; the opinion was not a mere concurrence in the Court's judgment. And MR. JUSTICE REHNQUIST, in his separate concurring opinion, quite understandably observed, as a consequence, that the Court was holding "without qualification," that "*members of the public have no constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials,*" *id.* at 443 U. S. 403, quoting from the primary opinion, *id.* at 443 U. S. 391. The resulting confusion among commentators [Footnote 5/1] and journalist [Footnote 5/2] was not surprising.

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## II

The Court's ultimate ruling in *Gannett*, with such clarification as is provided by the opinions in this case today, apparently is now to the effect that there is no Sixth Amendment right on the part of the public -- or the press -- to an open hearing on a motion to suppress. I, of course, continue to believe that *Gannett* was in error, both in its interpretation of the Sixth Amendment generally and in its application to the suppression hearing, for I remain convinced that the right to a public trial is to be found where the Constitution explicitly placed it -- in the Sixth Amendment. [Footnote 5/3]

The Court, however, has eschewed the Sixth Amendment route. The plurality turns to other possible constitutional sources, and invokes a veritable potpourri of them -- the Speech Clause of the First Amendment, the Press Clause, the Assembly Clause, the Ninth Amendment, and a cluster of penumbral guarantees recognized in past decisions. This course is troublesome, but it is the route that has been selected, and, at least for now, we must live with it. No purpose would be served by my spelling out at length here the reasons for my saying that the course is troublesome. I need do no more than observe that uncertainty marks the nature -- and strictness -- of the standard of closure the Court adopts. The plurality opinion speaks of "an overriding interest articulated in findings," *ante* at 448 U. S. 581; MR. JUSTICE STEWART reserves, perhaps not inappropriately, "reasonable limitations," *ante* at 448 U. S. 600; MR. JUSTICE BRENNAN presents his separate analytical framework; MR. JUSTICE POWELL, in *Gannett*, was critical of those Justices who, relying on the Sixth Amendment, concluded

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that closure is authorized only when "strictly and inescapably necessary," 443 U.S. at 443 U. S. 339-400; and MR. JUSTICE REHNQUIST continues his flat rejection of, among others, the First Amendment avenue.

Having said all this, and with the Sixth Amendment set to one side in this case, I am driven to conclude, as a secondary position, that the First Amendment must provide some measure of protection for public access to the trial. The opinion in partial dissent in *Gannett* explained that the public has an intense need and a deserved right to know about the administration of justice in general; about the prosecution of local crimes in particular; about the conduct of the judge, the prosecutor, defense counsel, police officers, other public servants, and all the actors in the judicial arena; and about the trial itself. See 443 U.S. at 443 U. S. 413, and n. 2, 443 U. S. 414, 443 U. S. 428-429, 443 U. S. 448. See also *Cox Broadcasting Corp. v. Cohn*, 420 U. S. 469, 420 U. S. 492 (1975). It is clear and obvious to me, on the approach the Court has chosen to take, that, by closing this criminal trial, the trial judge abridged these First Amendment interests of the public.

I also would reverse, and I join the judgment of the Court.

[Footnote 5/1]

See, e.g., Stephenson, Fair Trial-Free Press: Rights in Continuing Conflict, 46 Brooklyn L.Rev. 39, 63 (1979) ("intended reach of the majority opinion is unclear" (footnote omitted)); The Supreme Court, 1978 Term, 93 Harv.L.Rev. 60, 65 (1979) ("widespread uncertainty over what the Court held"); Note, 51 U.Colo.L.Rev. 425, 432-433 (1980) ("Gannett can be interpreted to sanction the closing of trials"; citing "the uncertainty of the language in *Gannett*," and its "ambiguous sixth amendment holding"); Note, 11 Tex.Tech.L.Rev. 159, 170-171 (1979) ("perhaps much of the present and imminent confusion lies in the Court's own statement of its holding"); Borow & Kruth, Closed Preliminary Hearings, 55 Calif.State Bar J. 18, 23 (1980) ("Despite the public disclaimers . . . , the majority holding appears to embrace the right of access to trials, as well as pretrial hearings"); Goodale, *Gannett* Means What it Says; But Who Knows What it Says?, Nat.L.J. Oct. 15, 1979, p. 20; see also Keeffe, The Boner Called Gannett, 66 A.B.A.J. 227 (1980).

[Footnote 5/2]

The press -- perhaps the segment of society most profoundly affected by *Gannett* -- has called the Court's decision "cloudy," Birmingham Post-Herald, Aug. 21, 1979, p. A4; "confused," Chicago Sun-Times, Sept. 20, 1979, p. 56 (cartoon); "incoherent," Baltimore Sun, Sept. 22, 1979, p. A14; "mushy,"

Washington Post, Aug. 10, 1979, p. A15; and a "muddle," Time, Sept. 17, 1979, p. 82, and Newsweek, Aug. 27, 1979, p. 69.

[Footnote 5/3]

I shall not again seek to demonstrate the errors of analysis in the Court's opinion in *Gannett*. I note, however, that the very existence of the present case illustrates the utter fallacy of thinking, in this context, that "the public interest is fully protected by the participants in the litigation." *Gannett Co. v. DePasquale*, 443 U.S. at 443 U. S. 384. Cf. *id.* at 443 U. S. 438-439 (opinion in partial dissent).

MR. JUSTICE REHNQUIST, dissenting.

In the Gilbert and Sullivan operetta "Iolanthe," the Lord Chancellor recites:

"The Law is the true embodiment"

"of everything that's excellent,"

"It has no kind of fault or flaw,"

"And I, my Lords, embody the Law."

It is difficult not to derive more than a little of this flavor from the various opinions supporting the judgment in this case. The opinion of THE CHIEF JUSTICE states:

"[H]ere, for the first time, the Court is asked to decide whether a criminal trial itself may be closed to the public upon the unopposed request of a defendant, without any

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demonstration that closure is required to protect the defendant's superior right to a fair trial, or that some other overriding consideration requires closure."

*Ante* at 448 U. S. 564. The opinion of MR. JUSTICE BRENNAN states:

"Read with care and in context, our decisions must therefore be understood as holding only that any privilege of access to governmental information is subject to a degree of restraint dictated by the nature of the information and countervailing interests in security or confidentiality."

*Ante* at 448 U. S. 586.

For the reasons stated in my separate concurrence in *Gannett Co. v. DePasquale*, 443 U. S. 368, 443 U. S. 403(1979), I do not believe that either the First or Sixth Amendment, as made applicable to the States by the Fourteenth, requires that a State's reasons for denying public access to a trial, where both the prosecuting attorney and the defendant have consented to an order of closure approved by the judge, are subject to any additional constitutional review at our hands. And I most certainly do not believe that the Ninth Amendment confers upon us any such power to review orders of state trial judges closing trials in such situations. *See ante* at 448 U. S. 579, n. 15.

We have, at present, 50 state judicial systems and one federal judicial system in the United States, and our authority to reverse a decision by the highest court of the State is limited to only those occasions when the state decision violates some provision of the United States Constitution. And that authority should be exercised with a full sense that the judges whose decisions we review are making the same effort as we to uphold the Constitution. As said by Mr. Justice Jackson, concurring in the result in *Brown v. Allen*, 344 U. S. 443, 344 U. S. 540 (1953), "we are not final because we are infallible, but we are infallible only because we are final."

The proper administration of justice in any nation is bound to be a matter of the highest concern to all thinking citizens.

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But to gradually rein in, as this Court has done over the past generation, all of the ultimate decisionmaking power over how justice shall be administered, not merely in the federal system, but in each of the 50 States, is a task that no Court consisting of nine persons, however gifted, is equal to. Nor is it desirable that such authority be exercised by such a tiny numerical fragment of the 220 million people who compose the population of this country. In the same concurrence just quoted, Mr. Justice Jackson accurately observed that

"[t]he generalities of the Fourteenth Amendment are so indeterminate as to what state actions are forbidden that this Court has found it a ready instrument, in one field or another, to magnify federal, and incidentally its own, authority over the states."

*Id.* at 344 U. S. 534.

However high-minded the impulses which originally spawned this trend may have been, and which impulses have been accentuated since the time Mr. Justice Jackson wrote, it is basically unhealthy to have so much authority concentrated in a small group of lawyers who have been appointed to the Supreme Court and

enjoy virtual life tenure. Nothing in the reasoning of Mr. Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch 137 (1803) requires that this Court, through ever-broadening use of the Supremacy Clause, smother a healthy pluralism which would ordinarily exist in a national government embracing 50 States.

The issue here is not whether the "right" to freedom of the press conferred by the First Amendment to the Constitution overrides the defendant's "right" to a fair trial conferred by other Amendments to the Constitution; it is, instead, whether any provision in the Constitution may fairly be read to prohibit what the trial judge in the Virginia state court system did in this case. Being unable to find any such prohibition in the First, Sixth Ninth, or any other Amendment to the United States Constitution, or in the Constitution itself, I dissent.

Supreme Court of India

Sahara India Real Estate ... vs Securities & Exch.Board Of India & ... on 11 September, 2012

Author: .....

Bench: D.K. Jain, Surinder Singh Nijjar, Ranjana Prakash Desai, Jagdish Singh Khehar

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

I.A. Nos. 4-5, 10, 11, 12-13, 16-17, 18, 19, 20-21, 22-23, 24-25, 26-27, 30-31, 32-33, 34, 35-36, 37-38, 39-40, 41-42, 43-44, 45-46, 47-48, 49-50, 55-56, 57, 58, 59, 61 and 62

in

C.A. No. 9813 of 2011 and C.A. No. 9833 of 2011

Sahara India Real Estate Corp. Ltd. & Ors. ...Appellants

Vs.

Securities & Exchange Board of India & anr. ...Respondents

with

I.A. Nos. 14 and 17 in C.A. No. 733 of 2012

## J U D G M E N T

S. H. KAPADIA, CJI Introduction

1. Finding an acceptable constitutional balance between free press and administration of justice is a difficult task in every legal system.

Factual background

2. Civil Appeal Nos. 9813 and 9833 of 2011 were filed challenging the order dated 18.10.2011 of the Securities Appellate Tribunal whereby the appellants (hereinafter for short "Sahara") were directed to refund amounts invested with the appellants in certain Optionally Fully Convertible Bonds (OFCD) with interest by a stated date.

3. By order dated 28.11.2011, this Court issued show cause notice to the Securities and Exchange Board of India (SEBI), respondent No. 1 herein, directing Sahara to put on affidavit as to how they intend to secure the liabilities incurred by them to the OFCD holders during the pendency of the Civil Appeals.

4. Pursuant to the aforesaid order dated 28.11.2011, on 4.01.2012, an affidavit was filed by Sahara explaining the manner in which it proposed to secure its liability to OFCD holders during the pendency of the Civil Appeals.

5. On 9.01.2012, both the appeals were admitted for hearing. However, IA No. 3 for interim relief filed by Sahara was kept for hearing on 20.01.2012.

6. On 20.01.2012, it was submitted by the learned counsel for SEBI that what was stated in the affidavit of 4.01.2012 filed by Sahara inter alia setting out as to how the liabilities of Sahara India Real Estate Corporation Ltd. (SIRECL) and Sahara Housing and Investment Corporation (SHICL) were to be secured was insufficient to protect the OFCD holders.

7. This Court then indicated to the learned counsel for Sahara and SEBI that they should attempt, if possible, to reach a consensus with respect to an acceptable security in the form of an unencumbered asset. Accordingly, IA No. 3 got stood over for three weeks for that purpose.

8. On 7.02.2012, the learned counsel for Sahara addressed a personal letter to the learned counsel for SEBI at Chennai enclosing the proposal with details of security to secure repayment of OFCD to investors as pre- condition for stay of the impugned orders dated 23.06.2011 and 18.10.2011 pending hearing of the Civil Appeals together with the Valuation Certificate indicating fair market value of the assets proposed to be offered as security. This was communicated by e-mail from Delhi to Chennai. Later, on the same day, there was also an official communication enclosing the said proposal by the Advocate-on-Record for Sahara to the Advocate-on- Record for SEBI.

9. A day prior to the hearing of IA No. 3 on 10.02.2012, one of the news channels flashed on TV the details of the said proposal which had been communicated only inter parties and which was obviously not meant for public circulation. The concerned television channel also named the valuer who had done the valuation of the assets proposed to be offered as security.

10. On 10.02.2012, there was no information forthcoming from SEBI of either acceptance or rejection of the proposal.

11. The above facts were inter alia brought to the notice of this Court at the hearing of IA No. 3 on 10.02.2012 when Shri F.S. Nariman, learned senior counsel for Sahara orally submitted that disclosure to the Media was by SEBI in breach of confidentiality which was denied by the learned counsel for SEBI. After hearing the learned counsel for the parties, this Court passed the following order:

“We are distressed to note that even “without prejudice” proposals sent by learned counsel for the appellants to the learned counsel for SEBI has come on one of the TV channels. Such incidents are increasing by the day. Such reporting not only affects the business sentiments but also interferes in the administration of justice. In the above circumstances, we have requested learned counsel on both sides to make written application to this Court in the form of an I.A. so that appropriate orders could be passed by this Court with regard to reporting of matters, which are sub-judice.”

12. Pursuant to the aforesaid order, IA Nos. 4 and 5 came to be filed by Sahara. According to Sahara, IA Nos. 4 and 5 raise a question of general public importance. In the said IA Nos. 4 and 5, Sahara stated that the time has come that this Court should give appropriate directions with regard to reporting of matters (in electronic and print media) which are sub judice. In this connection, it has been further stated: “it is well settled that it is inappropriate for comments to be made publicly (in the Media or otherwise) on cases (civil and criminal) which are sub judice; this principle has been stated in [Section 3](#) of the Contempt of Courts Act, which defines criminal contempt of court as the doing of an act whatsoever which prejudices or interferes or tends to interfere with the due course of any judicial proceeding or

tends to interfere or interfere with or obstruct or tends to interfere or obstruct the administration of justice”. In the IAs, it has been further stated that whilst there is no fetter on the fair reporting of any matter in court, matters relating to proposal made inter- parties are privileged from public disclosure. That, disclosure and publication of pleadings and other documents on the record of the case by third parties (who are not parties to the proceedings in this court) can (under the rules of this Court) only take place on an application to the court and pursuant to the directions given by the court (see Order XII, Rules 1, 2 and 3 of Supreme Court Rules, 1966). It was further stated that in cases like the present one a thin line has to be drawn between two types of matters; firstly, matters between company, on the one hand, and an authority, on the other hand, and, secondly, matters of public importance and concern. According to Sahara, in the present case, no question of public concern was involved in the telecast of news regarding the proposal made by Sahara on 7.02.2012 by one side to the other in the matter of providing security in an ongoing matter. In the IAs, it has been further stated that this Court has observed in the case of [State of Maharashtra v. Rajendra J. Gandhi](#) [(1997) 8 SCC 386] that: “A trial by press, electronic media or public agitation is the very antithesis of rule of law”. Consequently, it has been stated in the IAs by Sahara that this Court should consider giving guidelines as to the manner and extent of publicity which can be given to pleadings/ documents filed in court by one or the other party in a pending proceedings which have not yet been adjudicated upon.

13. Accordingly, vide IA Nos. 4 and 5, Sahara made the following prayers:

“(b) appropriate guidelines be framed with regard to reporting (in the electronic and print media) of matters which are sub- judice in a court including public disclosure of documents forming part of court proceedings.

(c) appropriate directions be issued as to the manner and extent of publicity to be given by the print/ electronic media of pleadings/ documents filed in a proceeding in court which is pending and not yet adjudicated upon;”

14. Vide IA No. 10, SEBI, at the very outset, denied that the alleged disclosure was at its instance or at the instance of its counsel. It further denied that papers furnished by Sahara were passed on by SEBI to the TV Channel. In its IA, SEBI stated that it is a statutory regulatory body and that as a matter of policy SEBI never gives its comments to the media on matters which are under investigation or sub judice. Further, SEBI had no business stakes involved to make such disclosures to the media. However, even according to SEBI, in view of the incident having happened in court, this Court should give appropriate directions or frame such guidelines as may be deemed appropriate.

15. At the very outset, we need to state that since an important question of public importance arose for decision under the above circumstances dealing with the rights of the citizens and the media, we gave notice and hearing to those who had filed the IAs; the question of law being that every citizen has a right to negotiate in confidence inasmuch as he/ she has a right to defend himself or herself. The source of these two rights comes from the common law. They are based on presumptions of confidentiality and innocence. Both, the said presumptions are of equal importance. At one stage, it was submitted before us that this Court has been acting suo motu. We made it clear that Sahara was at liberty to withdraw the IAs at which stage Shri Sidharth Luthra, learned senior counsel stated that Sahara would not like to withdraw its IAs. Even SEBI stated that if Sahara withdraws its IAs, SEBI would insist on its IA being decided. In short, both Sahara and SEBI sought adjudication. Further, on 28.03.2012, learned counsel for Sahara filed a note in the Court citing instances (mostly

criminal cases) in which according to him certain aberration qua presumption of innocence has taken place. This Court made it clear that this Court is concerned with the question as to whether guidelines for the media be laid down? If so, whether they should be self-regulatory? Or whether this Court should restate the law or declare the law under [Article 141](#) on balancing of [Article 19\(1\)\(a\)](#) rights vis-à-vis [Article 21](#), the scope of [Article 19\(2\)](#) in the context of the law regulating contempt of court and the scope of [Article 129/ Article 215](#).

16. Thus, our decision herein is confined to IA Nos. 4, 5 and 10. This clarification is important for the reason that some accused have filed IAs in which they have sought relief on the ground that their trial has been prejudiced on account of excessive media publicity. We express no opinion on the merits of those IAs.

Constitutionalization of free speech Comparative law: differences between the US and other common-law experiences

17. Protecting speech is the US approach. The First Amendment does not tolerate any form of restraint. In US, unlike India and Canada which also have written Constitutions, freedom of the press is expressly protected as an absolute right. The US Constitution does not have provisions similar to Section 1 of the Charter Rights under the Canadian Constitution nor is such freedom subject to reasonable restrictions as we have under [Article 19\(2\)](#) of the Indian Constitution. Therefore, in US, any interference with the media freedom to access, report and comment upon ongoing trials is prima facie unlawful. Prior restraints are completely banned. If an irresponsible piece of journalism results in prejudice to the proceedings, the legal system does not provide for sanctions against the parties responsible for the wrongdoings. Thus, restrictive contempt of court laws are generally considered incompatible with the constitutional guarantee of free speech. However, in view of cases, like O.J. Simpson, Courts have evolved procedural devices aimed at neutralizing the effect of prejudicial publicity like change of venue, ordering re-trial, reversal of conviction on appeal (which, for the sake of brevity, is hereinafter referred to as “neutralizing devices”). It may be stated that even in US as of date, there is no absolute rule against “prior restraint” and its necessity has been recognized, albeit in exceptional cases [see *Near v. Minnesota*, 283 US 697] by the courts evolving neutralizing techniques.

18. In 1993, Chief Justice William Rehnquist observed: “constitutional law is now so firmly grounded in so many countries, it is time that the US Courts begin looking at decisions of other constitutional courts to aid in their own deliberative process”.

19. Protecting Justice is the English approach. Fair trials and public confidence in the courts as the proper forum for settlement of disputes as part of the administration of justice, under the common law, were given greater weight than the goals served by unrestrained freedom of the press. As a consequence, the exercise of free speech respecting ongoing court proceedings stood limited. England does not have a written constitution. Freedoms in English law have been largely determined by Parliament and Courts. However, after the judgment of ECHR in the case of *Sunday Times v. United Kingdom* [(1979) 2 EHRR 245], in the light of which the English Contempt of Courts Act, 1981 (for short “the 1981 Act”) stood enacted, a balance is sought to be achieved between fair trial rights and free media rights vide [Section 4\(2\)](#). Freedom of speech (including free press) in US is not restricted as under [Article 19\(2\)](#) of our Constitution or under Section 1 of the Canadian Charter. In England, Parliament is supreme. Absent written constitution, Parliament can by law limit the freedom of speech. The view in England, on interpretation, has been and is even today, even after the [Human Rights Act](#),

1998 that the right of free speech or right to access the courts for the determination of legal rights cannot be excluded, except by clear words of the statute. An important aspect needs to be highlighted. Under [Section 4\(2\)](#) of the 1981 Act, courts are expressly empowered to postpone publication of any report of the proceedings or any part of the proceedings for such period as the court thinks fit for avoiding a substantial risk of prejudice to the administration of justice in those proceedings. Why is such a provision made in the Act of 1981? One of the reasons is that in [Section 2](#) of the 1981 Act, strict liability has been incorporated (except in [Section 6](#) whose scope has led to conflicting decisions on the question of intention). The basis of the strict liability contempt under the 1981 Act is the publication of “prejudicial” material. The definition of publication is also very wide. It is true that the 1981 Act has restricted the strict liability contempt to a fewer circumstances as compared to cases falling under common law. However, contempt is an offence sui generis. At this stage, it is important to note that the strict liability rule is the rule of law whereby a conduct or an act may be treated as contempt of court if it tends to interfere with the course of justice in particular legal proceedings, regardless of intent to do so. Sometimes, fair and accurate reporting of the trial (say a murder trial) would nonetheless give rise to substantial risk of prejudice not in the pending trial but in the later or connected trials. In such cases, there is no other practical means short of postponement orders that is capable of avoiding such risk of prejudice to the later or connected trials. Thus, postponement order not only safeguards fairness of the later or connected trials, it prevents possible contempt. That seems to be the underlying reason behind enactment of [Section 4\(2\)](#) of the 1981 Act. According to Borrie & Lowe on the “Law of Contempt”, the extent to which prejudgment by publication of the outcome of a proceedings (referred to by the House of Lords in Sunday Times’s case) may still apply in certain cases. In the circumstances to balance the two rights of equal importance, viz., right to freedom of expression and right to a fair trial, that [Section 4\(2\)](#) is put in the 1981 Act. Apart from balancing it makes the media know where they stand in the matters of reporting of court cases. To this extent, the discretion of courts under common law contempt has been reduced to protect the media from getting punished for contempt under strict liability contempt. Of course, if the court’s order is violated, contempt action would follow.

20. In the case of *Home Office v. Harman* [(1983) 1 A.C. 280] the House of Lords found that the counsel for a party was furnished documents by the opposition party during inspection on the specific undertaking that the contents will not be disclosed to the public. However, in violation of the said undertaking, the counsel gave the papers to a third party, who published them. The counsel was held to be in contempt on the principle of equalization of the right of the accused to defend himself/herself in a criminal trial with right to negotiate settlement in confidence. [See also *Globe and Mail v. Canada (Procureur général)*, 2008 QCCA 2516]

21. The Continental Approach seeks to protect personality. This model is less concerned with the issue of fair trial than with the need for safeguarding privacy, personal dignity and presumption of innocence of trial participants. The underlying assumption of this model is that the media coverage of pending trials might be at odds not only with fairness and impartiality of the proceedings but also with other individual and societal interests. Thus, narrowly focussed prior restraints are provided for, on either a statutory or judicial basis. It is important to note that in the common-law approach the protection of sanctity of legal proceedings as a part of administration of justice is guaranteed by institution of contempt proceedings. According to [Article 6\(2\)](#) of the European Convention of Human Rights, presumption of innocence needs to be protected. The European Courts of Human Rights has ruled on several occasions that the presumption of innocence should be employed as a normative parameter in the matter of balancing the right to a fair trial as against freedom of

speech. The German Courts have accordingly underlined the need to balance the presumption of innocence with freedom of expression based on employment of the above normative parameter of presumption of innocence. France and Australia have taken a similar stance. [Article 6\(2\)](#) of the European Convention of Human Rights imposes a positive obligation on the State to take action to protect the presumption of innocence from interference by non-State actors. However, in a catena of decisions, the ECHR has applied the principle of proportionality to prevent imposition of overreaching restrictions on the media. At this stage, we may state, that the said principle of proportionality has been enunciated by this Court in [Chintaman Rao v. The State of Madhya Pradesh](#) [ (1950) SCR 759].

22. The Canadian Approach: Before Section 1 of Canadian Charter of Rights, the balance between fair trial and administration of justice concerns, on the one hand, and freedom of press, on the other hand, showed a clear preference accorded to the former. Since the Charter introduced an express guarantee of “freedom of the press and other media of communication”, the Canadian Courts reformulated the traditional sub judice rule, showing a more tolerant attitude towards trial-related reporting [see judgment of the Supreme Court of Canada in *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 SCR 835 which held that a publication ban should be ordered when such an order is necessary to prevent a serious risk to the proper administration of justice when reasonably alternative measures like postponement of trial or change of venue will not prevent the risk (necessity test); and that salutary effects of the publication bans outweigh the deleterious effects on the rights and interests of the parties and the public, including the effect on the right to free expression and the right of the accused to open trial (i.e. proportionality test)]. The traditional common law rule governing publication bans – that there be real and substantial risk of interference with the right to a fair trial – emphasized the right to a fair trial over the free expressions interests of those affected by the ban. However, in the context of post-Charter situation, the Canadian Supreme Court has held that when two protected rights come in conflict, Charter principles require a balance to be achieved that fully respects both the rights. The Canadian Courts have, thus, shortened the distance between the US legal experience and the common- law experiences in other countries. It is important to highlight that in *Dagenais*, the publication ban was sought under common law jurisdiction of the Superior Court and the matter was decided under the common law rule that the Courts of Record have inherent power to defer the publication. In *R. v. Mentuck* [2001] 3 SCR 442 that *Dagenais* principle was extended to the presumption of openness and to duty of court to balance the two rights. In both the above cases, Section 2(b) of the Charter which deals with freedom of the press was balanced with Section 1 of the Charter. Under the Canadian Constitution, the Courts of Record (superior courts) have retained the common law discretion to impose such bans provided that the discretion is exercised in accordance with the Charter demands in each individual case.

23. The Australian Approach: The Australian Courts impose publication bans through the exercise of their inherent jurisdiction to regulate their own proceedings. In Australia, contempt laws deal with reporting of court proceedings which interfere with due administration of justice. Contempt laws in Australia embody the concept of “sub judice contempt” which relates to the publication of the material that has a tendency to interfere with the pending proceedings.

24. The New Zealand Approach: It recognizes the Open Justice principle. However, the courts have taken the view that the said principle is not absolute. It must be balanced against the object of doing justice. That, the right to freedom of expression must be balanced against

other rights including the fundamental public interest in preserving the integrity of justice and the administration of justice.

## Indian Approach to prior restraint

### (i) Judicial decisions

25. At the outset, it may be stated that the Supreme Court is not only the sentinel of the fundamental rights but also a balancing wheel between the rights, subject to social control. Freedom of expression is one of the most cherished values of a free democratic society. It is indispensable to the operation of a democratic society whose basic postulate is that the government shall be based on the consent of the governed. But, such a consent implies not only that the consent shall be free but also that it shall be grounded on adequate information, discussion and aided by the widest possible dissemination of information and opinions from diverse and antagonistic sources. Freedom of expression which includes freedom of the press has a capacious content and is not restricted to expression of thoughts and ideas which are accepted and acceptable but also to those which offend or shock any section of the population. It also includes the right to receive information and ideas of all kinds from different sources. In essence, the freedom of expression embodies the right to know. However, under our Constitution no right in Part III is absolute. Freedom of expression is not an absolute value under our Constitution. It must not be forgotten that no single value, no matter exalted, can bear the full burden of upholding a democratic system of government. Underlying our Constitutional system are a number of important values, all of which help to guarantee our liberties, but in ways which sometimes conflict. Under our Constitution, probably, no values are absolute. All important values, therefore, must be qualified and balanced against, other important, and often competing, values. This process of definition, qualification and balancing is as much required with respect to the value of freedom of expression as it is for other values. Consequently, free speech, in appropriate cases, has got to correlate with fair trial. It also follows that in appropriate case one right [say freedom of expression] may have to yield to the other right like right to a fair trial. Further, even Articles 14 and 21 are subject to the test of reasonableness after the judgment of this Court in the case of [Maneka Gandhi v. Union of India](#) [(1978) 1 SCC 248].

### Decisions of the Supreme Court on “prior restraint”

26. [In Brij Bhushan v. State of Delhi](#) [AIR 1950 SC 129], this Court was called upon to balance exercise of freedom of expression and pre- censorship. This Court declared the statutory provision as unconstitutional inasmuch as the restrictions imposed by it were outside [Article 19\(2\)](#), as it then stood. However, this Court did not say that pre- censorship per se is unconstitutional.

27. [In Virendra v. State of Punjab](#) [AIR 1957 SC 896], this Court upheld pre-censorship imposed for a limited period and right of representation to the government against such restraint under Punjab Special Powers (Press) Act, 1956. However, in the same judgment, another provision imposing pre- censorship but without providing for any time limit or right to represent against pre-censorship was struck down as unconstitutional.

28. In the case of [K.A. Abbas v. Union of India](#) [AIR 1971 SC 481], this Court upheld prior restraint on exhibition of motion pictures subject to Government setting up a corrective

machinery and an independent Tribunal and reasonable time limit within which the decision had to be taken by the censoring authorities.

29. At this stage, we wish to clarify that the reliance on the above judgments is only to show that “prior restraint” per se has not been rejected as constitutionally impermissible. At this stage, we may point out that in the present IAs we are dealing with the concept of “prior restraint” per se and not with cases of misuse of powers of pre-censorship which were corrected by the Courts [see [Binod Rao v. Minocher Rustom Masani](#) reported in 78 Bom LR 125 and C. Vaidya v. D’Penha decided by Gujarat High Court in Sp. CA 141 of 1976 on 22.03.1976 (unreported)]

30. The question of prior restraint arose before this Court in 1988, in the case of [Reliance Petrochemicals Ltd. v. Proprietors of Indian Express Newspapers Bombay \(P\) Ltd.](#) [AIR 1989 SC 190] in the context of publication in one of the national dailies of certain articles which contained adverse comments on the proposed issue of debentures by a public limited company. The validity of the debenture was sub judice in this Court. Initially, the court granted injunction against the press restraining publication of articles on the legality of the debenture issue. The test formulated was that any preventive injunction against the press must be “based on reasonable grounds for keeping the administration of justice unimpaired” and that, there must be reasonable ground to believe that the danger apprehended is real and imminent. The Court went by the doctrine propounded by Holmes J of “clear and present danger”. This Court treated the said doctrine as the basis of balance of convenience test. Later on, the injunction was lifted after subscription to debentures had closed.

31. In the case of [Naresh Shridhar Mirajkar v. State of Maharashtra](#) [AIR 1967 SC 1], this Court dealt with the power of a court to conduct court proceedings in camera under its inherent powers and also to incidentally prohibit publication of the court proceedings or evidence of the cases outside the court by the media. It may be stated that “open Justice” is the cornerstone of our judicial system. It instills faith in the judicial and legal system. However, the right to open justice is not absolute. It can be restricted by the court in its inherent jurisdiction as done in Mirajkar’s case if the necessities of administration of justice so demand [see [Kehar Singh v. State \(Delhi Administration\)](#), AIR 1988 SC 1883]. Even in US, the said principle of open justice yields to the said necessities of administration of justice [see: *Globe Newspaper Co. v. Superior Court*, 457 US 596]. The entire law has been reiterated once again in the judgment of this Court in [Mohd. Shahabuddin v. State of Bihar](#) [(2010) 4 SCC 653], affirming judgment of this Court in Mirajkar’s case.

32. Thus, the principle of open justice is not absolute. There can be exceptions in the interest of administration of justice. In Mirajkar, the High Court ordered that the deposition of the defence witness should not be reported in the newspapers. This order of the High Court was challenged in this Court under [Article 32](#). This Court held that apart from Section 151 of the Code of Civil Procedure, the High Court had the inherent power to restrain the press from reporting where administration of justice so demanded. This Court held vide para 30 that evidence of the witness need not receive excessive publicity as fear of such publicity may prevent the witness from speaking the truth. That, such orders prohibiting publication for a temporary period during the course of trial are permissible under the inherent powers of the court whenever the court is satisfied that interest of justice so requires. As to whether such a temporary prohibition of publication of court proceedings in the media under the inherent powers of the court can be said to offend [Article 19\(1\)\(a\)](#) rights [which includes freedom of the press to make such publication], this Court held that an order of a court passed to protect

the interest of justice and the administration of justice could not be treated as violative of [Article 19\(1\)\(a\)](#) [see para 12]. The judgment of this Court in *Mirajkar* is delivered by a Bench of 9-Judges and is binding on this Court.

33. At this stage, it may be noted that the judgment of the Privy Council in the case of *Independent Publishing Co. Ltd. v. AG of Trinidad and Tobago* [2005 (1) AC 190] has been doubted by the Court of Appeal in New Zealand in the case of *Vincent v. Solicitor General* [(2012) NZCA 188 dated 11.5.2012]. In any event, on the inherent powers of the Courts of Record we are bound by the judgment of this Court in *Mirajkar*. Thus, Courts of Record under [Article 129/Article 215](#) have inherent powers to prohibit publication of court proceedings or the evidence of the witness. The judgments in *Reliance Petrochemicals Ltd.* and *Mirajkar* were delivered in civil cases. However, in *Mirajkar*, this Court held that all Courts which have inherent powers, i.e., the Supreme Court, the High Courts and Civil Courts can issue prior restraint orders or proceedings, prohibitory orders in exceptional circumstances temporarily prohibiting publications of Court proceedings to be made in the media and that such powers do not violate [Article 19\(1\)\(a\)](#). Further, it is important to note, that, one of the Heads on which [Article 19\(1\)\(a\)](#) rights can be restricted is in relation to “contempt of court” under [Article 19\(2\)](#). [Article 19\(2\)](#) preserves common law of contempt as an “existing law”. In fact, the [Contempt of Courts Act, 1971](#) embodies the common law of contempt. At this stage, it is suffice to state that the Constitution framers were fully aware of the Institution of Contempt under the common law which they have preserved as “existing law” under [Article 19\(2\)](#) read with [Article 129](#) and [Article 215](#) of Constitution. The reason being that contempt is an offence sui generis. The Constitution framers were aware that the law of contempt is only one of the ways in which administration of justice is protected, preserved and furthered. That, it is an important adjunct to the criminal process and provides a sanction. Other civil courts have the power under Section 151 of Code of Civil Procedure to pass orders prohibiting publication of court proceedings. In *Mirajkar*, this Court referred to the principles governing Courts of Record under [Article 215](#) [see para 60]. It was held that the High Court is a Superior Court of Record and that under [Article 215](#) it has all the powers of such a court including the power to punish contempt of itself. At this stage, the word “including” in [Article 129/Article 215](#) is to be noted. It may be noted that each of the Articles is in two parts. The first part declares that the Supreme Court or the High Court “shall be a Court of Record and shall have all the powers of such a court”. The second part says “includes the powers to punish for contempt”. These Articles save the pre-existing powers of the Courts as courts of record and that the power includes the power to punish for contempt [see [Delhi Judicial Service Association v. State of Gujarat](#) [(1991) 4 SCC 406] and Supreme Court [Bar Association v. Union of India](#) [(1998) 4 SCC 409]. As such a declaration has been made in the Constitution that the said powers cannot be taken away by any law made by the Parliament except to the limited extent mentioned in [Article 142\(2\)](#) in the matter of investigation or punishment of any contempt of itself. If one reads [Article 19\(2\)](#) which refers to law in relation to Contempt of Court with the first part of [Article 129](#) and [Article 215](#), it becomes clear that the power is conferred on the High Court and the Supreme Court to see that “the administration of justice is not perverted, prejudiced, obstructed or interfered with”. To see that the administration of justice is not prejudiced or perverted clearly includes power of the Supreme Court/High Court to prohibit temporarily, statements being made in the media which would prejudice or obstruct or interfere with the administration of justice in a given case pending in the Supreme Court or the High Court or even in the subordinate courts. In view of the judgment of this Court in [A.K. Gopalan v. Noordeen](#) [(1969) 2 SCC 734], such statements which could be prohibited temporarily would include statements in the media which would prejudice the right to a fair trial of a suspect or accused under [Article 21](#) from

the time when the criminal proceedings in a subordinate court are imminent or where suspect is arrested. This Court has held in [Ram Autar Shukla v. Arvind Shukla](#) [1995 Supp (2) SCC 130] that the law of contempt is a way to prevent the due process of law from getting perverted. That, the words “due course of justice” in [Section 2](#) (c) or [Section 13](#) of the 1971 Act are wide enough and are not limited to a particular judicial proceedings. That, the meaning of the words “contempt of court” in [Article 129](#) and [Article 215](#) is wider than the definition of “criminal contempt” in [Section 2](#) (c) of the 1971 Act. Here, we would like to add a caveat. The contempt of court is a special jurisdiction to be exercised sparingly and with caution whenever an act adversely affects the administration of justice [see Nigel Lowe and Brenda Sufrin, Law of Contempt (Third Edition)]. Trial by newspaper comes in the category of acts which interferes with the course of justice or due administration of justice [see Nigel Lowe and Brenda Sufrin, page 5 of Fourth Edition]. According to Nigel Lowe and Brenda Sufrin [page 275] and also in the context of second part of [Article 129](#) and [Article 215](#) of the Constitution the object of the contempt law is not only to punish, it includes the power of the Courts to prevent such acts which interfere, impede or pervert administration of justice. Presumption of innocence is held to be a human right. [See : [Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra](#) (2005) 5 SCC 294]. If in a given case the appropriate Court finds infringement of such presumption by excessive prejudicial publicity by the newspapers (in general), then under inherent powers, the Courts of Record suo motu or on being approached or on report being filed before it by subordinate court can under its inherent powers under [Article 129](#) or [Article 215](#) pass orders of postponement of publication for a limited period if the applicant is able to demonstrate substantial risk of prejudice to the pending trial and provided he is able to displace the presumption of Open Justice and to that extent the burden will be on the applicant who seeks such postponement of offending publication.

34. The above discussion shows that in most jurisdictions there is power in the courts to postpone reporting of judicial proceedings in the interest of administration of justice. Under [Article 19\(2\)](#) of the Constitution, law in relation to contempt of court, is a reasonable restriction. It also satisfies the test laid down in the judgment of this Court in [R. Rajagopal v. State of T.N.](#) [(1994) 6 SCC 632]. As stated, in most common law jurisdictions, discretion is given to the courts to evolve neutralizing devices under contempt jurisdiction such as postponement of the trial, re- trials, change of venue and in appropriate cases even to grant acquittals in cases of excessive media prejudicial publicity. The very object behind empowering the courts to devise such methods is to see that the administration of justice is not perverted, prejudiced, obstructed or interfered with. At the same time, there is a presumption of Open Justice under the common law. Therefore, courts have evolved mechanisms such as postponement of publicity to balance presumption of innocence, which is now recognized as a human right in [Ranjitsing Brahmajeetsing Sharma v. State of Maharashtra](#) (supra) vis-à-vis presumption of Open Justice. Such an order of postponement has to be passed only when other alternative measures such as change of venue or postponement of trial are not available. In passing such orders of postponement, courts have to keep in mind the principle of proportionality and the test of necessity. The applicant who seeks order of postponement of publicity must displace the presumption of Open Justice and only in such cases the higher courts shall pass the orders of postponement under [Article 129/Article 215](#) of the Constitution. Such orders of postponement of publicity shall be passed for a limited period and subject to the courts evaluating in each case the necessity to pass such orders not only in the context of administration of justice but also in the context of the rights of the individuals to be protected from prejudicial publicity or mis-information, in other words, where the court is satisfied that [Article 21](#) rights of a person are offended. There

is no general law for courts to postpone publicity, either prior to adjudication or during adjudication as it would depend on facts of each case. The necessity for any such order would depend on extent of prejudice, the effect on individuals involved in the case, the over-riding necessity to curb the right to report judicial proceedings conferred on the media under [Article 19\(1\)\(a\)](#) and the right of the media to challenge the order of postponement.

(ii) [Contempt of Courts Act](#), 1971

35. [Section 2](#) defines “contempt”, “civil contempt” and “criminal contempt”. In the context of contempt on account of publications which are not fair and accurate publication of court proceedings, the relevant provisions are contained in [Sections 4](#) and [7](#) whereas [Section 13](#) is a general provision which deals with defences. It will be noticed that [Section 4](#) deals with “report of a judicial proceeding”. A person is not to be treated as guilty of contempt if he has published such a report which is fair and accurate. [Section 4](#) is subject to the provisions of [Section 7](#) which, however, deals with publication of “information” relating to “proceedings in chambers”. Here the emphasis is on “information” whereas in [Section 4](#), emphasis is on “report of a judicial proceeding”. This distinction between a “report of proceedings” and “information” is necessary because [Section 7](#) deals with proceedings in camera where there is no access to the media. In this connection, the provisions of [Section 13](#) have to be borne in mind. The inaccuracy of reporting of court proceedings will be contempt only if it can be said on the facts of a particular case, to amount to substantial interference with the administration of justice. The reason behind [Section 4](#) is to grant a privilege in favour of the person who makes the publication provided it is fair and accurate. This is based on the presumption of “open justice” in courts. Open justice permits fair and accurate reports of court proceedings to be published. The media has a right to know what is happening in courts and to disseminate the information to the public which enhances the public confidence in the transparency of court proceedings. As stated above, sometimes, fair and accurate reporting of the trial (say a murder trial) would nonetheless give rise to substantial risk of prejudice not in the pending trial but in the later or connected trials. In such cases, there is no other practical means short of postponement orders that is capable of avoiding such risk of prejudice to the later or connected trials. Thus, postponement order not only safeguards fairness of the later or connected trials, it prevents possible contempt by the Media.

(iii) “Order of Postponement” of publication- its nature and Object

36. As stated, in US such orders of postponement are treated as restraints which offend the First Amendment and as stated courts have evolved neutralizing techniques to balance free speech and fair trial whereas in Canada they are justified on the touchstone of Section 1 of the Charter of Rights. What is the position of such Orders under [Article 19\(1\)\(a\)](#) and under [Article 21](#)?

37. Before examining the provisions of [Article 19\(1\)\(a\)](#) and [Article 21](#), it may be reiterated, that, the right to freedom of speech and expression, is absolute under the First Amendment in the US Constitution unlike Canada and India where we have the test of justification in the societal interest which saves the law despite infringement of the rights under [Article 19\(1\)\(a\)](#). In India, we have the test of “reasonable restriction” in [Article 19\(2\)](#). In the case of [Secretary, Ministry of Information & Broadcasting, Govt. of India v. Cricket Association of Bengal](#) [(1995) 2 SCC 161] it has been held that “it is true that [Article 19\(2\)](#) does not use the words “national interest”, “interest of society” or “public interest” but the several grounds mentioned in [Article 19\(2\)](#) for imposition of restrictions such as security of the State, public

order, law in relation to contempt of court, defamation etc. are ultimately referable to societal interest which is another name for public interest” [para 189]. It has been further held that, “the said grounds in [Article 19\(2\)](#) are conceived in the interest of ensuring and maintaining conditions in which the said right can meaningfully be exercised by the citizens of this country” [para 151].

38. In the case of [E.M.S. Namboodripad v. T. Narayanan Nambiar](#) [AIR 1970 SC 2015] it has been held that “the existence of law containing its own guiding principles, reduces the discretion of the Courts to the minimum. But where the law [i.e. 1971 Act] is silent the Courts have discretion” [para 30]. This is more so when the said enactment is required to be interpreted in the light of [Article 21](#). We would like to quote herein below para 6 of the above judgment which reads as under :

“The law of contempt stems from the right of the courts to punish by imprisonment or fines persons guilty of words or acts which either obstruct or tend to obstruct the administration of justice. This right is exercised in India by all courts when contempt is committed in *facie curiae* and by the superior courts on their own behalf or on behalf of courts subordinate to them even if committed outside the courts. Formerly, it was regarded as inherent in the powers of a court of record and now by the Constitution of India, it is a part of the powers of the Supreme Court and the High Courts.”

39. The question before us is whether such “postponement orders” constitute restrictions under [Article 19\(2\)](#) as read broadly by this Court in the case of Cricket Association of Bengal (*supra*)?

40. As stated, right to freedom of expression under the First Amendment in US is absolute which is not so under Indian Constitution in view of such right getting restricted by the test of reasonableness and in view of the Heads of Restrictions under [Article 19\(2\)](#). Thus, the clash model is more suitable to American Constitution rather than Indian or Canadian jurisprudence, since First Amendment has no equivalent of [Article 19\(2\)](#) or Section 1 of the Canadian Charter. This has led the American Courts, in certain cases, to evolve techniques or methods to be applied in cases where on account of excessive prejudicial publicity, there is usurpation of court’s functions. These are techniques such as retrials being ordered, change of venue, ordering acquittals even at the Appellate stage, etc. In our view, orders of postponement of publications/ publicity in appropriate cases, as indicated above, keeping in mind the timing (the stage at which it should be ordered), its duration and the right of appeal to challenge such orders is just a neutralizing device, when no other alternative such as change of venue or postponement of trial is available, evolved by courts as a preventive measure to protect the press from getting prosecuted for contempt and also to prevent administration of justice from getting perverted or prejudiced.

(iv) Width of the postponement orders

41. The question is - whether such “postponement orders” constitute restriction under [Article 19\(1\)\(a\)](#) and whether such restriction is saved under [Article 19\(2\)](#)?

42. At the outset, we must understand the nature of such orders of postponement. Publicity postponement orders should be seen, in the context of [Article 19\(1\)\(a\)](#) not being an absolute right. The US clash model based on collision between freedom of expression (including free press) and the right to a fair trial will not apply to Indian Constitution. In certain cases, even

accused seeks publicity (not in the pejorative sense) as openness and transparency is the basis of a fair trial in which all the stakeholders who are a party to a litigation including the judges are under scrutiny and at the same time people get to know what is going on inside the court rooms. These aspects come within the scope of [Article 19\(1\)](#) and [Article 21](#). When rights of equal weight clash, Courts have to evolve balancing techniques or measures based on recalibration under which both the rights are given equal space in the Constitutional Scheme and this is what the “postponement order” does subject to the parameters, mentioned hereinafter. But, what happens when courts are required to balance important public interests placed side by side. For example, in cases where presumption of open justice has to be balanced with presumption of innocence, which as stated above, is now recognized as a human right. These presumptions existed at the time when the Constitution was framed [existing law under [Article 19\(2\)](#)] and they continue till date not only as part of rule of law under [Article 14](#) but also as an [Article 21](#) right. The constitutional protection in [Article 21](#) which protects the rights of the person for a fair trial is, in law, a valid restriction operating on the right to free speech under [Article 19\(1\)\(a\)](#), by virtue of force of it being a constitutional provision. Given that the postponement orders curtail the freedom of expression of third parties, such orders have to be passed only in cases in which there is real and substantial risk of prejudice to fairness of the trial or to the proper administration of justice which in the words of Justice Cardozo is “the end and purpose of all laws”. However, such orders of postponement should be ordered for a limited duration and without disturbing the content of the publication. They should be passed only when necessary to prevent real and substantial risk to the fairness of the trial (court proceedings), if reasonable alternative methods or measures such as change of venue or postponement of trial will not prevent the said risk and when the salutary effects of such orders outweigh the deleterious effects to the free expression of those affected by the prior restraint. The order of postponement will only be appropriate in cases where the balancing test otherwise favours non-publication for a limited period. It is not possible for this Court to enumerate categories of publications amounting to contempt. It would require the courts in each case to see the content and the context of the offending publication. There cannot be any straightjacket formula enumerating such categories. In our view, keeping the above parameters, if the High Court/ Supreme Court (being Courts of Record) pass postponement orders under their inherent jurisdictions, such orders would fall within “reasonable restrictions” under [Article 19\(2\)](#) and which would be in conformity with societal interests, as held in the case of Cricket Association of Bengal (supra). In this connection, we must also keep in mind the language of [Article 19\(1\)](#) and [Article 19\(2\)](#). Freedom of press has been read into [Article 19\(1\)\(a\)](#). After the judgment of this Court in Maneka Gandhi (supra, p. 248), it is now well-settled that test of reasonableness applies not only to [Article 19\(1\)](#) but also to [Article 14](#) and [Article 21](#). For example, right to access courts under Articles 32, 226 or 136 seeking relief against infringement of say [Article 21](#) rights has not been specifically mentioned in [Article 14](#). Yet, this right has been deduced from the words “equality before the law” in [Article 14](#). Thus, the test of reasonableness which applies in [Article 14](#) context would equally apply to [Article 19\(1\)](#) rights. Similarly, while judging reasonableness of an enactment even Directive Principles have been taken into consideration by this Court in several cases [see recent judgment of this Court in [Society for Un-aided Private Schools of Rajasthan v. U.O.I.](#) 2012 (4) SCALE 272. Similarly, in the case of [Dharam Dutt v. Union of India](#) reported in (2004) 1 SCC 712, it has been held that rights not included in [Article 19\(1\)\(c\)](#) expressly, but which are deduced from the express language of the Article are concomitant rights, the restrictions thereof would not merely be those in [Article 19\(4\)](#)]. Thus, balancing of such rights or equal public interest by order of postponement of publication or publicity in cases in which there is real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial and within the above

enumerated parameters of necessity and proportionality would satisfy the test of reasonableness in Articles 14 and 19(2). One cannot say that what is reasonable in the context of [Article 14](#) or [Article 21](#) is not reasonable when it comes to [Article 19\(1\)\(a\)](#). Ultimately, such orders of postponement are only to balance conflicting public interests or rights in Part III of Constitution. They also satisfy the requirements of justification under [Article 14](#) and Article

21. Further, we must also keep in mind the words of [Article 19\(2\)](#) “in relation to contempt of court”. At the outset, it may be stated that like other freedoms, clause 1(a) of [Article 19](#) refers to the common law right of freedom of expression and does not apply to any right created by the statute (see page 275 of Constitution of India by D.D. Basu, 14th edition). The above words “in relation to” in [Article 19\(2\)](#) are words of widest amplitude. When the said words are read in relation to contempt of court, it follows that the law of contempt is treated as reasonable restriction as it seeks to prevent administration of justice from getting perverted or prejudiced or interfered with. Secondly, these words show that the expression “contempt of court” in [Article 19\(2\)](#) indicates that the object behind putting these words in [Article 19\(2\)](#) is to regulate and control administration of justice. Thirdly, if one reads [Article 19\(2\)](#) with the second part of [Article 129](#) or [Article 215](#), it is clear that the contempt action does not exhaust the powers of the Court of Record. The reason being that contempt is an offence sui generis. Common law defines what is the scope of contempt or limits of contempt. [Article 142\(2\)](#) operates only in a limited field. It permits a law to be made restricted to investigations and punishment and does not touch the inherent powers of the Court of Record. Fourthly, in case of criminal contempt, the offending act must constitute interference with administration of justice. Contempt jurisdiction of courts of record forms part of their inherent jurisdiction under [Article 129/ Article 215](#). Superior Courts of Record have inter alia inherent superintendent jurisdiction to punish contempt committed in connection with proceedings before inferior courts. The test is that the publication (actual and not planned publication) must create a real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial. It is important to bear in mind that sometimes even fair and accurate reporting of the trial (say murder trial) could nonetheless give rise to the “real and substantial risk of serious prejudice” to the connected trials. In such cases, though rare, there is no other practical means short of postponement orders that is capable of avoiding the real and substantial risk of prejudice to the connected trials. Thus, postponement orders safeguard fairness of the connected trials. The principle underlying postponement orders is that it prevents possible contempt. Of course, before passing postponement orders, Courts should look at the content of the offending publication (as alleged) and its effect. Such postponement orders operate on actual publication. Such orders direct postponement of the publication for a limited period. Thus, if one reads [Article 19\(2\)](#), [Article 129/ Article 215](#) and [Article 142\(2\)](#), it is clear that Courts of Record “have all the powers including power to punish” which means that Courts of Record have the power to postpone publicity in appropriate cases as a preventive measure without disturbing its content. Such measures protect the Media from getting prosecuted or punished for committing contempt and at the same time such neutralizing devices or techniques evolved by the Courts effectuate a balance between conflicting public interests. It is well settled that precedents of this Court under [Article 141](#) and the Comparative Constitutional law helps courts not only to understand the provisions of the Indian Constitution it also helps the Constitutional Courts to evolve principles which as stated by Ronald Dworkin are propositions describing rights [in terms of its content and contours] (See “Taking Rights Seriously” by Ronald Dworkin, 5th Reprint 2010). The postponement orders is, as stated above, a neutralizing device evolved by the courts to balance interests of equal weightage, viz., freedom of expression vis-à-vis freedom of trial, in

the context of the law of contempt. One aspect needs to be highlighted. The shadow of the law of contempt hangs over our jurisprudence. The media, in several cases in India, is the only representative of the public to bring to the notice of the court issues of public importance including governance deficit, corruption, drawbacks in the system. Keeping in mind the important role of the media, Courts have evolved several neutralizing techniques including postponement orders subject to the twin tests of necessity and proportionality to be applied in cases where there is real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial. Such orders would also put the Media to notice about possible contempt. However, it would be open to Media to challenge such orders in appropriate proceedings. Contempt is an offence sui generis. Purpose of Contempt Law is not only to punish. Its object is to preserve the sanctity of administration of justice and the integrity of the pending proceeding. Thus, the postponement order is not a punitive measure, but a preventive measure as explained hereinabove. Therefore, in our view, such orders of postponement, in the absence of any other alternative measures such as change of venue or postponement of trial, satisfy the requirement of justification under [Article 19\(2\)](#) and they also help the Courts to balance conflicting societal interests of right to know vis-à-vis another societal interest in fair administration of justice. One more aspect needs to be mentioned. Excessive prejudicial publicity leading to usurpation of functions of the Court not only interferes with administration of justice which is sought to be protected under [Article 19\(2\)](#), it also prejudices or interferes with a particular legal proceedings. In such case, Courts are duty bound under inherent jurisdiction, subject to above parameters, to protect the presumption of innocence which is now recognised by this Court as a human right under [Article 21](#), subject to the applicant proving displacement of such a presumption in appropriate proceedings. Lastly, postponement orders must be integrally connected to the outcome of the proceedings including guilt or innocence of the accused, which would depend on the facts of each case. For aforesaid reasons, we hold that subject to above parameters, postponement orders fall under [Article 19\(2\)](#) and they satisfy the test of reasonableness.

#### (v) Right to approach the High Court/ Supreme Court

43. In the light of the law enunciated hereinabove, anyone, be he an accused or an aggrieved person, who genuinely apprehends on the basis of the content of the publication and its effect, an infringement of his/ her rights under [Article 21](#) to a fair trial and all that it comprehends, would be entitled to approach an appropriate writ court and seek an order of postponement of the offending publication/ broadcast or postponement of reporting of certain phases of the trial (including identity of the victim or the witness or the complainant), and that the court may grant such preventive relief, on a balancing of the right to a fair trial and [Article 19\(1\)\(a\)](#) rights, bearing in mind the abovementioned principles of necessity and proportionality and keeping in mind that such orders of postponement should be for short duration and should be applied only in cases of real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial. Such neutralizing device (balancing test) would not be an unreasonable restriction and on the contrary would fall within the proper constitutional framework.

#### Maintainability

44. As stated above, in the present case, we heard various stake holders as an important question of public importance arose for determination. Broadly, on maintainability the following contentions were raised: (i) the proceedings were not maintainable as there is no lis; (ii) there is a difference between law-making and framing of guidelines. That, law can be

made only by Parliament. That, guidelines to be framed by the Court, therefore, should be self-regulatory or at the most advisory. (iii) under [Article 142](#), this Court cannot invest courts or any other authority with jurisdiction, adjudicatory or otherwise, which they do not possess.

45. [Article 141](#) uses the phrase “law declared by the Supreme Court.” It means law made while interpreting the statutes or the Constitution. Such judicial law-making is part of the judicial process. Further under [Article 141](#), law-making through interpretation and expansion of the meanings of open-textured expressions such as “law in relation to contempt of court” in [Article 19\(2\)](#), “equal protection of law”, “freedom of speech and expression” and “administration of justice” is a legitimate judicial function. According to Ronald Dworkin, “Arguments of principle are arguments intended to establish an individual right. Principles are propositions that describe rights.” [See “Taking Rights Seriously” by Ronald Dworkin, 5th Reprint 2010, p. 90]. In this case, this Court is only declaring under [Article 141](#), the constitutional limitations on free speech under [Article 19\(1\)\(a\)](#), in the context of [Article 21](#). The exercise undertaken by this Court is an exercise of exposition of constitutional limitations under [Article 141](#) read with [Article 129/Article 215](#) in the light of the contentions and large number of authorities referred to by the counsel on [Article 19\(1\)\(a\)](#), [Article 19\(2\)](#), [Article 21](#), [Article 129](#) and [Article 215](#) as also the “law of contempt” insofar as interference with administration of justice under the common law as well as under [Section 2\(c\)](#) of 1971 Act is concerned. What constitutes an offending publication would depend on the decision of the court on case to case basis. Hence, guidelines on reporting cannot be framed across the Board. The shadow of “law of contempt” hangs over our jurisprudence. This Court is duty bound to clear that shadow under [Article 141](#). The phrase “in relation to contempt of court” under [Article 19\(2\)](#) does not in the least describe the true nature of the offence which consists in interfering with administration of justice; in impeding and perverting the course of justice. That is all which is done by this judgment. We have exhaustively referred to the contents of the IAs filed by Sahara and SEBI. As stated above, the right to negotiate and settle in confidence is a right of a citizen and has been equated to a right of the accused to defend himself in a criminal trial. In this case, Sahara has complained to this Court on the basis of breach of confidentiality by the Media. In the circumstances, it cannot be contended that there was no lis. Sahara, therefore, contended that this Court should frame guidelines or give directions which are advisory or self-regulatory whereas SEBI contended that the guidelines/directions should be given by this Court which do not have to be coercive. In the circumstances, constitutional adjudication on the above points was required and it cannot be said that there was no lis between the parties. We reiterate that the exposition of constitutional limitations has been done under [Article 141](#) read with [Article 129/Article 215](#). When the content of rights is considered by this Court, the Court has also to consider the enforcement of the rights as well as the remedies available for such enforcement. In the circumstances, we have expounded the constitutional limitations on free speech under [Article 19\(1\)\(a\)](#) in the context of [Article 21](#) and under [Article 141](#) read with [Article 129/Article 215](#) which preserves the inherent jurisdiction of the Courts of Record in relation to contempt law. We do not wish to enumerate categories of publication amounting to contempt as the Court(s) has to examine the content and the context on case to case basis.

## Conclusion

46. Accordingly, IA Nos. 4-5 and 10 are disposed of.

47. For the reasons given above, we do not wish to express any opinion on the merit of the other IAs. Consequently, they are dismissed.

.....CJI (S. H. Kapadia) .....J.

(D.K. Jain) .....J.

(Surinder Singh Nijjar) .....J.

(Ranjana Prakash Desai) .....J.

(Jagdish Singh Khehar) New Delhi;

September 11, 2012.

Supreme Court of India

State Of Maharashtra vs Rajendra Jawnmal Gandhi on 11 September, 1997

Author: D Wadhwa

Bench: M.K. Mukherjee, D.P. Washwa

PETITIONER:

STATE OF MAHARASHTRA

Vs.

RESPONDENT:

RAJENDRA JAWNMAL GANDHI

DATE OF JUDGMENT: 11/09/1997

BENCH:

M.K. MUKHERJEE, D.P. WASHWA

ACT:

HEADNOTE:

JUDGMENT:

WITH CRIMINAL APPEAL NOS. 840 & 839 OF 1997 (Arising out of SLP (Crl.) Nos. 2510 /97 Crl. M.P. No.839/97) and SLP (Crl.) No.1773/96) J U D G M E N T D.P. WADHWA, J.

leave granted Rajendra Jawanmal Gandhi (the accused) was convicted by the Sessions Judge, Satara for offences under [Section 376](#) Indian Penal Code (IPC) and Section 57 of the Bombay Children Act, 1948 for having committed rape on a girl of eight years of age and sentenced to undergo rigorous imprisonment for 7 years and to pay fine of Rs.5,000/- and in default of payment of fine to undergo rigorous imprisonment for six months and for offence under Section 57 of the Bombay Children Act, he was sentenced to undergo rigorous imprisonment for one year and fine of Rs.500/- and in default thereof rigorous imprisonment for one moth. The substantive sentences were ordered to urn concurrently. Maruti car in which the offence of rape was committed was ordered to be forfeited and confiscated to the State. The accused appealed to the Bombay High Court against his conviction and sentence. A Division Bench of the High Court by judgment dated October 4, 1994 upheld the conviction of the accused under Section 57 of the Bombay Children Act and upset the conviction under [Section 376](#) IPC and instead convicted him for an offence under [Section 354](#) IPC and sentenced him to suffer rigorous imprisonment which he had already undergone (which was 33 days in all) and to pay fine of Rs.40,000/-. In default of payment of fine, the accused was sentenced to undergo rigorous imprisonment for three months. It was ordered that our of the fine so realised, a sum of Rs.25,000/- shall be paid to the complaint who was father of the girl. For an offence under Section 57 of the Bombay Children Act, sentence was reduced to imprisonment already undergone and the accused not required to undergo any separate imprisonment for this offence. The Maruti Car was ordered to be returned to the accused and the order of forfeiture and confiscation was set aside.

The matter did not end at that. Nagrik Kirti Samiti, Kolhapur which had been formed was agitated about the acquittal of the accused for an offence under [Section 376](#) IPC. The Convener of the Samiti Mr. P.D. Hankare represented to the State Government to file an appeal to this Court against the acquittal of the accused under [Section 376](#) IPC. In the meantime, the accused had deposited the fine of Rs.40,000/- as ordered by the High Court and out of this amount a sum of Rs.25,000/- has been withdrawn by the father of the girl. Perhaps this was the consideration for the State Government not to file any appeal in the Supreme Court. Since there was no response from the State Government, Mr. P.D. Hankare, Convener of the Nagarik Kirti Samiti, Kolhapur approached this Court. He was granted permission to file special leave petition against the conviction and sentence on the accused by the High Court and as afore mentioned, after notice of this appeal was served upon the State of Maharashtra and the accused, both filed separate appeals in this Court, while the State of Maharashtra filed appeal against the conviction and sentence of the accused by the High Court praying for his conviction under [Section 376](#) IPC and for enhancement of his sentence of minimum of 10 years, the accused filed appeal against his very conviction and sentence under [Section 354](#) IPC and 57 of the Bombay Children Act.

Since the State itself has filed an appeal praying for conviction of the accused under [Section 376](#) IPC and for his punishment under [Section 376\(f\)](#) as the girl child was less than 12 years of age, leave granted to P.D. Hankare, Convener, Nagrik Kirti Samiti, Kolhapur loses its significance and we direct that the leave be revoked.

It may be noticed at the outset that the offence was committed at Kolhapur and the accused was to be tried there in the court of Session. But because of public outcry, the plea of the accused that he may not get fair trial at Kolhapur was accepted and the case was transferred to the file of Sessions Judge, Satara.

Before we consider the rival contentions, we may set out the relevant provisions of law under which the accused was tried:

[Section 375](#) and [Section 376](#) in relevant part is as under:

"375 Rape. A man is said to commit "rape" who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six of following descriptions:- First.- Against her will. Secondly.- Without her consent. Thirdly.- With her consent, when her consent has been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly.- With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married Fifthly.- With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly.- With or without her consent, when she is under sixteen years of age.

Explanation.- Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception.- Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

376. Punishment for rape.- (1) whoever, except in the cases provided for by sub-section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may extend to ten years and shall also be liable to fine unless the woman raped is his own wife and is not under twelve years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both: Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than seven years. (2) Whoever, -

(a) .....

(b).....

(c).....

(d) .....

(e) .....

(f) Commits rape on a woman when she is under twelve years of age; or

(g) ..... shall be punished with rigorous imprisonment for a term which shall not be less than ten year but which may be for life and shall also be liable to fine:

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years."

Section 57 of the Bombay Children Act, 1948 is as under:

"57. Whoever seduces or indulges in immoral behaviour with a girl under the age of eighteen years shall, on conviction be punished with imprisonment of either description for a term which may extend to two years or with fine which may extended to one thousand rupees or with both."

"Immoral behaviour" is defined under [Section 4\(j\)](#) of this Act and it includes any act or conduct which is indecent or obscene.

The accused was charged for having committed rape on a girl of 8 years of age in a Maruti car of chocolate colour on a road leading to Ragala Park at Kolhapur at about 9.30 A.M. on September 24, 1986, thus committing offences punishable under [Section 376](#) IPC and 57 of the Bombay Children Act.

In support of the charge the prosecution examined as many as 24 witness. The material witness would, however, be (1) the complainant Shrikant Desphande, father of the girl, (2) prosecutrix, (3) Police Inspector Labde who initially investigated the case, (4) Dr. Mrs. Sahastrabuddha (family doctor of the complainant), (5), Dr. Gunda (Medical Officer, Civil Hospital, Kolhapur), (6) Dr. Hoshing (Civil Surgeon, Kolhapur), (7) Vishakha Kulkarni (who gave the registration number of the Maruti car of chocolate colour), (8) Parashuram Jadhav (earlier registered owner of the car but had sold the same to the company of which accused was a Director), (9) Meena Bornvankar (Additional S.P., Kolhapur) and (10) Police Inspector Katambale (Investigating Officer).

The prosecutrix, a student of 4th class, had gone for tuition at 8.15 A.M. on September 24, 1986 to a private teacher in the colony where she was living with her parents. After her private tuition which was from 8.15 a.m. to 9.15 a.m. she was coming back to her home and

then go to school with other children in a cycle rickshaw hired for the purpose. When the prosecutrix was going on the colony road at the intersection of this road and a bye-lane, which was a secluded spot, the accused caught-hold of her on the pretext that her assistance was required for pulling either the pipe or the wires in the Maruti car which was standing there. The girl was pushed inside the car. At that time she was wearing a midi-frock and a nicker. The accused pulled down her nicker and laid her on the seat in the car. She did try to resist by saying that she should be allowed to go and that she would be late in reaching home. The accused then opened the zip of his pant and started pressing his penis on her private part. When the girl cried that she would be late in reaching home, the accused said 'wait', 'one second'. According to her, thereafter the accused urinated. She felt wetness on her private part. After the girl was released she came home weeping. She embraced her father and narrated the whole incident to him. The parents of the girl examined her private part and the garments and noticed the sticky substance (semen) on some part of the midi-frock as well as on the nicker. There was redness on her private part. The girl described the person who committed such bashful act on her. Shrikant Deshpande, the father of the girl, took her on his scooter and came to the spot where the incident took place but there was no body. They returned home. The mother of the girl gave her bath and she went to her school as usual. Deshpande, however, did not stop at that and he made more enquiries. He went to the spot again and there then he was told by Vishakha Kulkarni, a college student, who was living in the vicinity that a Maruti Car of chocolate colour was seen there which bore registration No. MGR-942. Deshpande went to RTO and came to know that the car was registered in name of Parashuram Jadhav. Thereafter he met Meena Bornvankar, Additional S.P. who at the relevant time was holding the charge of S.P. Kolhapur. She sent him to the police station to lodge of formal complaint. Parashuram Jadhav was traced. From his interrogation, it transpired that the Maruti car had been sold by him and further investigation revealed that at the relevant time it was in the possession of the accused.

At about 7.30 P.M. on the same day Deshpande took her daughter to a family Dr. Mrs. Sahastrabuddha for examination as after returning from the school the prosecutrix was complaining of pain in her private part. Dr. Mrs. Sahastrabuddha had been informed in the morning of the incident of rape. She noticed inflammation of labium minus (labia-minora). It appears, as held by the Sessions Judge, that this doctor did not fully examine the prosecutrix for when she was apprised that Deshpande had lodged a report with the police she advised him to get the girl examined by the Civil Surgeon as it was a medico-legal case. Dr. Gunda was the Medical Officer at Civil Hospital, Kolhapur and he examined the prosecutrix at 9 P.M. on September 24, 1986 itself. This he did on the basis of police 'yadi'. On examination he found:

- "i) Labia-minora was inflamed and reddened.
- ii) External urethral meatus was reddened and swollen.
- iii) Hymen was intact.
- iv) P.V. examination was not possible. he therefore took the swab from introitus (opening of the vagina) and not from inside the vagina."

He, however, did not issue the medico-legal certificate on the same day. On October 2, 1986, he issued the certificate and under the head "Chief complaints" he had written : "Complains of burning micturition since afternoon today". Then on the following day he certified that rape was committed with the following report:

"Conclusion - Committed rape.. This conclusion I have drawn after clinical examination of the girl."

Report about the incident appeared in the newspaper of the town on the following day, i.e., September 25, 1986 and there was an immediate outcry in the public and `morchas' taken out.

Dr. Hoshing was the Civil Surgeon, Kolhapur, who, it would appear under intense public pressure, formed a panel of three private doctors to again examine the prosecutrix. The panel examined her on September 29, 1986. This panel consisted of Dr. Naganonkar, M.d. in Gynecologist, Dr. Kudalkar and Mr. Malakar, both senior doctors and the result of their examination is as under:

"i) Labia-minora inflamed.

ii) External urethral meatus inflamed.

iii) Fourchette showed abrasions with signs of inflammation.

iv) Infected linear vertichi teat

on right para-urethral region, and

v) Tear of hymen at 3' O'Clock position."

The midi-frock and the nicker of the prosecutrix were taken into possession in the course of investigation and so also the underwear, T-shirt and pant which the accused was wearing at the time he was taken into custody. The semen stain of Blood Group B were found on the nicker of the prosecutrix. The semen stain of blood group B were also found at the spot where the penis of the accused was touching his underwear. The blood group of the accused is of Group B.

It may be noticed that the Trial Court came heavily on the conducts of Dr. Gunda, the Medical Officer in his not submitting the medical report at the earliest and also to an extent of Dr. Houshing, the Civil Surgeon. It justified the medical examination of the prosecutrix on 29.9.1986 by panel of private doctors.

The Trial Court also noticed the following observations in the commentary on Medical Jurisprudence:

"more redness of the labia minors is not indicative of recent sexual activity and it may no more than an indication of a lack of personal hygiene, especially in young girls."

After examination the evidence and considering the arguments advanced, it came to the conclusion that it was the accused who indulged in sexual intercourse with the prosecutrix and that there was penetration. The Court, therefore, held that the accused was guilty of an offence of having committed rape on the prosecutrix. The Trial Court also found that it was proved that the accused indulged in immoral behaviour with the prosecutrix. It, therefore, convicted the accused and sentenced him as aforesaid.

The accused appealed to the High Court. It did not agree with the trial Court that considering the statement of the prosecutrix, examination of the cloths she was wearing and the medical evidence, any offence of rape within the meaning of [Section 375](#) IPC was committed. The High Court noticed the medical examination of the prosecutrix in the following words:

"The girl was taken to the family doctor Shashikala Sahastrabudhe (P.W.7) by her father in the evening at 7.30 p.m. who clinically examined her and found her private part has become reddish. In the night of 24th September, 1986 at about 9 p.m., 'X' was examined by Dr. Gunda (P.W.140 - Medical Officer, Civil Hospital. He has also deposed that the case papers are at Ex. 56. He says that on internal examination of 'X', both labia-minora were found inflamed (reddened) and external ursthral meatus was reddened and swollen. Hymen was intact."

The High Court then referred to the cloths which the prosecutrix was wearing at the time of the crime and it was found that there were two semen stains on her under- garments. The High Court also examined the cloths of the accused and it found that the semen stains found on the under-garments of the prosecutrix and underwear of the accused were of the same blood group 'B' which was the blood group of the accused. One semen stain on the underwear of the girl was about two centimeter diameter near the waste band of her under-garment. From the examination of the evidence, the High Court also came to the conclusion that it was the accused who indulged in the perpetration of the crime which was committed on September 24, 1986 at about 9.30 a.m. was the charge laid by the prosecution. On the question, if it was a rape or an offence under [Section 354](#) IPC outraging the modesty of a woman, the High Court referred to the statement of the prosecutrix and that of her father, Deshpande who lodged the FIR. As to what the FIR recorded, we may refer to the following observations of the High Court:

"In the FIR, Ex.26 filed by the father, it is mentioned that the girl informed that the accused slept her on seat and then he slept on her body and began to struggle with her. The accused then pulled away her under-pant and pulled the chain of his pant and took out his male organ and put it on her private part and pressed it. Her private part was then aching. After some time to be passed his urine on her private part and her rubbed his organ to her frock. Then she took her under-pant upwards and came home running. However, the C.A. report, Ex.82, shows that there was no semen found on the frock. The evidence of the girl, her father and the FIR show that the legs of the accused were on the road. The nicker of the girl was only pulled and not removed. This is also clear the from the C.A. report Ex.82, that her nicker was having two stains of semen. If the nicker would have been removed then there would have been no stains as it is not the case of the prosecution that it was used by the accused for wiping his organ. Her legs were neither separated nor lifted. The evidence shows that he took out his organ and pressed it against her body and within seconds he discharged."

The High Court then noticed that the girl was given a bath and she went to school and that she only complained of some pain or burning sensation and that if there was anything serious noticed by the parents on examination, they would not have allowed her to go to school and rather taken her immediately to doctor. When the parents examined her private part, they found only reddishness. Her father took her to the family Doctor Mrs. Sahastrabudde at about 7.30 p.m. on the same day and doctor only noticed some portion of her private part had become red. No blood was noticed. Then the girl was examined by Dr. Gunda at about 9.00 p.m. on that very day. After examining the report of Dr. Gunda, the High Court concluded that clearly ruled out the actual rape. The High Court disapproved the constitution of the panel of doctors which it held was done under pressure from the public and that Dr. Houshing, civil surgeon succumbed to that pressure. The High Court was critical of the statement of Dr. Nagavkar who was member of the panel. High Court referred to the fact that at the time of examination by the panel of three doctors neither Dr. Sahastrabuddha nor Dr. Gunda was called. Dr. Nagavkar stated that some respectable citizens of Kohlapur had

approached him with a request to come for examination of the girl. No reason was recorded as to why it was necessary to re-examine the girl. High Court noticed that Dr. Nagavkar was evasive when he was asked whether he could say that the injuries noticed by the panel were present on September 24, 1986. He however, admitted that if tear was beyond the superficial layer, then it was bound to bleed. As there was no bleeding it was an abrasion involving superficial layer. He admitted that such abrasion was possible due to scratching. He also agreed that rupture of hymen was almost invariably accompanied by bleeding and that bleeding was brisk, immediate and visible. Dr. Nagavkar also agreed with the proposition that cloths put on immediately would have blood stains. High Court commented that Dr. Nagavkar was "required to make various acrobatics just to support the opinion and that while so he virtually admitted that there was not rape." The High Court held that there was no rupture of hymen and the girl was virgin. The accused was also examined and there was no injury to his private part. It noticed the statement of Dr. Nagavkar where he agreed with the opinion in Medical Jurisprudence quoted above and further that "exercisation of this type is common in young children as a result of poor local hygiene, scratching due to worm infection". For all these reasons the High Court rejected the conclusion arrived at by the panel of doctors. As to the conduct of Dr. Gunda which we have noticed above, the High Court was of the opinion that it seemed that he was required to bow before public pressure and the internal official pressure. It, therefore, rejected the opinion given by him on 3.10.1986 which certified that the rape was committed. The High Court said that a great disservice had been done to the little girl because of public agitation and which tended to make the future of the girl bleak. The Court, therefore, held that there was no rape as contemplated by [Section 375](#) committed or proved. Then the High Court concluded that in its opinion, the evidence on record would, at the most, show that the accused attempted to commit rape. But then added that "however, as the evidence shows that her nicker was not completely removed, her legs were not separated or lifted and the act was sought to be done standing on the road, we hold that the act of the accused would fall within [Section 354](#) of IPC and that he used criminal force as covered by [Section 350](#) of IPC knowing full well that it would cause injury to the girl. He knew that it would thereby outrage the modesty of the girl. He pulled down her nicker and opened his pant and laid himself on her and discharged. The girl suffered pain. Therefore, we find that the accused guilty under [Section 354](#) of IPC." On the question if an offence under Section 57 of the Bombay Children was committed, the High Court held that similarly as in the case of the offence under [Section 354](#) IPC, the offence of the accused would also fall under [Section 57](#) of that Act. The Court, therefore, held that the accused acted indecently and was thus guilty under Section 57 of the Bombay Children Act, 1948.

Both the sessions court and the High Court accepted the prosecution evidence as to how and who committed the crime. They, however, differ on the approach as to what offence was committed. While the trial court holds the accused guilty of an offence under [Section 376](#) IPC, the High Court holds him guilty under [Section 354](#) IPC. Both the courts did not attach any importance to the discrepancies in the statements of the witnesses which were insignificant and did not damage or impair the case of the prosecution. The courts have considered all the relevant circumstances to come to the conclusion that crime was committed and it was the accused who did so. The High Court, however, does say that there was attempt to commit rape which would be an offence falling under [Section 376](#) read with [Section 511](#) IPC. But by some curious reasoning, the High Court proceeds to hold the accused guilty for an offence under [Section 354](#) IPC. We think that the High Court is right in its approach that from the medical evidence and the statement of the prosecutrix and attendant circumstances, it cannot be said that there was penetration and there was, therefore, no sexual intercourse though the ingredients of attempt to commit offence of rape are there. The High Court had set

aside the order of the sessions court confiscating the Maruti Car in which the offence of attempt to rape was committed as the car was owned by a company of which the accused was a Director. Since there is no appeal against this part of the order, we need not go into the scope and intent of [Section 452](#) Cr.P.C. if the court could order confiscation of the car, it having been "used for the commission" of the offence of rape particularly if the car had been owned by the accused.

The circumstances show that the accused intended to commit rape on the girl. In the commission of that crime, he laid the girl on the seat in the Maruti Car and then laid himself over her. He pulled down her nicker and also opened the zip of his pant and took out his male organ. He pressed his male organ on the private part of the girl. But since he discharged, he could not penetrate and was unable to complete the offence of rape. However, it is clear that he did attempt to commit rape.

[In Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat](#) [1983 Cr.L.J. 1096] the accused had been convicted for the offence under [Section 376](#) read with [Section 511](#) IPC and was sentenced to two and a half years rigorous imprisonment. He was accused of having committed the offence against girls of 10 to 12 years of age. The Supreme Court said that the accused had behaved in a shockingly and indecent manner. The magnitude of his offence cannot be over-emphasised. The Supreme Court further noticed that the incident occurred some seven years back and the appellant had lost its job in view of the conviction recorded by the High Court. The accused was also having a daughter of the same age at the time he committed the crime. This Court was of the view that the accused must have suffered great humiliation in the society. The prospects of getting a suitable match of his own daughter had perhaps been marred in view of the stigma in the wake of the finding of guilt recorded against him in the context of such an offence. Taking into account the cumulative effect of these circumstances, and overall view of the matter, the Court said that the ends of justice would be satisfied if the substantive sentence imposed by the High Court for the offence under [Section 376](#) read with [Section 511](#) IPC was reduced from one of two and a half years to one of 15 months' rigorous imprisonment.

In 1983, law was amended prescribing more severe punishments for the perpetrators of the crimes of rape and other sexual offences.

The Law Commission of India in his 42nd report on [Indian Penal Code](#) submitted in June 1971 suggested amendments to [Sections 375](#) and [376](#) IPC, expanding the definition of rape and providing for more severe punishment. The Commission also suggested incorporation of other offence relating to sexual offences in the [IPC](#). In its 69th report on the [Indian Evidence Act](#), 1872, the law Commission had also recommended reform in the law. Nothing, however, was done and law not amended. Then the subsequent Law Commission in its 84th report suggested changes in the law on rape and allied offences and amendments to the laws of procedure and evidence. The Commission submitted its report in April 1980 to the Central Government. After that the [IPC](#), [Cr.P.C.](#) and [Evidence Act](#) were amended by the [Criminal Laws \(Amendment\) Act](#), 1983. In the statements of objects and reasons while presenting the Bill, it was mentioned that recommendations of the Law Commission had been examined in consultation with the State Governments and suggestion on the subject received. It was mentioned that the changes proposed in the Bill had been formulated principally on the basis of the following considerations:

"(1) the law should be made more stringent without jeopardising considerations of fair trial; (2) the definition of rape should be amended to remove certain loopholes and inadequacies and to ensure that consent should be vitiated unless it is real and given out of free choice; (3) minimum punishments for rape should be prescribed;

(4) the prosecutrix should be protected from the glare of embarrassing publicity during the investigatory as well as trial stage and any information leading to identification of the victim should not be disclosed; (5) In the case of rape by a police officer or by a group of persons or by a person having a custodial control by virtue of his special position by virtue of his special position over the victim, once it is proved that sexual intercourse has taken place, the onus should be on the accused to prove that the sexual intercourse was with the consent of the woman."

it will be useful to quote the following passage from the 84th Report of the Law Commission:

"it is often stated that a woman who is raped undergoes two crises - the rape and the subsequent trial. While the first seriously wounds her dignity, curbs her individual, destroys her sense of security and may often ruin her physically, the second is no less potent of mischief, inasmuch as it not only force her to re-live through the traumatic experience, but also does so in the glare of publicity in a totally alien atmosphere, with the whole apparatus and paraphernalia of the criminal justice system focused upon her.

In particular, it is now well established that sexual activities with young girls of immature age have a traumatic effect which often persists through life, leading subsequently to disorders, unless there are counter-balancing factors in family life and in social attitudes which could act as a cushion against such traumatic effects.

Rape is the 'ultimate violation of the self'. It is a humiliating event in a woman's life which reads to fear for existence and a sense of powerlessness. The victim needs empathy and safety and a sense of re-assurance. In the absence of public sensitivity to these needs, the experience of figuring in a report of the offence may itself become another assault. Forcible rape is unique among crimes, in the manner in which its victims are dealt with by the criminal justice system. Raped women have to undergo certain tribulations. These begin with their treatment by the police and continue through a male-dominated criminal justice system. Acquittal of many of facto guilty rapists adds to the sense of injustice.

In effect, the focus of the law upon corroboration, consent and character of the prosecutrix and a standard of proof of guilt going beyond reasonable doubt have resulted in an increasing alienation of the general public from the legal system, who find the law and legal language difficult to understand and who think that the courts are not run so well as one would expect."

We may now refer to a few cases on [Section 376](#) IPC decided by this Court after the [Amending Act](#) of 1983.

[In State of Himachal Pradesh vs. Raghbir Singh](#) (1993) 2 SCC 622 (judgment delivered on February 18, 1993) the Supreme Court set aside the acquittal of the respondent by the High Court holding him guilty of an offence under [Section 376](#) IPC for having committed rape on the prosecutrix. Then the Court considered the question of awarding of proper sentence. It noted that the occurrence took place on August, 2, 1982, more than a decade ago and that the Sessions Judge after recording the conviction under [Section 376](#) IPC had sentenced the respondent to suffer RI for five years. The State had not moved the High Court for any enhancement of the sentence. The Court, therefore, felt that the ends of justice would be met

if the sentence to be imposed on the respondent was confined to five years RI as was awarded by the Sessions Judge. The Court also then observed as under:

"We ma emphasise that though for such an offence a more severe sentence would have been desirable but we have restricted ourselves to the maintenance of the sentence as imposed by the learned Sessions Judge for the reason that the States did not seek any enhancement of the sentence by filing an appropriate petition in the High Court or in this Court and for over a period of seven years, while the case has remained pending here, no notice had been issued to the acquitted respondent to show cause as to why in the event of his acquittal being set aside, a more deterrent sentence, than the one imposed by the Sessions Judge, be not imposed upon him and without putting him on such a notice, the Court cannot enhance the sentence. If the notice were to issue now, it would further delay the disposal of the case and we do not consider that to be a proper course to be adopted. The more stringent minimum sentence prescribed for an offence under [Section 376](#) IPC was also incorporated in [the Code](#) by an amendment only with effect from December 1983 after the offence in the present case had been committed."

[In State of Punjab vs. Gurmit Singh and others](#) (1996) 2 SCC 384 which was an appeal under [Section 14](#) of the Terrorist Affected Areas (Special Courts) Act, 1984 against the judgment of the Additional Judge, Special Court, Ludhiana dated June 1, 1985 acquitting the respondents of the charges of abduction and rape, the Court set aside the acquittal and convicted the respondents for offence under [Section 363/366/368](#) and [376](#) IPC. On the question of sentence the Court observed as under:

"So far as the sentence is concerned, the court has to strike a just balance. In this case the occurrence took place on 30-3-1984 (more than 11 years ago). The respondents were aged between 21-24 years of age at the time when the years of age at the time when the offence was committed. We are informed that the respondents have not have involved in any other offence after they were acquitted by the trial court on 1-6-1985, more than a decade ago. All the respondents as well as the prosecutrix must have by now got married and settled down by now got married and settled down in life.

There are some of the factors which we need to take into consideration while imposing an appropriate sentence on the respondents. We accordingly sentence the respondents for the offence under [Section 376](#) IPC to undergo five years' RI each and to pay a fine of Rs.5000 each and in default of payment of fine to 1 year's RI each. For the offence under [Section 363](#) IPC we sentence them to undergo three years' RI each but impose no separate sentence for the offence under [Sections 366/368](#) IPC. The substantive sentences of imprisonment shall, however, run concurrently."

The following observations in the judgment would also be relevant:

"Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical harm in the process. Rape is not merely a physical assault - it is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist degrades the very soul of the helpless female. The courts, therefore, shoulder a great

responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine then broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement in material particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may look for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive to its responsibility and be sensitive while dealing with cases involving sexual molestations."

[In State of Maharashtra vs. Prakash and another](#) AIR 1992 SC 1275 the Court \*\*\*\*\* aside the acquittal by the High Court of the respondents for offence under [Section 376](#) read with [Section 34](#) IPC as well as under [Section 342](#) read with [Section 34, IPC](#). The Extra Additional Sessions Judge, Amravati had, however, convicted the respondents and sentenced them to rigorous imprisonment for three years on the first count and for two months on the second count. After having set aside the acquittal of the respondents the Court on the question of sentence said as under:

"We are aware that the offence had taken place in the year 1978 and that they were acquitted by the High Court as far back as August, 1981 and we are reversing the acquittal after a lapse of more than 10 years but having regard to the nature of the offence and the circumstances in which it was perpetrated, we are of the opinion that the respondents deserve no mercy. They should suffer for their deed."

[In State of U.P. vs. Babul Nath](#) (1994) 6 SCC 29 the Session Judge convicted the respondent for offence under [Section 376](#) IPC for having committed rape on a minor girl aged about 5 years and sentenced him to suffer imprisonment for five years. On appeal by the respondent, the High Court, however, acquitted him of the charge of rape. This Court set aside the acquittal and held respondent guilty of an offence punishable under [Section 376](#) IPC and restored the sentence imposed by the Sessions Judge. It may be noted that the offence was committed in March 1977 and the appeal was decided by this Court in August 1994.

[In Madan Gopal Kakkad vs. Naval Dubey and another](#) (1992) 3 SCC 204) the trial court acquitted the respondent for an offence under [Section 376](#) IPC for having committed rape on girl child of 8 years of age. Aggrieved by the judgment of the trial court the State filed an appeal before the High Court challenging the order of acquittal. Father of the child also filed a criminal revision in the High Court questioning the legality of the order of acquittal. It appears one Jay Rao of New York (U.S.A) wrote the report of this incident in a German Magazine called "Der Spiegel" and after visiting Jabalpur sent a petition of grievance addressed to the Chief Justice of India with a copy to the Chief Justice of Madhya Pradesh. On the basis of this petition another criminal revision was also registered. The High Court disposed of the appeal and two criminal revisions by a common judgment, whereby it allowed the State appeal, held respondent guilty of an offence under [Section 354](#) IPC and sentenced him to pay a fine of Rs.3000/- and in default to suffer simple imprisonment for six months. The High Court also directed that a sum of Rs.2,000/- out of the fine amount if realised be paid over a compensation to father of the child who was petitioner in the criminal revision. No separate orders were passed in the two criminal revisions. The State did not prefer any further appeal before this Court. However, the father of the victim girl, who was

the complainant and also petitioner in the criminal revision before the High Court, filed criminal appeal in this Court. He felt aggrieved by the judgment of the High Court on the ground that the High Court had erred in finding the respondent guilty of a minor offence under [Section 354](#) IPC when all the necessary ingredients to constitute an offence punishable under [Section 376](#) IPC had been satisfactorily established and that the sentence of mere fine under [Section 354](#) IPC for such a serious offence was grossly inadequate and was not commensurate with the gravity of the offence committed by the respondent. This Court after examining the whole evidence and law on the subject held the respondent guilty of an offence under [Section 376](#) and set aside his conviction under [Section 354](#) IPC. The Court then addressed itself to the quantum of punishment which would meet the ends of justice in the facts and circumstances of the case. The offence in this case was committed in September 1982 and the judgment was delivered in April 1992 by this Court. The Court having regard to the seriousness and gravity of the repugnant crime of rape perpetrated on a girl child of B years of age sentenced the respondent to rigorous imprisonment for a period of seven years and to pay a fine of Rs.25,000/- and in default to suffer rigorous imprisonment for 1-1/2 years. It was further directed that the amount of fine of Rs.25,000/- if realised shall be paid to the victim girl who was now a major.

In our opinion, therefore, the High Court after having come to the conclusion that the accused was guilty of an offence under [Section 376/511](#) of the IPC could not have convicted the accused for an offence under [Section 354](#) IPC. [Section 511](#) IPC provides punishment for attempting to commit offence punishable with imprisonment for life or other imprisonment. In this case since the girl was under 12 years of age and the Sessions Judge having found that offence of rape had been committed could not have awarded sentence of 7 years when the law prescribes minimum sentence of rigorous imprisonment for a term not less than 10 years, unless exceptional circumstances existed. However, we find that the State or the complainant did not come up in appeal in the High Court for enhancement of the sentence. Though there was no charge under [Section 376](#) read with [Section 511](#) IPC, under [Section 222](#) of the Code of Criminal Procedure when a person is charged for an offence he may be convicted of an attempt to commit such offence although the attempt is not separately charged.

Having come to the conclusion that the accused committed an offence under [Section 376/511](#) IPC, the question arises as to what sentence should be imposed upon him. It was submitted before us that the time when the offence was committed the accused had also a daughter of 8 years of age. If that be so perversion of mind of the accused does not appear to have any limit. It was submitted that a long time had elapsed since the offence was committed and that in terms of the judgment of the High Court the accused deposited Rs.40,000/- out of which Rs.25,000/- had already been withdrawn by the father of the prosecutrix. It was submitted that if the Court came to the conclusion that the sentence had to be enhanced then amount of fine could be raised. We, however, do not think so. A heinous crime has been committed and the accused must suffer for his consequences. A rapist not only violates the victim personal integrity but leaves indelible marks on the very soul of the helpless female. The girl of 8 years must have undergone an traumatic experience. The question of imposition of sentence after lapse of 11 years of the offence troubled our mind a great deal. Keeping the objects of the amendment of [IPC](#) in view and the law as it exists today, the decisions of this Court referred to above on the question of sentence, the message is loud and clear that no person who commits or attempts to commit rape shall escape punishment.

We agree with the High Court that a great harm had been caused to the girl by unnecessary publicity and taking our morcha by the public. Even the case had to be transferred from

Kohlapur to Satara under the orders of this Court. There is procedure established by law governing the conduct of trial of a person accused of an offence. A trial by press, electronic media or public agitation is very antithesis of rule of law. It can well lead to miscarriage of justice. A judge has to guard himself against any such pressure and he is to be guided strictly by rules of law. If he finds the person guilty of an offence he is then to address himself to the question of sentence to be awarded to him in accordance with the provisions of law. While imposing sentence of fine and directing payment of whole or certain portion of it to the person aggrieved, the court has also to go into the question of damage caused to the victim and even to her family. As a matter of fact the crime is not only against the victim it is against the whole society as well. Since late, there has been spurt in crimes relating to sexual offences.

Considering the whole aspect of the matter, we are of the opinion that sentence of five years rigorous imprisonment and fine of Rs.40,000/- will meet the ends of justice. The fine has already been paid, out of that Rs.25,000/- has been withdrawn by the father of the girl as per direction of the High Court which we uphold. We, therefore, allow the appeal of the State convert the conviction of the accused-respondent from under [Section 354](#) IPC to that under [Section 376/511](#) IPC and sentence him as aforesaid. Since fine has already been paid, no sentence of imprisonment in lieu of payment thereof need be imposed. The conviction and sentence of the accused under Section 57 of the Bombay Children Act as ordered by the High Court shall, however, stand. The sentences shall run concurrently. In this view of the matter, appeal filed by the accused is dismissed. The accused will be taken into custody and would undergo the remaining portion of his sentence.